Reforming the European Convention on Human Rights

A work in progress
Reforming the European Convention on Human Rights: A Work in Progress

A compilation of publications and documents relevant to the ongoing reform of the ECHR

Prepared by the Steering Committee for Human Rights (CDDH)
Edition française : La réforme de la Convention européenne des droits de l'homme : un travail continu

The opinions expressed in this publication are those of the author and do not engage the responsibility of the Council of Europe. They should not be regarded as placing upon the legal instruments mentioned in it any official interpretation capable of binding the governments of member states, the Council of Europe’s statutory organs or any organ set up by virtue of the European Convention on Human Rights.

Council of Europe Publishing
F-67075 Strasbourg Cedex

© Council of Europe, 2009
Printed at the Council of Europe
# Table of Contents

## Chronology

## Foreword

## Proceedings

- **European Ministerial Conference on Human Rights**
  - Rome, 3-4 November 2000

- **Reform of the European human rights system**
  - Oslo, 18 October 2004

- **The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings**
  - Strasbourg, 28 April 2005

- **The European Court of Human Rights: Agenda for the 21st century**
  - Warsaw, 23-24 June 2006

- **Future developments of the European Court of Human Rights in the light of the Wise Persons’ Report**
  - San Marino, 22-23 March 2007

- **The role of Supreme Courts in the domestic implementation of the European Convention on Human Rights**
  - Belgrade, 20-21 September 2007

- **The role of government agents in ensuring effective human rights protection**
  - Bratislava, 3-4 April 2008

- **Towards stronger implementation of the European Convention on Human Rights at national level**
  - Stockholm, 9-10 June 2008

## Appendix I: Reports

- **Report of the Evaluation Group to the Committee of Ministers on the ECHR**
  - 27 September 2001

- **Report of the Group of Wise Persons to the Committee of Ministers**
  - November 2006
APPENDIX II: IMPACT OF PROTOCOL NO. 14

ECHR as amended by Protocols Nos. 11 and 14  629
Wording of certain Convention provisions prior to the entry into force of Protocol No. 14  643

APPENDIX III: ADOPTED TEXTS

Rules (2001)  656
Recommendation Rec (2002) 13  658
Resolution Res (2002) 58  660
Resolution Res (2002) 59  661
Final activity report of the CDDH  662
Declaration (2004)  667
Recommendation Rec (2004) 4  669
Recommendation Rec (2004) 5  674
Recommendation Rec (2004) 6  679
Resolution Res (2004) 3  685
Protocol No. 14  686
Explanatory report to Protocol No. 14  691
Declaration (2006)  710
Recommendation Rec (2008) 2  713

INDEX OF SPEAKERS
Chronology

2000

19 January

of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights

3-4 November

European Ministerial Conference on Human Rights
Rome

2001

10 January

Rules
adopted by the Committee of Ministers for the application of Article 46, paragraph 2, of the European Convention on Human Rights

27 September

Report of the Evaluation Group to the Committee of Ministers on the ECHR

2002

18 December

Recommendation Rec (2002) 13
of the Committee of Ministers to member states on the publication and dissemination in the member states of the text of the ECHR and of the case-law of the ECtHR

Resolution Res (2002) 58
on the publication and dissemination of the case-law of the European Court of Human Rights

Resolution Res (2002) 59
concerning the practice in respect of friendly settlements

2004

7 April

Explanatory report to Protocol No. 14 to the ECHR
amending the control system of the Convention

8 April

Guaranteeing the long-term effectiveness of the European Court of Human Rights
Final Activity Report of the CDDH
12 May

Declaration
of the Committee of Ministers ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels

Recommendation Rec (2004) 4
of the Committee of Ministers to member states on the ECHR in university education and professional training

of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR

Recommendation Rec (2004) 6
of the Committee of Ministers to member states on the improvement of domestic remedies

on judgments revealing an underlying systemic problem

13 May

Protocol No. 14 to the ECHR
amending the control system of the Convention

18 October

Reform of the European human rights system
High-level seminar organised under the Norwegian chairmanship of the Committee of Ministers of the Council of Europe. Oslo.

2005

28 April

The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings
Workshop held at the initiative of the Polish Chairmanship of the Council of Europe’s Committee of Ministers. Strasbourg, 28 April 2005

2006

19 May

Declaration
of the Committee of Ministers on sustained action to ensure the effectiveness of the implementation of the ECHR at national and European levels

23-24 June

The European Court of Human Rights: Agenda for the 21st century
Seminar organised by the Warsaw Information Office of the Council of Europe, in co-operation with the Polish Ministry of Foreign Affairs. Warsaw.

November

Report of the Group of Wise Persons to the Committee of Ministers
**2007**

**22-23 March**

**Future developments of the European Court of Human Rights in the light of the Wise Persons’ Report**

Colloquy organised by the San Marino chairmanship of the Committee of Ministers of the Council of Europe. San Marino.

**20-21 September**

**The role of Supreme Courts in the domestic implementation of the European Convention on Human Rights**

Regional conference organised by the Directorate General of Human Rights and Legal Affairs and the Supreme Court of Serbia in the framework of Serbia’s Chairmanship of the Committee of Ministers of the Council of Europe. Belgrade.

**2008**

**6 February**

**Recommendation Rec (2008) 2**

of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the ECtHR

**3-4 April**

**The role of government agents in ensuring effective human rights protection**

Seminar organised under the Slovak chairmanship of the Committee of Ministers of the Council of Europe. Bratislava.

**9-10 June**

**Towards stronger implementation of the European Convention on Human Rights at national level**

Colloquy organised under the Swedish chairmanship of the Committee of Ministers of the Council of Europe. Stockholm.
The European ministerial conference on human rights, meeting in Rome on the 50th anniversary of the Convention for the Protection of Human Rights and Fundamental Freedoms, emphasised two crucial elements:

- the responsibility of member states, Parties to the Convention, to ensure constantly that their law and practice conform to the Convention and to execute the judgments of the European Court of Human Rights;
- that urgent measures be taken to assist the Court in carrying out its functions, given the ever increasing number of applications. An in-depth reflection should be started as soon as possible on the various possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation.

The Rome conference has sparked intensive work. Ever since January 2001, the intergovernmental co-operation activities of the Steering Committee for Human Rights (CDDH) of the Council of Europe have concentrated on developing normative instruments, of which the most important has been Protocol No. 14 of the Convention. This work has benefited greatly from high-level debates during a series of round-table discussions, within working groups and at seminars organised mainly by the successive presidencies of the Committee of Ministers.

The present volume contains a record of this work.
PROCEEDINGS
EUROPEAN MINISTERIAL CONFERENCE ON HUMAN RIGHTS

Conference organised under the Italian chairmanship of the Committee of Ministers of the Council of Europe

Rome, 3-4 November 2000

Proceedings (Extracts)
FOREWORD

Mr Walter Schwimmer

Secretary General of the Council of Europe

In the field of human rights protection, Europe, which in the first half of the twentieth century experienced what were perhaps the most massive human rights violations in history, today sets an example to other regions of the world. It is only right that attention should be drawn to this when presenting the proceedings of the ministerial conference held to mark the fiftieth anniversary of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Over these fifty years, it has been possible to bring together almost all European states around respect for freedom, democracy and the rule of law. These states are committed to recognising that every person under their jurisdiction enjoys the rights and fundamental freedoms set out in the European Convention on Human Rights, and to complying with the judgments of the European Court of Human Rights in disputes to which they are party. The Convention, with its unique control system, has an important future before it. It must continue to play its central role as a constitutional instrument of European public policy on which the well-being of individuals and the democratic stability of the Continent depend.

And yet, despite the progress that has been made, conflict and crisis situations resulting in serious and massive violations of the most fundamental human rights have been deployed in certain parts of Europe in the recent past, and persist even today. Furthermore, very large numbers of individual applications continue to reach the European Court of Human Rights, to the point of jeopardising the current system’s viability. The ministerial conference therefore called upon the Council of Europe member states to shoulder fully the responsibility that falls to them in the first place for ensuring that human rights are respected, and, to this end, to ensure constantly that their law and practice conform to the Convention and to execute the judgments of the European Court of Human Rights. It also asked the Council of Europe to take the necessary steps in the short and medium term to ensure the effectiveness of the Court.

With regard to the protection of human rights and fundamental freedoms, no battles are won in advance, nor can past victories be taken for granted. Far from being self-satisfied, the member states taking part in the conference gave new impetus to their commitment to protect these rights and freedoms effectively, both in their domestic legal systems and at European level. The declaration and two resolutions adopted by the conference thus constitute a genuine programme for intergovernmental co-operation within the Council of Europe in the field of human rights, a programme whose implementation has already begun and will continue over the years to come.
Allow me first to express my deep thanks to the Italian Government for its initiative of convening this ministerial conference on the occasion of the fiftieth anniversary of the European Convention on Human Rights. This excellent initiative allows us not only to look at the results achieved over the last fifty years, but also and above all to discuss the question raised in the main theme of this conference: “what future for the protection of human rights in Europe?”

This conference comes at an appropriate moment. Europe, and the Council of Europe, has undergone profound changes over the last decade. At the informal ministerial conference on human rights held ten years ago here in Rome, there were twenty-three delegations of member states seated at the conference table. It suffices to look around this table today to note the tremendous scale and speed of the enlargement of the Council of Europe since 1990. It is also a great pleasure to note the presence today of representatives of several non-member states, including states that have applied for membership and observer states of the Council of Europe. The same is true for representatives of other international organisations and institutions as well as nongovernmental organisations.

Europe has changed, and it has definitely changed for the better. The values and principles for which the Council of Europe stands – democracy, rule of law, human rights – are now shared in a greater Europe. This is both an immense source of joy and a momentous challenge; for we all know from our experience in the last ten years that it is not an easy process to anchor those principles and values firmly in all branches of government and in all parts of society. It involves hard work, and the Council of Europe has worked, and works, very hard to protect and promote its values and principles throughout the Continent, and especially in the new member states and candidate states.

Courageous choice

The process of enlargement of the Council of Europe is nearing its completion. We are expecting soon new member states in the Organisation. And a few weeks ago the people of Serbia made a very courageous choice which will smooth the way for them to join the European family of democracies.

We should therefore use the opportunity offered by this conference and the experience gained over the last decade to discuss where Europe stands and where it should go in an area that is crucial for its identity and its stability: the protection of human rights.

More particularly, the two sub-themes chosen for the conference are sufficiently broad to enable us to fix priorities for the future. sub-theme I concerns, first of all, our institutional machinery for human rights protection. The enlargement of the Organisation has had a deep impact on the control system of the European Convention on Human Rights and our other human rights mechanisms, and several new mechanisms have also been created in the last ten years. We should examine how to maintain and improve their effectiveness in the years to come. The European Convention on Human Rights must remain the backbone of human rights protec-
tion in Europe, and I am pleased to note that the draft European Union Charter of Fundamental Rights recognises this. The Council of Europe observers to the convention drafting the European Union charter text insisted on the necessity to incorporate explicit references to the European Convention on Human Rights thereby guaranteeing an equivalent level of protection and even offering scope for further progress. And an additional very useful step would be, as already proposed by Finland, if the European Union were to consider accession to the European Convention on Human Rights.

**Possible improvements**

Full execution of judgments of our Court of Human Rights is essential and we must never compromise on this point. None of our human rights mechanisms operates in isolation: they are in constant interaction with the national level. We should also look at improvements that are possible in respect of the various national arrangements for the protection of human rights.

The second sub-theme allows us to discuss a number of current human rights challenges which in the longer or shorter term pose a threat to the stability of our Continent and our societies. This obviously includes the question of serious and massive violations, also in situations of conflict or crisis. In the past, this item would have been unthinkable as a topic on the agenda of a high-level meeting of the Council of Europe. Today, it is a necessary topic for discussion, for we should indeed draw lessons from our experiences in order to do better in the future. For my part, I have taken the unprecedented step of using the powers of investigation under Article 52 in respect of a single State Party in relation to the conflict in the Chechen Republic of the Russian Federation. The Council of Europe is for the time being the only international organisation which maintains a presence in the area. Our three experts have just begun their second six-month mandate. Their eyewitness reports furnish us with first-hand information and allow us to act and bring pressure on the competent authorities to identify and search for missing persons. The Council of Europe experts have also contributed to the re-establishment of the court system on the territory of the Chechen Republic. The population of this war-torn region depend on and encourage the Council of Europe to help normalise life in Chechnya.

I am pleased that the abolition of the death penalty, a clear priority for the Council of Europe, will also be on the agenda of this conference. Europe is now a death penalty-free zone, and this should also entail the abolition of the death penalty in time of war.

The Council of Europe has changed into a more political and operational organisation. One thing has not changed: the protection of human rights is and remains at the heart of its mission. This conference should give fresh impetus for political decisions and strengthen active human rights protection all over Europe.

---

**Mr Lamberto Dini**

*Minister for Foreign Affairs of Italy*

On behalf of the Italian Government, I should like first of all to welcome all the esteemed participants in the ministerial conference on human rights, which we have the pleasure of hosting here in Rome. We are here also to commemorate the fiftieth anniversary of the European Convention on Human Rights in the city where it first saw the light of day.

This conference will also offer the opportunity to reaffirm and update the message of
peace and civilisation which the Council of Europe has helped to spread over fifty years of its activities.

On 5 May 1949, the Statute of the Council of Europe was signed in London. Thus was born a far-seeing workshop for ideas and content of a high ethical value, led by a vanguard of ten sovereign states committed to a process of political rapprochement, to the concept of putting national instruments to common use and creating an influence shared by all in the future.

At the time, the hopes raised by the signature of the Treaty of London were high, in particular for those who, with the horror of the second world war still fresh in their memory, saw the Consultative Assembly – which brought together, for the first time, parliamentary representatives of different European states – as the expression of the mutual democratic will of the people of the old Continent.

The Council of Europe made an essential contribution to the respect and protection of fundamental human rights.

I firmly believe in the important achievements in the field of codifying rights: the 1961 European Social Charter and its 1996 revision, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987, the Framework Convention for the Protection of National Minorities of 1995, and, especially, in the twelve protocols that have extended and enriched the Convention signed in Rome in 1950. But at the same time, I think also of the long work of the European Commission and Court of Human Rights in establishing the substantial case-law relating to the Convention.

Yet the road before us is still a long one. Every day we are made aware of serious and repeated violations of human rights, of even the most fundamental among them. In too many countries, too many people see their dignity despised and humiliated, often in the face of general indifference.

The Council of Europe has fulfilled, convincingly and consistently, its role as the conscientious watchdog of the Continent, so attracting the respect and attention of those countries that saw the Council as the guarantor and defender of fundamental freedoms.

Let us remind ourselves that the Council of Europe has changed from an organisation of 23 member states to one encompassing 41 today. This is a proof that the totalitarian regimes of central and eastern Europe have not been able, among the peoples they have held subject to their authority, to quash their aspirations towards democracy, freedom and justice; nor to eradicate from their consciousness these same aspirations which ultimately manifested themselves both inevitably and irresistibly.

The 1993 Vienna Summit of Heads of State and Government confirmed the indivisible and interdependent nature of human rights. It is this facet of their character which has led the Council of Europe towards more effective protection systems, including also, with the adoption of the European Social Charter, economic and social rights. The charter has become a very useful instrument for reducing social tensions and guaranteeing decent living and working conditions.

Growing awareness

The very nature of the Council of Europe and the scope of its undertaking necessitate a profound and timely reflection on the way forward to ensure its correct functioning. I am thinking, for example, of the European Court of Human Rights, which finds itself today faced with an increasing number of potential applications from a population of some 800 million individuals, whose growing awareness of their rights can only increase this tendency.

This conference can be the venue and the occasion for assessing the progress already made and for defining the perspective of the Council of Europe’s future action.

The outcome of our discussions will show, I am sure, the attention paid by the Council to social phenomena likely to worsen the situation, or to introduce difficulties or even danger threatening the harmonious development of our society.
Proceedings

On this point, the European Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, which I had the honour to chair last October in Strasbourg, was a most successful experiment in collaboration between government delegations, specialised organs, independent experts and representatives of civil society; it constituted a unique event which gave the Council of Europe the opportunity to reaffirm its role as a source of ideas and initiatives in the search for new solutions adapted to the real world.

Once more, our Organisation and the countries that belong to it were able to give a lucid analysis of the principal ills that beset modern European society, drawing up a realistic account, without complacency or false modesty, of the serious difficulties which all western countries may have to face in the present socio-economic climate. In addition to the alarming resurgences of racist behaviour, the Strasbourg conference expressed concern, in particular, at the manifestations of xenophobia and intolerance directly related to the migration flows of recent years, which have drawn our attention to grave social, legal and humanitarian problems. On the basis of contemporary law and guarantees concerning fundamental freedoms, Europe must commit itself to the drawing up of new codes of conduct aimed at protecting the weakest in society, and thus allow us to strengthen the values of the solidarity of mankind and respect for peoples who, having grievously suffered in wars, now aspire only to a better and fairer way of life.

And we must not forget, in our enumeration of the deprived members of society, those subjected to the most heinous and barbarous forms of exploitation. I am thinking of trafficking in women and children, and the victimisation of immigrants, who are often used as virtual slaves by organised crime in drug dealing and other illicit activities.

We must condemn such activities high and loud, without reserve or hesitation, to help bring about maximum collaboration between the countries of origin, of transit and of destination of these unfortunate masses. We must eliminate criminal activity and restore to these individuals the right to lead a decent life.

It is Europe’s task, in the first place, to fight against such clandestine phenomena and to oppose the exploitation of these people’s lack of hope, by means of agreements, on-the-spot training and development initiatives in the countries of origin. To those who have already fallen victim to these odious traffickers we should show our solidarity with their suffering and the abuse of their dignity.

That is why I believe that the Council of Europe can be legitimately proud to welcome into the great family of international legal instruments Protocol No. 12, covering non-discrimination. Appropriately, we shall be signing this tomorrow at the Campidoglio. It represents one of the most progressive international agreements in the fight against racism.

The abolition of the death penalty: a fixed criterion

To conclude, I should like to recall a theme which traditionally recurs in the thoughts and conduct of the Council of Europe: the abolition of the death penalty. Since Protocol No. 6 to the European Convention on Human Rights was adopted in 1983, the abolition of capital punishment has been a constant and common priority of our Organisation. The battle fought by the Council of Europe has become, in recent years, a fixed criterion in the evaluation of a prospective member state’s ability to preserve the life of its citizens. On this subject, I should like to pay tribute to the parliamentary side of the Council of Europe. Without the zealous action of the Parliamentary Assembly, it would never have been possible to attain our goal. This fight for fairness represents the latest and greatest in a long series of measures aimed at strengthening respect for human dignity and the fundamental rights of the individual.

This is why Italy, at the end of its six-month chairmanship, will present to the Committee of Ministers on 9 November a solemn declaration in favour of the creation of a Europe free from the death penalty.

Life is our most precious possession. Progress, social advances and economic develop-
opment are phenomena that influence the ordered march of society. The globalisation of the economy, of trade and of means of communication, the discoveries in the fields of science and technology, and even the evolution of human thought have all helped to revolutionise our habits – our way of learning, of working and of speaking. I believe we are making our way towards a new order of things.

Yet this constant advance towards the future, so exhilarating yet so confounding, should not make us lose sight of what lies at the centre of this universe driven by dynamic events: humankind. A humankind with its hopes, utopias and rights – right to life, right to respect.

It is up to us first and foremost, fellow members of the Council of Europe, defenders of democratic values of liberty and pluralism everywhere, to make sure that these hopes, utopias and rights are not obscured and oppressed.

Lord Russell-Johnston

President of the Parliamentary Assembly of the Council of Europe

I have been repeatedly told by our hosts that I should not speak for longer than four minutes. It would be against my humble nature not to comply with this request, so you will perhaps forgive me if, in these circumstances, I leave out rhetoric and platitude. This gathering of ministers and the occasion we are celebrating are too important to be wasted on empty verbiage.

As we meet here in Rome to celebrate the fiftieth anniversary of the European Convention on Human Rights, more than 15 000 registered applications are pending before its Court. More than 700 letters are received every day and almost 200 telephone calls are taken from all over Europe.

These are not empty statistics, and should not be treated as such. Behind every application there is a human life, a story, sometimes plain and ordinary, but often tragic. But behind every letter, every call and every visit to the Court’s headquarters in Strasbourg, there is hope. Hope that grievances will be heard. Hope that wrongs will be made right. Hope that justice will be done.

It is this hope, and trust, of hundreds of millions of people living in Europe, from Grozny to Rome to the Isle of Skye, that should set our agenda for today. When we all leave for our capitals, let us not leave behind only empty declarations and speeches.

Our mechanism for the protection of human rights, unique in the whole world, needs a renewed commitment – political and financial – to continue to do what it was set up for and what the people in Europe expect it to do, that is deliver justice and protect the rights of Europe’s citizens against the might of Europe’s states.

Concrete acts

This is an expectation that cannot be fulfilled through diplomatic “shoulder clapping”, but only through concrete acts, which are:

– firstly, the Convention’s and the Court’s primacy in human rights questions in Europe cannot be endangered;
– secondly, additional money to meet the exponentially growing burden of applications must be made available;
– thirdly, the Court’s decisions must be respected unconditionally and by all.

In conceiving and creating the Convention in the aftermath of the second world war, our predecessors showed great vision, resolve and political courage. Fifty years later, we have an opportunity to demonstrate that we too can act with the same resolve, vision and courage – not for our own glory, but for the ideals we believe
Proceedings

in. The ideals of justice and human rights. The ideals that safeguard our freedom.
PRESENTATION OF THE TWO
INTRODUCTORY REPORTS ON THE SUB-
THEMES OF THE MINISTERIAL
CONFERENCE

Mr Walter Schwimmer

Secretary General of the Council of Europe

It is my duty and honour to present to you, as a general introduction to the discussions of this conference, the two reports which I have prepared on the two sub-themes of this conference. I can reassure you that I will not read them out; they are in your file.

Let me just make the preliminary comment that it is rather exceptional for the Secretary General to act as rapporteur at a ministerial conference. In most cases, it is the governments of member states that prepare reports on the themes to be discussed. However, the Steering Committee for Human Rights preferred that I perform this task and I have accepted the invitation with pleasure. Nonetheless, I should point out that such reports are intended to stimulate debate and decision-making, and the reports for this conference are no exception. For this reason, I have conceived my reports not so much as technical information documents describing ongoing work in the Council of Europe – even if they do contain some information of that kind – but more as critical and forward-looking papers identifying priority areas and proposals for the short and medium term. The structure of the reports mirrors that of the two draft resolutions which have been submitted for adoption by this conference. They cover a lot of ground and it is not possible here and now to go over all the issues raised.

This presentation will therefore be confined to highlighting just a few points made in the two written reports which I believe are central questions facing Europe, and the Council of Europe, in the field of human rights today. Of course, the fact that a specific issue is not mentioned in my presentation today does not mean that it is of lesser importance. I therefore refer to my written reports for a number of concrete proposals which I will not repeat orally.

I should like to begin by stating a simple truth: human rights protection begins and ends at home. It may be surprising to hear the Secretary General of an international organisation stress the responsibility of national authorities to protect and promote human rights inside their own legal systems. To avoid any misunderstandings, let me stress straight away that this does not detract from the essential role which the Council of Europe and its human rights protection systems have to play. However, I believe that this phrase reflects very well the experience with human rights protection which the Council of Europe has built up over the last fifty years. It also sums up, and allows us to analyse, the main challenges facing us in today’s Europe.

First of all, human rights can only be truly protected at home if that home is stable and democratic. Conversely, there can be no question of a stable democracy if the human rights of all or part of the population are flouted. Putting the house in order is certainly first and foremost the responsibility of governments of individual member states, but it is not theirs alone, as the very existence of the Council of Europe demonstrates. Europe has, unfortunately, been confronted with pockets of insta-
bility and even outright crisis and conflict situations in which human rights have been violated on a massive scale: Bosnia and Herzegovina, Kosovo and Chechnya, to name but a few. In the face of such situations, there is a need for rapid and effective international responses. For the Council of Europe, there are lessons to be learnt from our experience with the Chechen conflict. We need to remain firm in our condemnation of such massive and serious violations, but at the same time, there is a need to improve our response capacity. We must bear in mind that our experience and role in such situations is relatively recent, and I believe that the time has come to create and fund a rapid response capacity in the Secretariat in the form of a human rights task force and an intervention fund. These could play a vital role in helping the state concerned to restore quickly a minimum level of respect for human rights. In addition, our political response capacity needs to be improved.

If one takes seriously our statutory mission of achieving a greater unity in Europe through the maintenance of human rights, we must, where necessary, not shy away from developing and implementing new forms of constructive pressure whenever a country does not live up to the basic duties and principles inherent in membership of this Organisation. I feel this requires urgent attention from the Committee of Ministers and the Parliamentary Assembly; for realism tells us that new challenges will undoubtedly arise in the future.

The recent events in the former Yugoslavia provide the most eloquent illustration of the fact that human rights begin at home. We must pay tribute to the courage and democratic spirit of the people of Yugoslavia who have themselves shrugged off the yoke of totalitarian dictatorship and chosen the path of democracy, rule of law and respect for human rights, thereby following in the steps of the neighbouring countries. The role of the Council of Europe must be to encourage, reinforce and assist this transition in every way we can, even and especially now in the fragile early stages of this process. As is the case with Bosnia and Herzegovina, the clear perspective must be to bring the country into the stabilising European community of standards and values which the Council of Europe constitutes, whilst remaining vigilant that the necessary progress is indeed made.

However, the importance of respect for human rights for stable and cohesive societies at home is not only illustrated by such spectacular examples. There are worrying signals of increasing racism and other forms of discrimination and intolerance throughout Europe. These were recognised in the major European Conference organised in Strasbourg only three weeks ago as a European contribution to next year’s world conference against racism. In the longer term, these phenomena pose a serious threat to stability and cohesion because they are inherently divisive factors for each society. I believe this conference should express support for the various institutions and activities of the Council of Europe which deal with these and related problems: the European Commission against Racism and Intolerance, but also the pioneering Framework Convention for the Protection of National Minorities and its Advisory Committee.

I regard it as a sign of the times that Protocol No. 12 on non-discrimination has been added to the European Convention on Human Rights. This will give the Court a solid legal basis for dealing with discrimination complaints, so far not covered by the Convention, and thus enhance further the stabilising and unifying role of the Convention system on our Continent. The protocol will be signed by many member states tomorrow and I trust that others will soon follow suit.

Social rights, too, are important for stability. Too often, the protection of social rights is set apart as a less important area of human rights protection. There is thus a wide gap between this practice and the officially proclaimed theory that all human rights are indivisible. Unfortunately, invisibility of indivisibility seems to be current practice. Regarding social rights as a lesser category of human rights – if they are considered to be human rights at all – is first of all plainly wrong; if one thinks of persistent poverty, the situation of many elderly people, child abuse and so on, one must admit that some of the gravest affronts to human dignity lie precisely in the social sphere. But relativisation of these rights is also dangerous for it overlooks the fact that these rights are
essential for social cohesion and peace, and thus for stability. In my written report on sub-theme I, I therefore plead for a rethinking of our traditional categorisations of human rights. I feel obliged to note here that the draft texts submitted for adoption by this conference pay only limited attention to the importance of social rights in our societies.

Human rights protection begins at home; it requires much more than a stable and democratic system. It presupposes the availability and accessibility of effective legal procedures before independent courts capable of offering legal redress within a “reasonable time”, to use the words of Article 6 of the Convention. It presupposes the existence of a whole range of countervailing powers and watchdogs that help prevent or redress any abuses of power, such as ombudsmen and national human rights institutions, and a vibrant civil society with critical and independent media and NGOs. It also presupposes the existence of a democratic human rights culture in all branches of government, not least in those involved in law enforcement.

In most of these areas, Europe as a whole has made significant progress over the last fifty years and the Council of Europe has made its own contribution thereto, by setting standards and providing concrete assistance to member states. However, a lot remains to be done, for example as concerns the full integration of human rights standards and values in our educational and professional training systems.

Another area where further encouragement would seem necessary is transparency of government. Active and passive transparency are hallmarks of open, democratic and accountable government; they offer important safeguards against abuse of power, corruption and other evils. In this age of the “information society”, it appears incongruous that not all member states recognise a right of access for individuals to information held by public authorities. However, legislation is being prepared in several countries and I believe that it should be possible, in the next few years, to transform the basic principles which are currently being drawn up in the Council of Europe into a binding European convention on access to official information. I invite this ministerial conference to recognise this as a medium-term objective.

Human rights protection begins and ends at home; it is so to speak in the middle, in between the beginning and the end, that international protection of human rights steps in and it is here that our human rights protection systems come into play. In particular, where human rights protection machinery at home fails to prevent or remedy an alleged human rights violation, individuals have the possibility to submit their case to the European Court of Human Rights.

We will be commemorating the fiftieth anniversary of the Convention tomorrow and, of course, this is a proper occasion to pay tribute to the great achievements and success of this unique bill of rights. This conference should, however, also look to the challenges that lie ahead.

Here, I want to be frank with you: I see a few key areas that call for action. The first is the workload of the European Court of Human Rights. As we speak, the Court has more than 15,000 individual applications pending before it. The reform brought about by Protocol No. 11 – establishment of a full-time Court in place of the former two-tier system of Commission and Court – is not sufficient to cope with this massive influx of cases. I know the Court is working hard to rationalise further its working methods – President Wildhaber will address this issue in a moment – but it seems totally unrealistic to expect that this will lead to a capacity increase on a scale commensurate with the number of cases brought to Strasbourg. So, what should be done?

First, it is necessary to come to an understanding that the budgetary requirements of the Court are, in the short term at least, outside the control of the Secretariat and of the Court itself, as they depend on the number of individual applications. In this vein, I asked the Committee of Ministers last January to examine the role and operation of the Court with a view to proposing a method of financing that does not penalise the Council of Europe’s other activities in the medium term. For example, the Committee of Ministers could decide to treat the Court’s budget as a “separate basket” within the Ordinary Budget, or alternatively,
and after detailed scrutiny of requests received, include the additional budgetary requirements of the Court in a zero real growth coefficient of adjustment of the Ordinary Budget. In one way or the other, the Court should be provided with the necessary financial and human resources.

A second measure is a further reform of the Convention system. This raises a number of fundamental questions, some of which are mentioned in my written report on sub-theme I. Several ideas have been floated already, and while it is premature for this conference to indicate the precise direction that such a reform should take, I do believe that this conference should launch an urgent in-depth study of the various options. However, it is already possible to identify one main parameter for any future reform: the principle of subsidiarity must be firmly maintained if not reinforced. This dictates that, in the first instance, it is the job of the national authorities, in particular the courts, to protect the rights and freedoms of the Convention. The Strasbourg system should only operate on a subsidiary basis, namely when the national legal system has failed to provide adequate protection. We should resist any temptation to assign to the Strasbourg Court a role which should, and can only, be fulfilled by national courts and other authorities. The Convention system rests on the assumption that there are effective protection systems in place at the national level. Once again, this means that human rights protection begins at home.

Therefore, a third category of measures concerns this national level. I would stress that such measures are essential not only to reduce the flow of cases coming to Strasbourg, but, naturally, first and foremost, to improve human rights protection within the national legal systems. There is still much to be done to ensure that the courts and other public authorities are fully aware of the Strasbourg case-law, for example through training and dissemination and translation of judgments. How many contracting states have proper guarantees in place to ensure that draft legislation is systematically screened on its compatibility with the Convention? National human rights institutions and government agents can play a pivotal role in these respects.

There is a second main aspect of the Convention system that calls for attention: the execution of judgments of the Court. This is fundamental to the credibility and effectiveness of the Convention system. There is so far good compliance with judgments, but I must draw attention to a worrying tendency, at least in some cases, to politicise the Committee of Ministers’ role of supervising the execution of judgments. This is wholly alien to the judicial nature of the Convention procedure.

It is a fundamental requirement of the rule of law that all judgments must be executed, even if there is a political context to the case at hand. This is as true in Strasbourg as it is at the national level. Unfortunately, it would seem necessary to start thinking about possible responses, political and other, to late or even non-execution of a judgment by a contracting state. In this respect, I welcome the increased attention which the Parliamentary Assembly has paid in recent years to the question of the execution of judgments. More generally, I would stress that this supervisory role of the Committee of Ministers places it in an ideal position to note the existence of certain structural problems which individual cases may exemplify. Excessive length of proceedings in criminal and civil cases, torture and other ill-treatment during police interrogations, and non-execution of national judgments are obvious examples of such problems. It is of course in the first place for national governments and parliaments to solve them, but the Council of Europe can assist in finding solutions through a comprehensive effort. The Committee of Ministers can see to it that such issues are also taken up in our intergovernmental work, assistance programmes can be devised for the countries concerned and the Commissioner for Human Rights may also play a useful role here.

Human rights protection ends at home. Our European human rights standards, the judgments rendered by the Court, the recommendations made by our specific bodies for the prevention of torture, for the protection of social rights, for the protection of national minorities or in the field of racism and intolerance, etc. – all of these can only, and must be, implemented by the member states at the national level.
I am convinced that both the member states and the Council of Europe should give more attention to the implementation of standards. A moment ago, I stressed the importance of the execution of judgments, but the same is true for country-specific recommendations produced by our other human rights mechanisms. We must acknowledge that there are occasions when member states, while demonstrating the political will to implement these recommendations, sometimes encounter genuine difficulties of different kinds (financial, infrastructural or otherwise) in giving effect to them.

An example is the improvement of prison conditions following recommendations made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Member states turn to the Council of Europe for assistance, and in many cases we unfortunately do not have the means to respond favourably to such requests.

To answer this type of request I have obtained authorisation from the Committee of Ministers to create a new head in the Ordinary Budget called “Intervention Fund”. Unfortunately, at the moment, this is an empty box that needs to be filled if we want to mean business in this or in other important areas of our activities.

Before I conclude, allow me to make a last observation in relation to the European Convention on Human Rights. It concerns its place in the wider European institutional architecture. In a few weeks’ time, the European Union intends to proclaim officially its Charter of Fundamental Rights. I congratulate the Union on this important achievement. Of course, we are particularly pleased that the charter establishes a direct link with the European Convention on Human Rights as far as the interpretation of the charter is concerned. It is vital that the process of European construction proceed without construction errors, in order to create a Europe without dividing lines. Accession of the Union to the Convention, as advocated by many, would be an important step in this respect and allow for impartial control of EU institutions by an independent court, similar to the way national courts are subjected to control by the Strasbourg Court. I hope that the forthcoming intergovernmental conference will show the political vision and enable an agreement to be concluded to make such accession legally possible. Within the Council of Europe, a preliminary examination could be carried out in the meantime in order to look at the amendments that could be envisaged to the Convention in order to remove legal obstacles to accession. I therefore solemnly call upon the European Union to accede to the European Convention on Human Rights.

In this new century, the Council of Europe has an important role to play in encouraging and ensuring that human rights are effectively protected at home. This brief tour d’horizon has, I hope, served to highlight some key challenges facing us in the field of human rights. Whether they concern our response to situations of serious and massive human rights violations, the immediate needs of the Court and the future reform of the Convention system or the need for an increased focus on implementation of standards, finding solutions to all these issues requires the political will of the governments of our member states. In particular, it is essential that the Committee of Ministers fully assumes its role as the political guardian of our standards and mechanisms in the field of human rights, alongside the Parliamentary Assembly. It has been said that the Council of Europe is about human rights or it is about nothing. I can only agree, and therefore ask our member states to give priority consideration to this area, which is at the heart of the community of values that the Council of Europe constitutes.
Part I

Institutional and Functional Arrangements for the Protection of Human Rights at National and European Levels

Introductory Report

Mr Walter Schwimmer

Secretary General of the Council of Europe

1. Introduction: the development of a European system of human rights protection

What began as an experiment or even an adventure fifty years ago with the adoption of the European Convention on Human Rights has since developed into an impressive constellation of machinery for the protection of human rights at European level. Not only has the Convention system itself grown to maturity through gradual reinforcement of the supervisory system – the entry into force of Protocol No. 11 two years ago certainly was a landmark in this regard – but also other human rights conventions have been drawn up since 1950 which complement the Convention in various ways: they contain different standards, they provide for a supervisory mechanism of a different character, or both.

Some key dates may suffice to illustrate this:

- 1950: adoption of the European Convention on Human Rights;
- 1961: adoption of the European Social Charter;
- 1987: adoption of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- 1995: adoption of the collective complaints protocol to the European Social Charter;
- 1996: adoption of the revised European Social Charter;

In addition, certain non-convention-based institutions in the field of human rights have been established in the wake of the two summits of the Council of Europe: the European Commission against Racism and Intolerance (ECRI) was created by the Vienna Summit of 1993 and the Council of Europe Commissioner for Human Rights was instituted last year, after the Strasbourg Summit of 1997.

At the political level, mechanisms have been set up by the Parliamentary Assembly and the Committee of Ministers, respectively, in order to monitor compliance by member states with their commitments as members of the Organisation.
All in all, this picture is surely an impressive one, and one must pay tribute to the courage, foresight and perseverance of all those who were involved in bringing about this wide-ranging human rights protection machinery: the governments of our member states, the Parliamentary Assembly, non-governmental organisations as well as individuals both outside and inside the Secretariat.

At national level, too, significant progress can be noted in developing and reinforcing institutional and functional arrangements for the protection of human rights over the last fifty years. Among many examples to be found in many member states, reference can be made to improved access to legal counselling and to justice, a stronger respect for the independence of the judiciary, the rise of constitutionalism, the impressive Europe-wide development of the ombudsman institution and, to a lesser extent, of independent national human rights institutions, and enhanced accountability of administrative authorities, including through control by independent courts.

More generally, the post-war period has seen an unprecedented development of the role of the courts in our societies and legal systems. This role has expanded not only on account of the gradual widening of their jurisdiction (compare the development of administrative law) and the development of what has been termed a “claims culture” in society, but our legal systems have also moved away from earlier positivistic attitudes (which saw the role of courts essentially as being limited to applying the law) towards a very different conception which recognises the law-making function of the courts as legitimate and necessary in modern societies. This phenomenon has gone hand in hand with, and is partly explained by, important changes in the function of legislation. In the past fifty years, the law’s role in society has shifted considerably from codification to modification: a growing instrumentalisation of laws and regulations as tools to further certain policy aims and bring about social change. In addition, laws increasingly contain open-ended expressions, thus (sometimes deliberately as a result of political compromise) opening the way for a more important interpretative role of the courts. All these changes point towards a more active and protective role of the courts.

These various developments have created a huge potential for human rights protection, both within national legal systems and in the framework of the Council of Europe. Of course, this potential has acquired an historic new dynamic with the momentous changes in central and eastern Europe since 1989, which led to a doubling of the membership of the Council of Europe and a corresponding increase in the geographical reach of our human rights instruments.

At first sight, one may wonder, given this density and variety of available mechanisms and institutions, why it was considered necessary to include this sub-theme on institutional arrangements at national and European level in the agenda of this ministerial conference. However, a closer examination of the issues involved shows that this choice is fully justified.

Firstly, there are a number of issues relating to the functioning of the Convention’s mechanisms which require political attention. This concerns both the Court and the Committee of Ministers. They will be addressed in sections 2 and 3 below, respectively.

Secondly, it would seem necessary to raise some issues concerning a distinct area of human rights protection: the protection of social rights (section 4).

Thirdly, a European ministerial conference on human rights held on the occasion of the fiftieth anniversary of the Convention seems an excellent occasion to reflect upon the future of our human rights protection systems in the wider context of European construction. Some thoughts on this subject will be offered in the concluding part of this report (section 5).

Questions concerning the protection of human rights and the implementation of European standards at national level will not be addressed separately but will be integrated in

---

1. The key role played by non-governmental organisations, the media and other parts of civil society will not be addressed here since it would be inappropriate to consider these actors as “institutional or functional arrangements” for the protection of human rights. Their role will be highlighted in the introductory report on the second sub-theme (in section 5 on human rights and civil society).
Similarly, human rights mechanisms and institutions other than those connected with the Convention or with the European Social Charter will not receive separate treatment here. They will be referred to in the introductory report on the other sub-theme of the conference: "Respect for human rights, a key factor for democratic stability and cohesion in Europe: current issues".

2. The European Court of Human Rights

The outstanding success of the Convention is largely due to the exemplary work done by the former Commission and Court of Human Rights and, in the last two years, by the new Court of Human Rights. It is therefore appropriate to begin by paying tribute to the vast body of case-law which they have built up over the years, which has given concrete content to the Convention rights, specified the nature of the obligations of Contracting States and adapted the Convention standards to evolutions in society, always bearing in mind the overriding interest of the effectiveness of the human rights guarantees guaranteed by it. The case-law of the new Court shows continuity rather than a radical break with the past, a welcome indication that development of the case-law will respect the acquis. It is thanks to this case-law that a European human rights law exists which permeates the national legal orders of our member states. Thus, the Convention has acquired such an established and fundamental place in the European legal order that it has appropriately been described as a constitutional instrument of European public order. However, one should not forget either that other great achievement of the Convention: offering a European judicial remedy for aggrieved individuals against any form of state action or inaction which they believe violates their rights under the Convention. The recognition of the right of individual petition, considered too controversial in 1950 to be fully incorporated into the Convention system, is nowadays an integral part of it, thanks to Protocol No. 11 and the state practice which preceded its adoption.

This is not to say that everything is satisfactory. One cannot but be seriously concerned by the tremendous and continuing increase in the number of individual applications that reach the Court. At the ministerial conference held ten years ago in Rome celebrating the fortieth anniversary of the Convention, my predecessor, Catherine Lalumière, presented a report in which she expressed concern at the fact that, at the time, there were 2,000 individual applications pending before the Commission at the admissibility stage. Today, there are more than 15,000 applications pending before the Court.

It is partly in response to the need to rationalise the Convention procedure that Protocol No. 11 was elaborated, setting up a single Court of Human Rights replacing the former two-tier system of Commission and Court. Of course, the new permanent Court, set up only two years ago, has needed, and probably still needs, some time to reach full cruising speed and deal with this mass of applications in the most efficient way possible.

Nonetheless, it seems totally unrealistic to expect that the – necessary – practical measures such as increased financial and human resources for the Court and a further streamlining of the Court’s internal working methods would in themselves be capable of solving the workload problem through the capacity increases or input reductions they could bring about.

This raises the question of a further reform – amendment – of the Convention system. In this regard, some ideas were already mentioned by the President of the Court, expressing personal views at a meeting in Strasbourg.
on 8 June 2000. He tentatively mentioned some of the reform options that could be examined with a view to limiting the influx of cases into the Convention system:

(i) raising the hurdles which the individual applicant has to overcome in order to have access to the Court for a full decision on the merits by giving the Court a certain discretion to refuse adjudication and to select, for example, only those cases which actually contribute to preserving or raising the standard of human rights protection in Europe as a whole as well as in the country concerned;

(ii) instituting a preliminary reference procedure whereby national courts could refer questions to the Strasbourg Court, comparable to the procedure used by national courts vis-à-vis the Court of Justice of the European Union under Article 234 of the Treaty on European Union;

(iii) allow specially elected senior registry officials to carry out the filtering functions now performed by committees of three judges; and

(iv) again separating the filter function and the judicial function and assigning them to two different bodies: a tribunal of first instance and a Court (the idea being that it would not be necessary for both organs to operate on a full-time basis or to be composed of forty-one members).

Some of these options – and there are more, such as wider possibilities for the Court to give advisory opinions, the introduction of some form of class actions, and so on – obviously raise fundamental questions about the objectives of the Convention system. We may ask ourselves with President Wildhaber whether, with 41 states, 800 million inhabitants and a likelihood of 20 000 applications per year, it is realistic to continue to give all applicants a right to have their cases dealt with by the Court. Or should the Court become more like a quasi-constitutional court, perhaps not accessible for everyone but at least able to hand down decisions without undue delays that undermine the credibility of the whole system? In the future, should the Court not be dealing first and foremost with the major problems that are of fundamental importance in the country concerned and for the application and interpretation of the Convention in general? Is the Court not simply getting bogged down by numerous clear-cut but time-consuming cases, such as those concerning the length of proceedings before the domestic courts? Should such cases be dealt with on the merits by the European Court of Human Rights?

These are very difficult questions indeed. However, it is necessary to address them, and to address them urgently. They require in-depth study and the time does not yet seem ripe for rushing into political decisions at this ministerial conference as to the direction which the convention system should take in the years to come and the fundamental purposes it should serve.

However, it is only right and proper to ask that the governments of the member states give political attention to these questions and to expect that this conference will acknowledge the urgent need to launch a thorough study of all possible reform options, with a view to taking a political decision in the not too distant future. It should be stressed – and the few options mentioned already demonstrate this – that the ultimate decision as to the functions we wish to assign to the Convention system and the objectives it should pursue remains eminently political, for it is directly linked to the process of European construction and architecture. So far, the Convention system has been able to fulfil two key roles: to provide an avenue of redress accessible for every individual with human rights complaints and to elucidate, safeguard and develop the legal standards of human rights protection laid down in the Convention. Should the first role be sacrificed or curtailed in order to allow the Court to continue to fulfil the second one? Or is it possible to find less radical solutions?

These questions among others will have to be addressed in the context of the Steering Committee for Human Rights and the Committee of Ministers’ Liaison Committee with the Court.

There is another, domestic, dimension to this whole issue. The role of the Convention

Proceedings

system cannot be dissociated from the protection role of national authorities. The Court has time and again referred to the principle of subsidiarity: the whole logic of the Strasbourg system rests on the fundamental premise that it is primarily for national authorities, especially the courts, to protect the rights laid down in the Convention. If the Strasbourg system is suffering under an exorbitant workload, is this not because there is something wrong with the capacity of national courts and other authorities to offer adequate protection of the Convention rights or, at the very least, with the faith of individuals in the capacity of national courts to offer an effective remedy for their human rights complaints? Are the length of proceedings cases against Italy and other countries not a case in point?

It must be stressed that this phenomenon is not limited to any particular part of Europe. The statistics indicate that in many contracting states, increasing numbers of individuals are turning to Strasbourg.

It would appear that much more can and should be done at the national level: establishing effective preventive and remedial/compensatory mechanisms at national level; systematic training of prosecutors, judges and the police in the Convention should become standard practice in all contracting states as an integral part of their national training; and publication and dissemination of key Strasbourg judgments for the legal community, if necessary in translated form, etc. These needs have been fully recognised and addressed by some of our member states which have undertaken impressive efforts, for example in the field of training.

However, training of judges and law enforcement officials is not sufficient if the legal and political climate is such that they are reluctant to take the protective decisions required in order to observe the Convention rights. The status, authority and working conditions of judges must therefore be such that they can exercise their judicial role in full independence, free from any direct or indirect political interference. For, as long as that is not fully guaranteed, judges will all too often be inclined – even if they know full well that their judgment will violate the Convention – not to address what they fear might be embarrassing questions but to leave it to litigants and their lawyers to bring the matter before the Court in Strasbourg. Conversely, individuals who have confidence in their national courts will be less inclined to pursue their case in Strasbourg.

Of course, it is, fifty years hence, a most welcome fact that the Convention has been given direct effect in almost all contracting states, which creates good opportunities for effective protection of its rights at national level. However, as the experience in several contracting states shows, this in itself is again not sufficient to guarantee such protection: national judges must also be made aware of the Convention standards as interpreted in the Strasbourg case-law.

In short, the Convention system rests on the assumption that there are strong and effective protection systems in place at national level. Here, the question arises of whether the overburdening of the Convention system should not be attributed, in part at least, to the fact that not enough is done at national level. As was noted in the introduction above, there is an impressive potential for domestic protection. The question is: is that potential fully exploited?

Let us ask ourselves: how many contracting states pursue active training and information policies as regards the Strasbourg case-law? How many contracting states have proper guarantees in place so that draft legislation is systematically screened on compatibility with the Convention? Here, government agents and national human rights institutions, for example, can play a pivotal preventive role by ensuring that the different government departments are fully aware of potential compatibility problems. Inevitably, individuals who believe that national authorities have had insufficient regard to their fundamental rights and freedoms will turn to the Strasbourg Court.

However, it is not only the number of applications that is revealing. It is also the nature of the cases brought to Strasbourg. More and more, the Court is being asked to fulfil a function which really should be carried out by national courts: that of establishing in great detail the facts of the case and/or acting as a further court of appeal (“fourth instance”).
Surely, this should not be necessary if, in accordance with Articles 6 and 13 of the Convention, national procedures not only exist but also function which allow examination of the substance of Convention issues.

It is my firm belief that, in examining options for a further structural reform of the Convention system, the maintenance of the principle of subsidiarity should be an overriding consideration. Solutions that would envisage a departure from this principle, by assigning to the Court functions that simply must be carried out by national authorities, would be fundamentally flawed. This would not only be totally impracticable in terms of workload and resources needed, it would also, in the long run, be detrimental to the ultimate objective of the Convention: the effective protection of the fundamental rights and freedoms of every individual. The primary duty to protect these rights lies with national courts and other authorities; it is at the national level that violations of these rights can and should be prevented or remedied most effectively. In other words, any solutions to the workload problem in Strasbourg cannot and should not be a substitute for solutions within the legal systems of the contracting states. On the contrary, consideration should be given to including, with the control system of the Convention, further incentives for national authorities to assume fully their primary responsibilities under the Convention. But here again, one also has to ask whether existing possibilities for doing so are sufficiently exploited.

It would seem, for example, that the assistance and co-operation programmes of the Council of Europe should be much more tailored to addressing structural problems which stand in the way of effective human rights protection at national level. One possibility which would merit reflection would be to create a European support fund or other mechanism to assist states in overcoming such obstacles. This could be a means of providing targeted training and assistance in the drafting of legislation in conformity with European standards and thus of offering a form of back-up for the protection system of the Convention and other human rights mechanisms.

After all, we must not forget that the effectiveness of the Convention and of the protection of the rights guaranteed by it is a collective responsibility of all States Parties. This is, for example, the basic philosophy underlying the inter-state application procedure of Article 33 of the Convention. Seen in this light, lodging an application against another state is, contrary to what is often thought, not an unfriendly act against that state but it can be an exercise of that same collective responsibility for upholding respect for our common European human rights standards which can be to the benefit of all, not least the country that is asked to answer allegations of human rights violations. There are obviously situations of massive and serious human rights violations in respect of which it would be morally wrong to remain idle and where the need to exercise collective responsibility is at its most acute. This matter will be addressed further in the report on sub-theme II.

### 3. Supervision of execution of Court judgments by the Committee of Ministers

The area of execution of judgments of the European Court of Human Rights is a fundamental aspect of the Convention system which deserves full attention at the ministerial conference, because it is the key aspect in the proper functioning of the Convention’s mechanism. Indeed, a judgment of the Court is by no means the end of the story. Looking back on the experience of the past decades, there are certainly positive elements to be noted. The record so far has been one of general compliance with and execution of judgments of the Court. It is also a positive feature that, today, it is uncontested that, depending on the case, such execution may require not only payment of just satisfaction to the victim, but also general measures (whether through legislative changes, a change of domestic case-law or measures of another kind) to prevent a repetition of the violation found, as well as individual measures such as non-expulsion or release of the victim from detention. In addition, the need has been recognised to modernise the rules of procedure of the Committee of Minis-
ters so as to enhance the position of the successful applicant and increase transparency of the procedure vis-à-vis that applicant and the wider public. The draft revised rules were finalised recently; they will be forwarded soon to the Committee of Ministers for adoption.

Nonetheless, it would seem necessary to recall the need for the Committee of Ministers to respect the judicial nature of the Convention procedure. In certain cases, there seems to be a tendency to politicise the procedure, which is wholly alien to the role of the Committee as an organ of the Convention. This is not to say that there is never a political context to a judgment and its execution, for there may well be one. In this respect, court cases in Strasbourg are not different from cases before national courts. What matters is that such a context must never be allowed to lead to immunity and to departure from the firm rule that judgments must be executed in all cases, even where this might be politically embarrassing or uncomfortable. This is nothing less than a key requirement of the rule of law. Unfortunately, there are increasing signs that it is becoming urgent to examine possible responses, political and other, to late or even non-execution of a judgment by a contracting state.

Here again, the Convention role assigned to the Committee of Ministers can and should be looked at from a totally different angle. Not only is execution and supervision thereof central to the credibility of the Convention system as a whole, as already indicated, it also presents excellent opportunities for effective action to prevent human rights violations in the future. Because of this supervisory role, the Committee of Ministers is ideally placed to note the existence of structural problems in contracting states likely to engender more cases on the same issue in the future and, on the basis of this information, to ensure that such problems are addressed in the intergovernmental programmes as well as in assistance programmes for the countries concerned. To give just a few examples of such problems repeatedly revealed by the Court’s judgments in respect of different states: non-execution of decisions of national courts by the executive; excessive length of proceedings in civil and criminal cases; and torture and ill-treatment during police interrogations. I would welcome it if on such issues (and there are more) a comprehensive effort would be undertaken – quite apart from the individual cases which, however serious they may be, are mere symptoms of the problem – in order to address the underlying structural problems. Of course, it is in the first place for the contracting states themselves to do so, but the Council of Europe, as a framework for co-operation and assistance, as well as the Commissioner for Human Rights, also have a role to play here.

This is not to minimise the importance of ensuring that Court judgments are also fully executed in respect of the individual victim. As stated, it is nowadays accepted that individual measures may be required which go well beyond payment of just satisfaction. However, difficulties are still being encountered in ensuring satisfactory follow-up in order to remove the consequences which the violation has had for the applicant, for example through a re-opening of judgments of national courts after the finding of a violation in a Strasbourg judgment. The recent adoption by the Committee of Ministers of a recommendation to member states on this question is a positive first step, which should be followed by concrete measures of implementation by the member states. In this respect, it is encouraging to note recent developments in national case-law and legislation in some states, as well as developments under way in certain other states.

It is particularly encouraging that the Parliamentary Assembly has, in recent years, paid increasing attention to the question of execution of judgments of the Court, insisting on the fundamental importance of proper execution for the effectiveness of the Convention’s mechanism. It has thus addressed numerous questions (written and oral) to the Committee of Ministers or its Chair concerning individual cases and, at its most recent session, considered a comprehensive report on the issue (Document 8808) leading to a recommendation on ways to improve such execution.
4. The protection of social rights

Human rights are indivisible. The fundamental notion underlying all human rights, whether they are classified as civil, political, social, economic or cultural, is human dignity: the need to respect and uphold the dignity of every human being in all situations and in all its manifestations. The principle of indivisibility has been reaffirmed time and again in European and international fora, including at the World Conference on Human Rights in Vienna in 1993. The importance and everyday relevance of this principle becomes abundantly clear when we look at the realities of our societies. It is in the social sphere where perhaps the greatest number of attacks on the dignity of the individual can be seen. One only has to think of the persistence of poverty and long-term unemployment, the situation of many elderly people, the disabled, children who are abused, the social dimension of migrations, and so on.

Yet, there is a wide gap between the official recognition of this indivisibility and giving concrete effect to it. It somehow seems as if we have become hostage to the categorisation of human rights into civil and political rights, on the one hand, and social rights, on the other. It is one thing that the implementation of the Universal Declaration of Human Rights has led, both in the Council of Europe and in the United Nations itself, to two distinct instruments for these two categories of rights. But are the consequences that have been drawn from this fact not too rigid, with the result that we lose sight of that unifying underlying notion of human dignity? Invisibility of indivisibility seems to be current practice.

It would seem that the explanation for this wide gap between theory and practice lies to a large extent in the manner in which the question of the protection of social rights is frequently approached. It is argued, first, that social rights are just as important as civil and political rights but that their different character requires a different protection mechanism. Social rights, it is said, do not lend themselves to judicial protection whereas civil and political rights do. While there is already much to be said against the simplicity of such traditional thinking, the next step in this reasoning is fundamentally flawed: it seems that for some, because the system of protection of social rights is not judicial, it should or can be taken less seriously than the system for the protection of civil and political rights. From there, it is only a very small step to the conclusion – even if it often remains implicit – that social rights are a less important category of human rights or even that they are not human rights at all.

We see this when comparing the operation of the twin conventions of the Council of Europe: the European Convention on Human Rights and the European Social Charter. Is the European Social Charter really taken seriously as the full counterpart of the Convention in the area of social rights? If we look at the negative attitudes of some contracting states towards their obligations under the Charter and the need to follow up recommendations, are we not seeing the very opposite?

Of course, there are positive developments to be noted: the relaunch of the European Social Charter decided at the ministerial conference in Turin in 1990 has resulted in a revised European Social Charter and in an innovative Collective Complaints Protocol to the Charter. The Parliamentary Assembly is campaigning for more ratifications of the revised Charter and I hope that a good number of such further ratifications will take place between now and the fortieth anniversary of the Charter next year.

However, these positive steps are only a partial answer to the questions outlined above. On a more fundamental level, is it not time to rethink our traditional categorisation of human rights? Can Europe credibly claim to be a Europe of human rights as long as social questions are seen in terms of social problems, an amalgam of difficulties and obstacles, not as a natural feature of life in any society inseparably linked to the dignity of each of its members?

4. This is amply illustrated in the various papers and contributions to the Colloquy on the Social Charter of the 21st Century, Strasbourg, 14-16 May 1997. A main point is of course the fact that most social rights are judicially protected at the national level.
Reforming the social dimension of human rights could be a way of overcoming the consequences of categorisations. In addition, more thought should be given to the question of judicial protection of social rights, also at European level. From the point of view of indivisibility of human rights, one can only be satisfied with the fact that the drafting work on the EU Charter of Fundamental Rights has resulted in a text encompassing the traditional different categories of rights. But this raises the question of whether a similar return to human dignity as the basis for all human rights should not be undertaken by the Council of Europe. I believe there are ample reasons for doing so and I regret that this issue has not been given a more prominent place in the texts to be submitted to the ministerial conference.

5. Concluding observations

This report has focused on the two oldest human rights conventions of the Council of Europe. However, they are part of a much broader constellation of institutions and arrangements. The coexistence of this multitude of arrangements has made it necessary to pay increased attention to the question of synergies and complementarity between them. Earlier this year, this subject was examined in depth at a conference organised by the Irish Chair of the Committee of Ministers. Among the many valid points made, one general issue should be highlighted: the coexistence of different mechanisms should not lead to a situation of paralysis, namely a situation where the existence of another mechanism becomes an excuse for inaction under a different mechanism. Whether it is the Commissioner of Human Rights, the procedure under Article 33 or that of Article 52 of the Convention, the political monitoring systems or any other arrangement, all these mechanisms should be governed by two key principles: unity of purpose and specificity of competence. The various arrangements ultimately serve the common goal of ensuring respect for and protection of human rights in Europe. This should always be borne in mind. In this spirit, and with a view to enhancing synergies and complementarity between the different human rights treaty bodies of the Organisation, consideration should be given to organising – as is the case within the United Nations system – annual meetings of such bodies. More generally, the different actors within the Organisation (specialised ministers, Committee of Ministers, Parliamentary Assembly, Steering Committees, etc.) would do well to take into greater account the results of the various human rights mechanisms so as to anticipate and address, in a timely and adequate fashion, issues which are clearly of a structural nature (for example, length of domestic proceedings).

In view of its statutory position, the Committee of Ministers has to play a key role in promoting synergies so that the common goal is achieved. This presupposes vigilance to ensure that the different institutions can do their work. Most treaty-based mechanisms cannot fully determine their own workload; there is an autonomous growth which, realistically, cannot be managed under the zero budget-growth of the Council of Europe in recent years. Other solutions will have to be found and here, as in other respects, it is vital that our member states recommit themselves to giving full political support to the human rights work of the Council of Europe, which constitutes the backbone of the Organisation and which responds to real needs existing in our societies.

Finally, the ministerial conference is also a proper forum for looking at the place of the Council of Europe’s human rights institutions in the broader context of European integration. In a few weeks’ time, the European Union is expected to adopt its Charter of Fundamental Rights. Similarly, a new intergovernmental conference will examine important institutional issues concerning the future development of the European Union.

Both the Committee of Ministers and the Parliamentary Assembly have stressed the importance of a coherent development of European construction, without “construction errors” so to speak, in order to create a Europe without dividing lines. This is important in all

areas, but especially in the field of human rights, where the principle of universality is fundamental.

It is therefore most welcome that the EU Charter of Fundamental Rights establishes a direct link with the European Convention on Human Rights as far as the interpretation of the Charter’s provisions is concerned, even if it is to be regretted that no such link was made in relation to the revised European Social Charter. However, the Parliamentary Assembly, the European Parliament and the European Commission, amongst many others, have advocated that the European Union go one step further and become a Party to the Convention. This would create an additional organic link between human rights protection in the Union and the Strasbourg system for the protection of human rights. It would provide for external control of EU institutions by an independent Court, similar to the way the national courts and other authorities are subjected to control by the Strasbourg Court. I hope that the forthcoming intergovernmental conference will show political vision and reach agreement on appropriate amendments to the treaties so as to enable such accession to the Convention. As far as the Council of Europe is concerned, making such accession possible will require some prior amendments to the Convention. I would express the wish that already now a preliminary technical study be undertaken by our expert bodies, with the participation of the European Commission, in order to identify the amendments that could be envisaged, without prejudice to the ultimate decision about accession itself, but simply with a view to removing legal obstacles to accession. A similar approach could be followed with regard to a possible accession by the Union to the European Social Charter.

6. It is hoped that this question will be pursued in another context, for example during the discussions on the future status of the EU Charter.

**Statement**

Mr Luzius Wildhaber

President of the European Court of Human Rights

Fifty years of the Convention have brought about a European human rights area which includes 41 states and 800 million potential applicants entitled to submit applications in 37 languages, as well as a Court which has received more than 10 000 applications this year.

Making it possible for individuals to lodge applications against states was a wholly new experiment that was destined to become the cornerstone of the extraordinary success of the Strasbourg human rights system. Thus, fifty years ago the foundations of a European constitution of fundamental rights were laid. It is the distinguishing mark of the Convention that its terms have remained relevant and contemporary. To take but one example, notions such as private and family life have evolved to take in such modern issues as bioethics, data protection and industrial pollution.

A fiftieth anniversary is an opportunity to focus on prospects. Nearly two years after the major overhaul by Protocol No. 11, the Convention system is under pressure. Its annual case-load, which has increased by 500% over the last seven years, is still rising. This trend will not disappear; indeed it is likely to amplify.

Yet if the Convention system is to remain credible it must be able to deal with cases within a reasonable length of time, while preserving the quality of the Court’s judgments. The effective execution of the Court’s judgments will likewise be crucial.
With that in mind at the recent anniversary ceremony before the Parliamentary Assembly, I identified five points for the contracting states.

Firstly, they must ensure that their legislation is in conformity with the Convention standards and above all set in place practices and procedures that guarantee those standards. The Court in Strasbourg cannot be a substitute for effective national protection. The right to an effective remedy in respect of allegations of Convention breaches is a key element of the Convention system, as the Court confirmed only last week in a judgment finding that an applicant complaining of the length of judicial proceedings under Article 6 of the Convention was also entitled to an effective remedy under Article 13 whereby to raise that complaint in the first instance at national level.

Secondly, the states must provide the Court with the necessary means to cope with its growing case-load so that it can function in the way that the governments and parliaments of the contracting states intended when they adopted and ratified Protocol No. 11. In plain language, we need some 3.8 million euros or 3 million dollars’ worth of extra resources to allow us to recruit additional temporary lawyers plus back-up staff. We also need arrangements allowing for the separate treatment of the Court’s budget.

Thirdly, states must continue to respect the Court’s independence and to propose candidates of the highest calibre for election to the Court under conditions that secure that independence.

Fourthly, states must execute in good faith the Court’s judgments where appropriate by amending domestic law. Beyond the strict execution of individual judgments, I would exhort governments to take into account even those judgments which do not directly concern them and I would also encourage them to have at least the important decisions of principle translated into their national language, thereby making them accessible to their judiciary at all levels.

Finally, states must be prepared, if it becomes necessary, to engage in a further, possibly far-reaching, reform of the Convention system. The Court is not yet in a position to put forward precise proposals on reform. We do think, however, that individual complaints must continue to constitute the backbone of the system. Personally, I have little doubt that the Court will need an element of discretion if it is to be in a position to give judgment without undue delay and concentrate on priorities. The Court would in any event urge that it be fully consulted and involved in any process of reform.

The recent adoption of the European Union Charter of Fundamental Rights has confirmed the place of the Convention as a permanent and important feature of the European constitutional landscape. The recognition by the charter of the Convention as the primary source for the substance of the rights set out in the Convention, however they are formulated, and at least implicitly of the Court as the final interpreter of such rights, makes it clear that the Union too accepts the common heritage of the Convention states and paves the way for closer co-operation between the Strasbourg Court and the Court of Justice of the European Union. The European Union should now take this process to its logical conclusion by acceding to the Convention, under modalities and procedures to be agreed.

The member states of the Council of Europe gave birth to a human rights protection system that has become unique in its scope and effectiveness. You must continue to take care of it. You must take the steps necessary to guarantee the Convention system’s survival in this century. I am confident that the resolution adopted by this conference will make clear that the Council of Europe states remain committed to its future and are prepared to give concrete effect to that commitment. ★
Mr Lamberto Dini

Minister for Foreign Affairs of Italy

We are here today not only to celebrate the fiftieth anniversary of the signature of the European Convention on Human Rights, but also to commemorate the road travelled by European civilisation over the past fifty years.

The decision taken at that time was a happy, far-sighted intuition, and its wisdom has been demonstrated.

In a Europe divided and devastated by the tragedy of the second world war, we unhesitatingly chose the camp of freedom and democracy, the camp of rights. We decided to codify these rights, and recognise their inviolability and indivisibility, in a convention which also established judicial organs to sanction any violation of them.

The Convention enshrines rights and values which we nowadays regard as unrenounceable and inalienable. However, in the Europe of 1950 they were not, and nor are they even today in too many countries. I have in mind the right to life, the right to freedom of thought, religion and expression, the right to a fair trial, to education and to free elections, these last two enshrined in the first additional protocol of 1952. These are values and rights that now form part of our civilisation's ethical and judicial heritage.

The date of 4 November 1950 also marked a new awareness that fundamental human rights are universal and that serious violations of those rights do just as serious damage to world peace. The horrors of the mass extermination were in everyone's mind, a reminder of the validity of this principle.

In sum, this was an attempt not to undermine state sovereignty but to give it a nobler substance. I believe that we must be guided by the same vision today as we seek to develop the Strasbourg system in order to preserve its efficiency and capacity to respond appropriately to the increasingly difficult challenges of our times.

The story of the Council of Europe's action to promote the protection of human rights, in which the Convention naturally has a central role, is a dynamic one.

At the Congress of Europe, held in The Hague in May 1948, there was a hope that a “European Assembly” would rapidly draw up a charter of human rights and establish a court of justice accessible by all European citizens.

That was an era of congresses, an era abounding in ideas and initiatives. At The Hague, a declaration, known as the “Message to Europeans”, was adopted, which, with extraordinary foresight, set the course which European history was to follow.

52 years ago, this declaration asserted, and I quote, “Alone, no one of our countries can solve the economic problems of today” and continued, “Human dignity is Europe's finest achievement, freedom her true strength. Both are at stake in our struggle. The union of our Continent is now needed not only for the salvation of the liberties we have won, but also for the extension of their benefits to all mankind.”
This is the Europe to which we aspire, an area of shared, inviolable rights, free from oppression and the death penalty, an area of tolerance and understanding, where our diversity can be a factor of enrichment, not division.

I believe we can feel legitimate satisfaction at the path travelled so far. We, nevertheless, have many reasons for concern about the future.

Without stopping halfway through the journey on which we have embarked, we must, with the same degree of commitment, continue our efforts to preserve the heritage of the Council of Europe and to enrich and strengthen it in preparation for the new challenges that lie ahead. We must keep a high profile, so as to ensure that our action for the defence of fundamental rights is always underpinned by a strong moral pressure.

Strasbourg is not only the prestigious seat of an international organisation; it is also our rampart against the aberrations of history, a solemn warning that destruction and death can no longer prevail on this Continent.

Phenomena such as globalisation and migration sometimes provoke negative reactions in some sections of the community, which it is our duty to forestall and censure. In my opening address to the ministerial conference yesterday, I referred to the role we are called to play in combating racism, xenophobia and trafficking in women and children. Let us never tire of firmly denouncing and condemning such odious, aberrant behaviour. Those guilty of it exile themselves to the margins of civil society. Any hint of understanding or indulgence on our part would constitute a dangerous departure from the ideals that inspire and guide us.

One of the many consequences of the end of Europe’s division into two opposing blocs was that it drove the governments and populations of states emerging from the long tunnel of dictatorship closer to those organisations – from the oldest to the most recent – that represent the values of freedom and democracy: the European Union, the Council of Europe, the Central European Initiative, Nato, the OSCE, all of which have experienced a thrust towards an enlargement which is in some cases already well in hand and in others – I am thinking of the European Union – now in the pipeline.

However, this is not an enlargement without conditions.

In fact, in all the organisations I have mentioned recognising and upholding human rights have been, and are, a fundamental membership requirement.

This criterion is certainly not fortuitous, but a universal, objective benchmark for gauging the genuinely democratic nature of political systems and societies. As Tacitus said, it is a rare happiness to think what one wants and to say what one thinks.

I find it significant that the ministerial conference, which closed today, should have taken place only a few weeks before the European Council in Nice, which, on 7 and 8 December next, will solemnly proclaim the Charter of Fundamental Rights of the European Union.

This Charter, the content of which is largely based on the European Convention of 1950, will help to guarantee the protection and visibility of the rights enshrined in the convention itself throughout the European Union. It will therefore be necessary to harmonise whatever is adopted in Nice and the Council of Europe’s action and development plans, so as to define a common path to be followed.

Fifty years ago in Rome, the signing of the Convention was the first, fundamental step of a journey on which there was no turning back. Since then, civil society has matured, consciences and the passage of generations have carved pages in the history of Europe in the name of freedom and the defence of rights and dignity of all people.

Nonetheless, Europe will only be able to call itself really complete, at least from the standpoint of the comparability of its member states’ legal systems, when the death penalty no longer exists under the national law of any country in Europe. This is also what the right to life means. ★
Very many words have already been poured forth to commemorate the fiftieth anniversary of the European Convention on Human Rights.

By now, it is well nigh impossible to say anything different or new.

One thing, however, stands out.
This is a joyful day for democracy!
This is a day of achievement!

In our stumbling path to create, throughout our Continent, stable, tolerant, peaceful, pluralist societies, after the consuming destruction of the second world war, we have not found the way easy. We have been slow; we have nurtured selfish pride – foreign offices are full of it – and we have witnessed outright failure, as in the Balkans and Chechnya.

But that we are able, half a century after the establishment of the Convention, and the construction of the Court to oversee its implementation, to celebrate, not just its fiftieth birthday, but its success, is a triumph! We salute those of vision to whose inspiration we owe this. It was appropriate that the European Union was represented by France today when one remembers the remarkable work of René Cassin or Robert Schuman.

And the thought must resound in our minds that if this can be done, what other things lie waiting? Sometimes in politics one grows weary, one yields to pessimism. One wonders if the hopes of one’s youth can ever be realised. The candle gutters.

The European Convention on Human Rights was a victory of moral over realpolitik. Not as an exercise in self-righteousness, but as a recognition, born of bitter experience, that the pragmatic tolerance of oppression and injustice is not only ethically wrong, but also the certain way to make worse an already bad situation.

A moment ago, as the coffee cups clattered, I read again the words of the Rapporteur on the Convention, Pierre-Henri Teitgen, to the Parliamentary Assembly: “evil progresses cunningly – one by one, freedoms are suppressed – it is necessary to intervene before it is too late – a conscience must exist somewhere which will sound the alarm – an international Court, within the Council of Europe, and a system of supervision and guarantees could be the conscience of which we all have need.” That was on 7 September 1949.

Today, the Court, in implementing the Convention, has accumulated a remarkable body, not only of jurisprudence, but also of institutional and human expertise.

But age also has certain drawbacks and one senses a feeling of, what I can only call, “the anticipation of exhaustion”, as the relentless growth of new applications continues, but remains unmatched by resources. Luckily, conventions and courts do not have to submit to the same physical laws of irreversible wear, which makes a human life such an ephemeral experience. What is old can be rejuvenated, and adapted to deal with fresh new situations in a way which senior citizens, like my good self, can only dream about!

It can be done.
So long, that is, as there is a will.
A political will.

It is the lack of will more than anything else which can be blamed for the shortcomings for which the Convention is at times criticised: namely, that the scope of the rights protected is outdated – and the European Union drafting of a charter of fundamental rights has again thrown this into sharp relief – or that its procedures are too slow.

Paradoxically, it is the responsible parties, the member states’ governments themselves that, often, are first to cast a stone, rather than directing their energies towards ensuring the additional political and financial support needed.

By now, we surely know that justice is not something upon which to save pennies. It
never comes cheap, but its absence costs far more.

I said at the beginning that at this stage in this important commemorative conference, so splendidly organised and presented by our Italian friends, it is impossible to avoid repetition.

But some things, even at times apparently obvious things, need to be repeated and repeated and repeated!

So I repeat the three basic demands – and I use that word, very consciously, rather than the politer “requests” because these things are necessary – the three basic demands the Parliamentary Assembly makes of its member states:

– firstly, to provide the Court with sufficient resources to deal with the growing burden of new applications. This may require a budget separate from the Council of Europe as a whole, as was said by a number of people yesterday;

– secondly, to undertake measures which will confirm and reinforce the Convention’s role as a principal reference, and the Court’s supremacy as an arbitrator in all human rights questions in Europe. This should include negotiating new protocols which adapt the Convention to new challenges – the tidemark of human rights entitlements is slowly, happily, rising!

– thirdly, to respect, and to ensure respect for Court judgments unconditionally, without delay, and by all.

As I said at the beginning, we pay tribute to those whose resolve bequeathed us the Convention and the Court and, in so doing, took a great stride forward for European civilisation.

I conclude by saluting those who give the Convention life today.

The President of the Court, my friend Luzius Wildhaber, presides over the most prestigious group of judges in Europe, if not the world. That is something intense and difficult and heavy.

But he is doing it so well, with that calm, firm kindness, which is his hallmark. And which we want to be the colour of our justice. They are all giving their skill and their judgment, in a way we admire.

I wish to thank them, to assure them of the support they have from the Parliamentary Assembly and to pledge that we will work to strengthen the safeguards of which they are the guardians.

Mr Walter Schwimmer

Secretary General of the Council of Europe

Fifty years ago today, Europe gave itself a Bill of Rights, signed here in Rome by the twelve states that made up the Council of Europe at the time.

This was an historic and unprecedented step. Two years earlier, the United Nations had adopted the Universal Declaration of Human Rights, which was to become the direct source of inspiration for the drafting of the European Convention. But the document signed here in Rome was the first text by which sovereign states agreed to be legally bound to secure to everyone within their jurisdiction a whole range of human rights and fundamental freedoms. Moreover, they agreed to set up a supranational control system in order to ensure the observance of their obligations.

Why did these European countries embark on such a daring enterprise? One does not have to look much further back in history. The second world war and the dark days of nazi atrocities had made it clear to everyone that one cannot rely totally on national constitutions alone to safeguard human rights. A collective guarantee was needed.

Perhaps no one has expressed this more eloquently than Pierre-Henri Teitgen, one of the great driving forces behind the creation of
the Convention system. When he addressed the Consultative Assembly in September 1949 to argue the case for setting up a supranational system of human rights protection, he said (I quote):

“Many of our colleagues have pointed out that our countries are democratic and are deeply impregnated with a sense of freedom; they believe in morality and in natural law… Why is it necessary to build such a system? [...] Democracies do not become nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control. One by one, freedoms are suppressed, in one sphere after another. Public opinion and the entire national conscience are asphyxiated. And then, when everything is in order, the ‘Führer’ is installed and the evolution continues even to the oven of the crematorium.

It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption, to warn them of the peril and to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or to Dachau. An international Court, within the Council of Europe, and a system of supervision and guarantees could be the conscience of which we all have need …”

It is therefore fitting, on this solemn occasion, to pay tribute first of all to the wisdom and vision of all those, whether in the European Movement, the Consultative Assembly or in the governments, who contributed to the creation of this unique system of human rights protection. In 1950, few would have expected that the pioneering work of the drafters of the Convention would lead, fifty years later, to where we are today. The Convention is now in force in forty-one countries – not counting the special position given to the Convention in Bosnia and Herzegovina under the Dayton Agreement. It constitutes an essential bill of rights for 800 million people in Europe. Well over a thousand judgments on the merits have been delivered by the old Court and the new Court together. Every week, hundreds of individuals from all parts of the Continent turn their hopes to the Strasbourg Court.

But figures are only one side of the story. In fifty years’ time, the Convention has grown, thanks to the development of the case-law of the former Commission and the Court, and of the new Court since November 1998, into what has aptly been described as a constitutional instrument of European public order. The standards of the Convention permeate the legal systems of our member states to an extent and with an authority its founding fathers had never dreamed of. This is the result of the incredible richness of the Strasbourg case-law which has given concrete content to the rights and freedoms and which today forms part and parcel of the Convention acquis. Every week, national courts in Europe apply the standards of the Convention as interpreted by the European Court of Human Rights. Innumerable are the changes of national law and practice which the Convention has brought about. I must therefore also pay tribute to the outstanding work of the former Commission, the former Court and the new Court. It is not an exaggeration to say that the law of the Convention is the common law of Europe in the field of human rights and fundamental freedoms.

I believe it is necessary to make one point very clear on the occasion of this anniversary: the Convention may have reached the age of fifty, but it is very much alive and kicking. The Court’s own judicial – and perhaps more judicious – expression is that the Convention is a living instrument. This is largely the result of the evolutive case-law through which the continuing relevance of the Convention in today’s world is ensured. However, let us not forget that several important protocols guaranteeing additional rights have been added to the Convention in the past decades, including Protocol No. 6 on the abolition of the death penalty. In a few hours’ time, Protocol No. 12 on non-discrimination will be signed by many member states. I regard this protocol as a landmark achievement of the Council of Europe, and every signature is a clear demonstration of the political will of the government concerned to combat racism and intolerance by all possible means. The same is true in respect of other kinds of discrimination. I hope and trust that the protocol will soon obtain the number of
ratifications necessary for its entry into force. But standard-setting does not stop here. Proposals for new additional protocols have been launched, including on the abolition of the death penalty in time of war.

While we rightly celebrate this fiftieth anniversary, we should not close our eyes to the many challenges that lie ahead for the Convention. The ministerial conference which came to a close this morning has allowed us to discuss them and to indicate pointers for the future. I will just mention three crucial issues: the future functioning of the system of individual applications given the tremendous workload of the Court; the need for increased vigilance of the Committee of Ministers in supervising the execution of judgments; and, finally, the place of the Convention in the wider European architecture, especially the question of accession by the European Union, as proposed by Finland.

The European Convention on Human Rights is a legacy which its founding fathers have given to Europe. This legacy is now in the hands of our generation. However, it is not – in the words of Protocol No. 1 – a “possession” that can be “peacefully enjoyed”. We cannot be complacent as long as human rights continue to be violated. The full realisation of human rights and fundamental freedoms requires constant attention and efforts. The same is true for the proper functioning of the control system of the Convention.

This is not only the responsibility of the European Court of Human Rights. It is first and foremost the responsibility of the governments and the parliaments of our member states, the Committee of Ministers, the Parliamentary Assembly and the Secretary General of the Council of Europe and all others who, as national judges, as non-governmental organisations or in any other capacity, have a role to play in ensuring that the Convention rights are respected and protected across the Continent. I call on all of them to exercise this responsibility to the full. The Convention exists as a collective guarantee of the individual rights of the 800 million people living in our countries. We must all do our utmost to ensure that our populations can be confident that the Convention is in good hands, now and in the future.

Mr Luzius Wildhaber

President of the European Court of Human Rights

May I first of all congratulate and thank the Italian Government for their hospitality and for having organised this ceremony, together with the Council of Europe. I should also like to express the satisfaction of the Court at the tenor of the resolution just adopted by the ministers with its recognition of the difficulties facing the Court and of the need for urgent measures. We look forward to further dialogue with the Ministers’ Deputies in the Liaison Committee and such expert groups as may and should be appointed to examine the various solutions, which must cater for the short, medium and long term. We are gratified by the consistent and wholehearted support shown by the government delegations in their contributions to the conference.

Our first thoughts today are for the extraordinary achievement represented by the instrument whose fiftieth anniversary we are celebrating. Fifty years ago, few of those involved in the signing ceremony in the Palazzo Barberini can have foreseen the full impact of their actions. The breakthrough in international law and indeed in the conduct of human affairs that was concretised that day was born of the vision of a small group of farsighted, idealistic lawyers and politicians, led by Pierre-Henri Teitgen and David Maxwell-Fyfe, the rapporteurs in the Parliamentary Assembly. Following up on the work of Eleanor Roosevelt and René Cassin on the Universal Declaration and determined to prevent the recurrence of the devastation of war and the
attendant horrendous crimes, they argued that the best way to achieve that end was to guarantee respect for democracy and the rule of law at national level. They realised that only by the collective enforcement of fundamental rights, requiring states to surrender what was at the time an unprecedented degree of sovereignty, was it possible to secure the common minimum standards that form the basis of democratic society. For the first time, individuals could challenge the actions of governments before an international mechanism under a procedure leading to a binding judicial decision. The fact that we take this for granted today is a measure of the progress that has been accomplished since the beginning of the twentieth century.

Impervious and imperious sovereignty has yielded to a culture of international accountability of states and indeed individuals. From a worldwide perspective, this process is far from complete. Other regional human rights protection systems, and I take the opportunity to greet the representatives of our sister Court, the Inter-American Court of Human Rights, not having had the advantage of a homogeneous core of democratic states at the outset, are at an earlier stage of development. The United Nations procedure is optional and lacks teeth. The Statute of the International Criminal Court has not yet entered into force. The matrix of this movement is the Universal Declaration of Human Rights. But its fullest and most successful realisation is our Convention, the European Convention on Human Rights.

Two years ago, the Convention system underwent a major reform. The original institutions, the European Court and the Commission of Human Rights, were replaced by a single Court functioning on a full-time basis. The optional elements of the earlier system, the right to individual petition and the acceptance of the Court’s jurisdiction, were eliminated, as was the Committee of Ministers’ adjudicative role. The Convention process, directly accessible to individuals, had become fully judicial in character in accordance with the first intentions of the drafters. In our celebration today, we must not forget the immense contribution to the Convention’s success of the two initial bodies, the Commission from 1954 (and here may I salute the presence of the former president, Stefan Trechsel) and the Court from 1959. Slowly but surely, they built up the confidence of the governments, the legal professions and the citizens.

Through their pioneering case-law, the Convention was given life. Their purposive, autonomous and, at times, creative interpretation of the Convention enhanced the rights protected to ensure that they had practical effect. Just to take one example, the right of access to a court, a right that lies at the heart of the Convention and a key element of the rule of law, was not expressly mentioned in the due process provision, Article 6, paragraph 1. The Court’s observation was of beautiful simplicity. “The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings” (Golder 1975, paragraph 35). To this the Court later added that the right of access “would be illusory if a contracting state’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party” (Hornsby, 1997, paragraph 40).

The Court and Commission established the principle that the Convention is to be interpreted as a living instrument, to be construed in the light of present-day conditions. The Convention terms have consequently not remained frozen in the meaning that might have been attributed to them in 1950. The Convention retains its direct relevance fifty years on.

I therefore pay tribute to the work of the present Court’s predecessors in both original institutions. They left us an extensive and rich case-law, woven into and inextricable from the very terms of the Convention. I am pleased to be able to report that those high standards have been maintained. There has been no weakening of the protection offered; on the contrary, in some important areas, the new Court has taken positive steps to clarify and strengthen the Convention’s reach. But we also inherited a considerable case-load and a situation in that respect which was rapidly deteriorating, a 40% increase in 1999, over 20% this year. We had to learn to run before we could walk and, I say with some pride in the achievement of my colleagues, we did learn to run, but, rather like the Chaplin film Modern Times, we are running on
an accelerating conveyor belt and we have to run faster all the time just to keep on the same spot.

So we must also use this anniversary to look forward. In doing so, we must keep in mind the ambition and breadth of the original vision, the vision of a Europe-wide common system of protection of human rights. This vision has, I believe, been reinforced by the recent adoption of the draft European Union Charter of Fundamental Rights, which has confirmed the place of the Convention as a permanent and important feature of the European constitutional landscape. The charter discussions have established a consensus that in Europe there can be only one set of common minimum standards whether within or outside the Union. We must be vigilant in ensuring that that consensus is preserved. I reiterate my call that the European Union should take this process to its logical conclusion by themselves acceding to the Convention, under modalities and procedures to be agreed.

Ladies and gentlemen, the authority of an international court such the Strasbourg Court rests essentially on two elements: its independence and its effectiveness. It is therefore by protecting these two aspects that we preserve the future of the system.

As to independence, apart from obviously unresolved questions of the administrative status of the Court within the Council of Europe, this issue has up to now not given too much cause for concern. We should, however, remain vigilant, and this is particularly important in relation to procedures for the election of judges. Put crudely, sitting judges must not be under the impression that their reselection as a candidate will depend on their voting record. I am confident that the informal consultation process carried out by the Committee of Ministers and the controls exercised by the Parliamentary Assembly will ensure that the selection of candidates, a fortiori where the candidate is a sitting judge, is determined solely on the basis of experience, particularly judicial experience and ability.

On effectiveness, a whole range of measures is being, and will need to be, contemplated. Faced with a steadily rising case-load, the Court will continue to refine its practices and procedures within the limits of the Convention terms. This needs to be accompanied by efforts on the part of the contracting states to strengthen human rights protection at national level and particularly to set in place the appropriate procedures within their domestic systems. They must continue to execute judgments in good faith and must be encouraged to implement the Court’s case-law in general and to make it accessible to their national courts.

In the immediate future, however, the Court will need more resources, essentially with a view to recruiting case-processing lawyers and maintaining an effective level of information technology. In plain language, if the Court is to have a realistic chance of keeping up with case-load volumes, its budget will have to be increased by about 3.8 million euros or around 3 million dollars. That is not an enormous amount, although in the context of the current budgetary climate within the Council of Europe it would require a derogation from the zero-growth orthodoxy. Let me be entirely clear about this. The Court will make every effort to increase its efficiency, in so far as that does not impinge on the quality of its main judicial work. The Court is ready to explore every avenue that does not affect the substance of the Convention guarantee, but a pan-European system of human rights protection which has raised legitimate expectations among the 800 million citizens within its jurisdiction requires adequate funds. The case-load will continue to rise, the opening for signature of Protocol No. 12, which we welcome, will also increase the Court’s workload. If you want this system to work, you, the governments, are going to have to draw the inevitable conclusions. We are reassured to see that yesterday’s conference called for urgent measures.

Finally, reform in the longer term is, in my personal view, an option, if not a necessity. The Court has not come to Rome with concrete proposals and it will, in any case, seek to achieve the maximum within the existing terms. But the process of reflection must start now. I can say on behalf of the Court that we do not support the idea of regional human rights tribunals. A system of requests for preliminary
rulings submitted by national courts would be conceivable only if it was accompanied by a drastic reduction in the number of individual complaints. Yet, the Court considers that individual applications must remain the backbone of our system. Personally speaking I have no doubt that the Court will need the introduction of an element of discretion so that it can give judgments without undue delay and can concentrate on priority cases and issues. Again, let me urge that the Court be consulted and involved at every stage of the reform process.

It cannot be said that fifty years ago the Convention immediately ushered in a new era. But it was a turning point; a seed was sown and it has grown, flourished and spread, even beyond the frontiers of Europe. There is no going back to days of absolute impunity for states that abuse human rights. Let us make this anniversary celebration an occasion for reaffirming our determination to progress further.

We have heard some beautiful words over the last two days; beautiful words are of course some comfort, and we are indeed grateful for them, but they must be translated into concrete action after this conference if you want our system to continue to work. In this connection, I would remind you that the final budgetary discussions within the Council of Europe are imminent: you have the opportunity there and then to give us the means we need to carry out our task properly. Do not let it go by. We also need action on reform, so do not delay in appointing a small group of experts, to work in close co-operation with the Court, to come up with realistic proposals which will guarantee effectiveness without depriving the Convention of its fundamental character as a pan-European instrument for the protection of the rights which must and will underpin all our societies.

Ms Nuala Mole

Director of the Aire Centre

Since I was asked to Chair the NGO forum, which was held here in February in preparation for this meeting, I have today been given the opportunity to add a few words at the end of our discussions on behalf of the NGOs.

We too have made our contribution to the protection of human rights in Europe in the past fifty years in many ways – monitoring and reporting human rights abuses, campaigning for reforms, challenging violations by the states, litigating on behalf of victims. In many member states, particularly the new ones, it is often only the lawyers who work for NGOs who have the willingness or expertise, or sometimes courage, to litigate against the state when violations of the Convention are identified.

We have had the opportunity to read the draft resolutions and to hear the contributions from the Secretary General, the Court, the member states and the Parliamentary Assembly – all of whom are our partners in the common task we have of protecting human rights in Europe.

I say partners because it is only by all of us working together that we will be effective in achieving this.

In many countries, NGOs contribute to the task by working on the ground at national – and even more importantly at local level – to ensure that the Convention’s standards are complied with by every local authority in every district court, every village police station and every local prison, and by bringing the attention of central government to any shortcomings.

Our NGO partners – partners in CEEC and the former Soviet Union – tell us how their governments and societies often feel that the Council of Europe has imposed standards on them – as the price of membership – standards
which they and the members of their administration and the public might not otherwise have been ready to accept and that this has made the task of ensuring that they are implemented in practice more difficult.

If you – the governments – are prepared to act on the commitments to ensure respect for human rights, which you have expressed yesterday and today, then your task is to ensure that you assume the ownership of these standards in each member state of the Council of Europe.

We feel that one small step you could take would be to ensure a wide dissemination at national level of both the sentiments that each of you has expressed here at this meeting and the text of the resolutions (not to mention, the text of the Convention, which our Dutch friend pointed out to us yesterday took some time to be disseminated in western Europe).

So please, on this fiftieth anniversary, send an expression of commitment to the Convention to every local authority, every district court, every police authority in your country so that – in the actual places where the violation of human rights most frequently occur – they know that compliance with the Convention has full official approval and is expected by the highest level of government, and that violations of the Convention even at the lowest level are completely unacceptable.

Like the other speakers, the NGOs welcome the Secretary General’s statement and share the concerns which he and others have expressed about massive violations of human rights which have been occurring in our region in the past decade. They are occurring within the Council of Europe states and a Council of Europe response is required.

We emphasise the necessity of using all the mechanisms at the disposal of the Council of Europe to put an end to them, but most importantly to prevent them occurring in the first place. This is the task of the Committee of Ministers, of the Parliamentary Assembly, of the office of the Commissioner for Human Rights but above all of the Committee for the Prevention of Torture, which has assumed a unique and vital role in identifying and reporting on situations which make it clear that human rights are in grave danger in many states. The torture committee relies heavily on the information supplied to it by NGOs and we, for our part, will continue to offer them all the support we can. But both the other Council of Europe organs, the member states and most importantly the Court, must make sure that they give the committee the vital support that it needs. The committee has always emphasised the importance of early automatic access to an independent lawyer as being central to protect detained persons from ill-treatment as well as the necessity of ensuring the independence and integrity of all medical professionals involved in the criminal justice system. In many member states, these important guarantees are not yet ensured and the risk of violations of the rights of detainees – particularly for those who belong to marginalised groups – remains acute.

It was Pierre-Henri Teitgen – the father of the European Convention on Human Rights – who pointed out fifty years ago that free countries do not go bad overnight. Nor do undemocratic countries adopt the rule of law overnight.

Our concerns are that the Convention should remain – and in some cases become – an instrument whose mechanisms will continue to strengthen the rule of law and the protection of human rights for which it has achieved justified worldwide acclaim.

We have heard a lot about the overburdening of the Court, with which we have the fullest sympathy. We – who can claim to speak for the victims of violations – have an even greater interest than you, the governments and institutions, in ensuring that it continues to function effectively.

Several speakers have suggested that the Court should solve this problem by only adjudicating on the most serious and important cases. No one has suggested what should happen to the others: the Court must not allow the way in which it manages its own success to undermine its whole raison d’être.

When each state represented in this room ratified the Convention and Protocol No. 11, you guaranteed to everyone within your jurisdiction that you would secure each of the rights and freedoms of the Convention; that you would provide an effective remedy for viola-
tions – and that if someone claimed that you failed to do this you would submit to the compulsory jurisdiction of a court where you would be held accountable for your failures, and that you would comply with any award of just satisfaction that the Court might make.

If you now fail to carry out your undertaking to secure the rights at national level – and many cases go to Strasbourg as a result – it is quite unacceptable that you should seek to avoid your responsibilities to the victims of your violations by restricting the categories of cases that go to the Court to those considered important or major. Curiously, states often mean by this the violations committed by other member states – not them.

Every violation of the European Convention on Human Rights is important, partly because of what it has done to the individual victim but also because most so-called minor violations of human rights are a sign of a fault in the system which permits them to occur. Exposing them exposes cracks in your national systems which you must repair. Our NGO colleagues from the Belgrade Centre for Human Rights kept alive the flame of the protection of human rights when the state had tried to extinguish it. Their presence here today as the envoys of a new Yugoslavia gives us all such pleasure and hope. They emphatically agree with us that it is the myriad so-called minor infractions which create a culture in which it is impossible for human rights protection to flourish. It is also a culture which permits the escalation of large-scale violations.

So, if we are honest about reducing the burden on the Court, whilst affirming our commitment to human rights, we must look for and find mechanisms which will go some way towards achieving that aim without diminishing the protection which every individual has been promised. We have discussed this very real problem at some length with many people.

The admissibility criteria are already very strict. When the Convention was adopted fifty years ago, the test of “manifestly ill-founded” was introduced to exclude cases which clearly fell outside the jurisdiction of the Convention organs. That decision is now taken at the stage of communicating a case to the respondent government.

“Manifestly ill-founded” is no longer in reality a test of admissibility but a negative decision on the merits. No stricter filtering test can be imposed without undermining the guaranteed protection of the Court. We have four positive suggestions to put to you:

- firstly, an expedited procedure should be adopted for all cases which are excludable for what are – usually simple – technical reasons: failure to meet the six-month limit, violation occurred before ratification, complaints about matters not covered by the Convention, etc.;
- secondly, a simplified system for declaring a case manifestly well founded. This would involve a procedure for a rapid finding of a violation and award of just satisfaction. This would extend the practice developed by the old Commission and now by the Court in all the hundreds of Italian undue length of proceedings cases. It would apply that approach to other manifestly well-founded cases from other jurisdictions and relating to other rights. Every week, the Court is required to consider cases which are practically identical to ones where the Court has already found violations.

These cases should be disposed of by the same kind of rapid simplified system which we are suggesting for the technically inadmissible, and states should be severely criticised for permitting repeat violations to occur in this way. If they are unable or unwilling to prevent the violations continuing and the cases keep coming to the Court, they must be speedily settled as soon as they are communicated. The financial resources of the Court are seriously and unnecessarily depleted by adjudicating on repetitions of the same or similar violations – and the governments’ contributions to the costs of the institutions do not reflect the unnecessary increase they make to the workload. We welcome the French Government’s solution to the Hakkar case but consider it essential that all states must adopt mechanisms which will ensure that the judgments of the Court are not only implemented in the case in question but
also reflected in immediate effective changes in law and practice.

- thirdly, more use should be made of general measures. In this context, we recommend that the new draft rules of procedure should be adopted. For example, the absence of any provision for civil legal aid or prompt access to lawyers for the detained in several jurisdictions means that many cases which could and should be resolved nationally, now burden the Court unnecessarily;

- fourthly, the Court must adopt a more robust attitude to governments in the application of the Convention standards if it wants to ensure that good practice is encouraged by a strong supportive jurisprudence; a finding of a violation in Strasbourg is a more effective incentive to ensure the protection of Convention rights than any amount of rhetoric.

Finally, whilst we have repeatedly emphasised that we would give priority to the effective protection of the rights we already have rather than to adding more rights, which run the risk of being theoretical and illusory rather than practical and effective, we, nevertheless, warmly welcome the adoption of Protocol No. 12. However, we regret that Part C of Resolution II omits discrimination based on disability, age or sexual orientation.

On behalf of the NGOs who participated in the February meeting, may I pledge our continued commitment to assisting all of you to fulfil your obligations under the Convention to secure the protection of human rights in Europe in the coming fifty years.

Ms Mary Robinson

United Nations High Commissioner for Human Rights

It is a pleasure for me to participate in this event to mark the fiftieth anniversary of the signature of the Convention for the Protection of Human Rights and Fundamental Freedoms. The struggle to champion and defend human rights is long and hard with many setbacks along the way. Therefore, landmarks on the road to greater respect for human rights should be recognised. Today’s event certainly qualifies under that heading.

The European Convention has been a success story. Big strides have been made in developing effective mechanisms to protect human rights in Europe. But we should temper any rejoicing by bearing in mind how far we are from truly realising all human rights for all. Two years ago, at the ceremonies for the fiftieth anniversary of the Universal Declaration of Human Rights, I said that it was an occasion to mark rather than to celebrate. I feel the same way about the European Convention on Human Rights.

Being from Ireland, I take special pride in the role played in the early days of the Council of Europe and the drawing up of the Convention by my compatriot Sean MacBride. As President of the Council of Europe’s Committee of Ministers from 1949 to 1950, Sean MacBride was present at and involved in the negotiations which produced the European Convention on Human Rights. We should pay particular tribute today to such visionary figures as Robert Schuman and René Cassin who worked so hard for this result. And here in Rome, I would like to mention those great fighters for human rights Carlo Sforza and Paolo Barile.

The impulse to conclude the European Convention was the same as that which motivated the drafters of the Universal Declaration of Human Rights: to devise a set of principles and rules which would protect the rights of every individual. It formed part of a resolve in Europe to learn lessons from the terrible conflicts that disfigured the Continent in the first half of the twentieth century and to embed a
culture of democracy and respect for the dignity of the individual. As the preamble makes clear, the European Convention was deeply influenced by the Universal Declaration.

The value and durability of the European Convention on Human Rights have been proved by the number of states which have incorporated its provisions into their domestic law over the past fifty years. The basic articles have been supplemented by a series of protocols, providing for further rights, modifying the procedures of the Commission and Court, and covering such vital areas as the death penalty. As the introductory report of the Secretary General puts it, “The Convention has acquired such an established and fundamental place in the European legal order that it has appropriately been described as a constitutional instrument of European public order”.

The Convention and Court have also played a key role in increasing human rights awareness and in the promotion and protection of human rights in new and aspiring member states of the Council of Europe. I believe that this influence will continue to be felt in the greatly expanded Council, and it will be important to deepen further the human rights friendly environment in which the Court exercises jurisdiction, and to stress the importance of adhering to and implementing its judgments.

Three features of the Convention are particularly noteworthy: firstly, the requirement on states wishing to join the Council of Europe to uphold the European Convention on Human Rights. Secondly, the Convention’s effective control machinery, which allows individuals claiming that their rights have been violated to appeal to a supranational court. This sets the Convention apart from many international human rights treaties. A third significant aspect is the power of the Court to hear inter-state complaints.

The obligation on governments to observe the rights enshrined in the Convention has been a powerful instrument in setting standards and shaping societies in the member states. The effects may in many cases have been less visible in that governments have been deterred from infringing rights covered by the Convention, and conflicts have only become public in instances such as derogation or the threat of suspension. But the impact of the Convention on the evolution of European legislation and society must be regarded as very significant.

The decisions of the Court on individual cases have resulted in a substantive jurisprudence steadily built up over the past fifty years. Many landmark judgments have been made – on torture, on the treatment of prisoners, criminal laws against homosexuality, freedom of the press, corporal punishment, the rights of the mentally ill and the equal status of children in families, to mention just some examples.

I recall when I was practising as a young lawyer the impact which Strasbourg rulings had on the legal system in Ireland. Ireland was one of the first signatories of the Convention and the first to give permanent and unconditional right of petition. The possibility of taking a case on an important issue of law to the Commission and Court was a most valuable option. The Court represented the outer limit of the legal possibilities, and I can personally attest to the impact it had on Irish jurisprudence.

Today, I see the Convention and the Court from a different perspective. As United Nations High Commissioner for Human Rights, I feel some concern about the future of these institutions, representing as they do what are probably the most effective human rights enforcement mechanisms in existence. The Council of Europe has changed radically from ten member states to the current membership of forty-one. Its remit has expanded to a total population of some 800 million people. The demands being placed on the Court have risen sharply. I understand that the number of individual petitions pending before the Court at the admissibility stage was 2 000 a decade ago, whereas today the number is 15 000.

Like all institutions concerned with protecting human rights, the Court must have the resources to do the job. I think I can speak with authority on the need to have adequate resources to defend human rights! Member states of the Council of Europe should ensure that the Court is given all the resources it needs to carry out its vital work.
It is appropriate that today’s ceremony coincides with a further step on the normative front: the opening for signature of Protocol No. 12, which provides for a general prohibition of discrimination. The new protocol extends the remit of Article 14 of the European Convention on Human Rights to prohibit discrimination on any ground by a public authority. I believe that this will strengthen the Court’s hand in combating discrimination.

This protocol has particular relevance in that the preparations for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance are now well under way. As Secretary General of the conference, which will be held in Durban, South Africa, from 31 August to 7 September next, I see in this event a unique opportunity to re-vitalise the struggle against racism and xenophobia in Europe, and in every part of the world.

The first of a series of regional conferences to prepare for the world conference was organised in Strasbourg last month with the efficiency which has come to be expected of the Council of Europe. I said then that the Council of Europe had a good record in that it has overseen the holding of major conferences on racism in Europe in Vienna in 1993 and in Strasbourg in 1997. The European Youth Campaign against Racism and the European Year against Racism have engaged public attention on issues of discrimination and intolerance, while the reports of the European Commission against Racism and Intolerance permit countries to measure progress and set targets.

But racism and prejudice persist in Europe as elsewhere. I see it as vital that we use the occasion of next year’s world conference to devise effective strategies against racism. The more I see of gross human rights violations in the world, the more I am convinced that racism and xenophobia are often root causes of such violations and of many conflict situations. I call on all present, and particularly government representatives, to engage actively in the preparations for the world conference so that we can together produce a ringing declaration against racism and a focused platform of action with a mechanism for review.

Today is a day to salute the far-sightedness of those who founded the Council of Europe and drew up the European Convention on Human Rights. The best tribute we can pay to their vision is to carry the work forward and do our utmost to ensure that the Convention continues to be a strong force for the protection of human rights throughout Europe.
I am pleased to welcome you today on the occasion of the ministerial conference being held under the Presidency of Italy to commemorate the fiftieth anniversary of the signing in Rome on 4 November 1950 of the European Convention on Human Rights. I greet the Secretary General of the Council of Europe, Mr Walter Schwimmer, the President of the Parliamentary Assembly, Lord Russell-Johnston, and its Secretary General, Mr Bruno Haller.

After the second world war, the Council of Europe adopted a new political vision and embodied a new juridical order, enshrining the principle that respect for human rights transcends national sovereignty and cannot be subordinated to political aims or compromised by national interests. In doing so, the Council helped to lay the foundation for the moral recovery needed after the ravages of the war, and the European Convention on Human Rights proved a vital element of that process.

The Convention was a truly historic document, and it remains a unique legal instrument, seeking to proclaim and safeguard the fundamental rights of every citizen of the signatory states. It was a concrete and creative response to the Universal Declaration of Human Rights, which, in 1948, had emerged from the tragic experience of the war and was deeply rooted in the twofold conviction of the centrality of the human person and the unity of the human family. As such, the Convention represented an important moment in the maturing of the sense of the innate dignity of the human person and the awareness of the rights and duties which flow from this.

It is significant too that, after their liberation from an alien ideology and totalitarian forms of government, the new democracies of eastern Europe turned to the Council of Europe as the focus of unity for all the peoples of the Continent, a unity which cannot be conceived without the religious and moral values which are the common heritage of all the European nations. Their desire to become parties to the European Convention on Human Rights reflects the will to safeguard the fundamental liberties which had for so long been denied them. In this respect, my conviction has always been that the peoples of Europe, east and west, deeply united by history and culture, share a common destiny. At the heart of our common European heritage – religious, cultural and juridical – is the notion of the inviolable dignity of the human person, which implies inalienable rights conferred not by governments or institutions but by the Creator alone, in whose image human beings have been made (see Genesis 1:26).

Through the years, the Holy See has been involved in the Council of Europe, seeking in its own distinctive way to accompany and aid the Council’s ever more extensive work in the field of human rights. Conscious of the unique role which the European Court of Human Rights plays in the affairs of Europe, the Holy See has been especially interested in the jurisprudence of the Court. The Judges are the guardians of the Convention and its vision of human rights, and I am happy to have the occasion today to welcome the President of the Court, Luzius Wildhaber, with the other honourable judges, and to wish you well in your noble and demanding task.
The fiftieth anniversary of the Convention is a time to give thanks for what has been achieved and to renew our commitment to making human rights ever more fully and widely respected in Europe. It is therefore a time to recognise clearly the problems that must be addressed if this is to happen. Fundamental among these is the tendency to separate human rights from their anthropological foundation – that is, from the vision of the human person that is native to European culture. There is also a tendency to interpret rights solely from an individualistic perspective, with little consideration for the role of the family as “the fundamental unit of society” (Universal Declaration of Human Rights, Article 16). And there is the paradox that, on the one hand, the need to respect human rights is vigorously affirmed while, on the other, the most basic of them all – the right to life – is denied. The Council of Europe has succeeded in having the death penalty removed from the legislation of the large majority of its member states. While rejoicing in this noble achievement and looking forward to its extension to the rest of the world, it is my fervent hope that the moment will soon come when it will be equally understood that an enormous injustice is committed when innocent life in the womb is not safeguarded. This radical contradiction is possible only when freedom is sundered from the truth inherent in the reality of things and democracy divorced from transcendent values.

For all the problems now evident and the challenges which lie ahead, we must be confident that the true genius of Europe will emerge in a rediscovery of the human and spiritual wisdom intrinsic to the European heritage of respect for human dignity and the rights which stem from it. As we move into the third millennium, the Council of Europe is called to consolidate the sense of a common European good. Only on this condition will the Continent, east and west, make its specific and uniquely important contribution to the good of the entire human family. Praying fervently that this will be so, I invoke upon you, your families and your efforts in the service of the peoples of Europe the abundant blessings of Almighty God. ★

ADDRESS BY THE PRESIDENT OF THE ITALIAN REPUBLIC

Mr Carlo Azeglio Ciampi

Palazzo del Quirinale, 3 November 2000

I first wish to thank you for your generous speeches and also for drawing attention to the fact that this conference in Rome is not only the commemoration of an anniversary but also an opportunity to express ever greater support for the protection of human rights.

It is therefore a particular pleasure for me to welcome you to Rome to celebrate the fiftieth anniversary of the signing of the European Convention on Human Rights.

The legal principles established half a century ago now constitute a common heritage for 800 million Europeans. If the peoples of our continent are acquiring an awareness that they share a single culture, this is, to a large extent, thanks to the legal system created by the Convention.

Mr Secretary General, I too have particularly vivid memories of my visit to the Council of Europe on 26 September; I also much appreciated the meeting I had a week later with representatives of the European Court of Human Rights. This gave me further confirmation that
values and rules are factors for unity among the citizens of Europe.

Without this heritage, it would also have been more difficult to finalise the Charter of Fundamental Rights to be submitted to the European Council in Nice. Through this instrument recalling, preserving and strengthening the body of law deriving from the European Convention on Human Rights, the European Union intends to set its seal to the indivisibility of the rights to dignity, liberty, equality, citizenship, solidarity and justice. The charter not only lists a number of economic and social rights, but also adds important new rights, such as protection of personal data and bioethical principles, intended to safeguard our citizens’ dignity and quality of life.

The Charter of Fundamental Rights is not conceived as an alternative to the Convention. By making reference to the Convention, it consolidates that text’s central importance as a European constitutional instrument. It does not require amendments to the constitutions of the member states, nor seek to replace these. It puts forward a structure which, combined with the legal system established by the European Convention, offers a common area of rights and establishes a common denominator among states differing in their legal traditions and sensibilities but resolved to bring to the fore the essential features that they have in common.

The charter seeks to give substance to the concept of European citizenship, while remaining open to all the realities that the Council of Europe signifies. It creates a new vehicle for communication between the peoples of Europe.

You are already fully aware of the role played by the Council of Europe in defining the inalienable rights of European citizens and fostering full respect for those rights. This achievement shows the Organisation’s capacity effectively to interpret the needs of our time.

Although significant progress has been made in the recognition and protection of the inalienable rights of the individual, there is no denying that racism, xenophobia and intolerance are still to be reckoned with; they must be countered with determination.

The conference held in Strasbourg under the aegis of the Council of Europe and which closed on 13 October proposed specific legal and political commitments in the fields of education and training. These cannot be disregarded.

With the signing of Protocol No. 12 to the European Convention on Human Rights, which will take place tomorrow, all forms of discrimination will be prohibited throughout the forty-one member states of the Council of Europe. It is a source of satisfaction to me that this significant step towards far-reaching protection of human dignity should take place during Italy’s chairmanship of the Council’s Committee of Ministers.

It is not by chance that we are celebrating the European Convention’s fiftieth birthday – as we did its fortieth – in Rome, for it was here that the Convention was signed in 1950. From the very beginning, Italy was a major player in the efforts to build and consolidate a system for the protection of human rights in Europe.

It is with unswerving enthusiasm and conviction, underpinned by fierce grass-roots commitment, voiced on a number of occasions in our national parliament, that Italy plays a part in promoting advanced forms of protection of individual dignity and freedom. In the same spirit, I wish you every success with your work.
Reform of the European human rights system

High-level seminar organised under the Norwegian chairmanship of the Committee of Ministers of the Council of Europe

Oslo, 18 October 2004

Proceedings
Reform of the European human rights system: high-level seminar, Oslo, 18 October 2004

At its 114th session in May 2004, the Committee of Ministers of the Council of Europe adopted a series of measures intended to ensure the effective implementation of the European Convention on Human Rights at national and European levels.

Protocol No. 14 to the European Convention on Human Rights sets out in particular to guarantee the long-term effectiveness of the European Court of Human Rights by streamlining the filtering and the processing of applications. A further aim is to improve the execution of the Court’s judgments. The protocol, which amends the Convention, was opened for signature by the Council of Europe’s member states on 13 May 2004. It requires ratification by all the signatories to the European Convention on Human Rights to enter into force.

Alongside Protocol No. 14, the Committee of Ministers also adopted several other instruments addressing, in particular, measures to be adopted at national level as a necessary contribution to reaching the aims of the protocol. All relevant texts have been published in Guaranteeing the effectiveness of the European Convention on Human Rights – Collected texts, Council of Europe, 2004.

To further the reform process, the Norwegian chairmanship of the Council of Europe’s Committee of Ministers organised a high-level seminar in Oslo on 18 October 2004. The purpose of the seminar was to enhance understanding of the agenda for reform of the European human rights system and identify practical measures to ensure that the reform package adopted by the Committee of Ministers in May 2004 is effectively implemented.

The seminar was opened by HRH Crown Prince Haakon. Norwegian Foreign Minister, Jan Petersen, in his capacity as Chairman of the Committee of Ministers, addressed the seminar. Presentations were also given by Mr Luzius Wildhaber, President of the European Court of Human Rights, and Mr Pierre-Henri Imbert, Director General of Human Rights in the Council of Europe. The seminar brought together high-level experts from a large number of member states, the Court and its Registry, national human rights institutions and NGOs, as well as representatives from the Council of Europe Secretariat and the OSCE.

On the basis of the participants’ findings, a comprehensive list of conclusions was drawn up at the seminar by the Chair. These conclusions of the seminar were presented to the Committee of Ministers’ Liaison Committee with the European Court of Human Rights on 9 November and to the Committee of Ministers at Deputy level on 17 November 2004. The Ministers’ Deputies decided to transmit the conclusions to the Council of Europe’s Steering Committee for Human Rights and to the Parliamentary Assembly.

The conclusions, key statements and written papers of the seminar are presented in this volume.
Welcome Address

HRH Crown Prince Haakon of Norway

Excellencies, Ladies and Gentlemen,

It is my pleasure to welcome you to this High Level Seminar in Oslo on Reform of the European Human Rights System.

Norway is a founding member and long standing supporter of the Council of Europe. Currently Norway chairs the Committee of Ministers. It is therefore a special honour to host such an event, which focuses on institutional reform in the field of human rights.

This area is fundamental to the organisation and to its member states. The protection of human rights is among the defining issues of European values and co-operation. It is a centrepiece of European ideals and aspirations.

An ultimate test for the continued success of the work of the Council of Europe is its continued and unrelenting focus on its core values and areas of expertise, while at the same time promoting an even more constructive relationship with the other European organisations. The protection of the universal human rights is at the basis of all these efforts.

In a world that is struck by violence and repression we have to relentlessly work to bring states into closer association on the basis of shared values and understanding. International law and human rights provide a unique common language for building and further strengthening such a basis. Pan-European cooperation on the basis of the rule of law is built on this language.

We believe that an active democracy at all levels and based on respect for the rule of law, is essential in creating stability and encouraging participation in society. Herein lies a fundamental tenet of the Council of Europe. Herein lie some of the canons of the European human rights system.

It is therefore a token of both the success and the importance of the European Court of Human Rights in Strasbourg that the number of individual applications has risen sharply over the years.

At the same time it is a fundamental challenge for the Court to adapt to the practical realities of being a court for a continent of forty-six member states and 800 million people.

A reform process has therefore been initiated. A key aim is to allow the Court to better focus its limited resources on cases which really raise issues of protection of human rights. Such a reform process is not only necessary, it is urgently needed.

I am confident that these perspectives will guide your deliberations today. This seminar will concentrate on how to make the reform process work. The seminar aims at developing further a practical understanding of how to ensure a swift, effective utilisation of the potential constituted by the reform measures recently adopted. I wish you all success with today's important discussions based on the values of the language of the human rights – a language we all share.

Thank you.
The Agenda for Reform of the European Human Rights System

Mr Jan Petersen
Minister of Foreign Affairs of Norway

Your Royal Highness, Excellencies, ladies and gentlemen,

As Chairman of the Committee of Ministers of the Council of Europe, I would also like to welcome you all to this seminar.

I am pleased that such eminent representatives of the European Court of Human Rights and the Council of Europe and such renowned experts from all parts of Europe have been able to join us today.

A particular welcome to the President of the Court, its Registrar and the representative of the Secretary General of the Council of Europe.

This seminar on reform of the European human rights system reflects one of the key priorities of the Norwegian chairmanship. All over Europe, individuals put their ultimate trust in the Court in Strasbourg when their fundamental rights and freedoms are at stake. It is thanks to the Court that the European Convention on Human Rights is a living instrument that has adapted to modern conditions.

This Court is widely perceived as the world’s leading human rights court, and rightly so. The fact that its influence is growing, even outside Europe, is remarkable. Not only have other human rights bodies drawn on its rich case-law – so have national Supreme Courts of states on other continents, as well as the international tribunals for the former Yugoslavia and Rwanda.

The Strasbourg Court thus contributes to the development of international law, promotes our common values and has a unique legitimacy even at the global level.

As members and representatives of the Council of Europe and the Court, we have reason to be proud of what has been achieved.

At the same time, we must not let pride lead to complacency.

The Court’s formidable success has itself contributed to the rapidly increasing flow of individual applications. The huge backlog of pending cases, and also the failure in certain cases of states to effectively implement judgments, have become major challenges. These must be addressed if our sustainable and effective system for protecting human rights in Europe is to be preserved. When we consider that at this very moment, more than 75,000 individuals, some of them in desperate circumstances, have an application pending, it is obvious that there is no time to lose.

The European Court of Human Rights must, as a court of last resort, respond to the human rights needs of 800 million people. It can therefore be no surprise that the practical and theoretical challenges are many and various. At the same time the resources available to respond to these needs are obviously limited.

The way these challenges are met also has a bearing on the broader discussion of the division of labour between national and international systems, as well as the form of cooperation between the two levels. The basic idea is that questions should primarily be solved at the local, national level. Furthermore, we may talk about complementarity between international criminal justice and national systems, or subsidiarity, as is the case between the Strasbourg Court and national systems. However, states retain a primary responsibility for
ensuring full compliance with international obligations.

Issues of division of labour are common in federalist structures, but international courts are not federal courts, their relations are with sovereign states. These have different legal traditions and cultures and margins of appreciation recognised by the Strasbourg Court.

The Convention and the Court were not created to replace governments or remove important matters from national regulation. States retain the primary duty and responsibility to protect human rights through implementation of the Convention at the domestic level. At the international and European level, the Strasbourg Court is the ultimate safety net.

Moreover, a distinguishing feature and a core principle of the Strasbourg system is the fundamental right of individuals to petition the Court. This right is not at issue. Nor is the single Court that emerged from the reform in 1998, based on Protocol No. 11.

The agreed priorities are the Court's organisation and procedures, more effective implementation of judgments and the need for more adequate national measures. Thus in concrete terms, the questions before this seminar are simply:

What should now be done by

- the Court itself;
- by the Council of Europe
- and by member states?

The reform package adopted by the Committee of Ministers in May, with Protocol No. 14 and a number of other texts, is a turning point. But the adoption of these texts is also only a starting point. Concrete follow-up is now the task facing the Court and the Committee of Ministers, its subsidiary bodies, and other organs of the Council of Europe. And last but by no means least, member states at the national level.

Some of the overriding questions in this respect are:

How can we ensure that the resources of the Court are allocated to the most important cases? And how can we deal with the flood of inadmissible cases?

I should like to list some of Norway's key priorities during its chairmanship with these questions in mind:

First, to promote the necessary steps to ensure the swift entry into force of Protocol No. 14 and the full utilisation of its potential;

Second, to support effective steps to follow up other reform measures by the competent bodies of the Council of Europe, including in particular the Committee of Ministers;

Third, to focus further on specific and effective measures to improve and accelerate the execution of the Court's judgments, notably those revealing an underlying systemic problem.

The first point concerns the amendment through Protocol No. 14 of the control system of the Convention. The aim is to make the system more efficient while at the same time preserving the individual right of application as the pillar of the European system of human rights protection.

The entry into force of the protocol has considerable potential for removing bottlenecks in the work of the Court. It will enable the Registry and the judiciary of the Court to take action themselves, for example through abbreviated or summary procedures. It is urgent to ensure that the Court is able to take such steps as soon as possible. We, the states, can contribute by swiftly signing and ratifying the Protocol.

I call on the participants in this seminar to consider ways and means of bringing the Protocol into force well before May 2006. It should be noted that ratification of the Protocol in most cases will not require any new legislation nor will it have financial implications.

To encourage the swift entry into force of Protocol No. 14, Norway and Poland have asked the Secretariat of the Council of Europe to organise a Treaty Event in Strasbourg on 10 November, to coincide with the transfer of the chairmanship of the Committee of Ministers from Norway to Poland.

I take this opportunity to urge all member states that have not already done so to sign the Protocol on this occasion and to proceed with ratification as soon as possible.
The second priority for our chairmanship reflects the fact that Protocol No. 14 is only one element of a broader reform package, which includes other measures requiring follow-up by states and competent bodies, notably those of the Council of Europe.

The Committee of Ministers should take specific and effective measures towards improving and accelerating the execution of the Court’s judgments, notably those revealing an underlying systemic problem.

Furthermore, the Committee of Ministers should undertake a review of the implementation of the above-mentioned recommendations to member states.

Finally, the Ministers should assess the resources necessary for the rapid and effective implementation of Protocol No. 14, and take measures accordingly.

The main pillar of the European Human Rights system is of course compliance by states with the Human Rights Convention. The Court is not responsible for straightening out systemic failures within states. Effective measures must be adopted by parliaments, governments and courts at the national level. The obligations of states under the Convention and the recommendations and resolutions adopted by the Committee of Ministers must be put into effect.

Our third priority is to contribute to increased focus on specific and effective measures to improve and accelerate the execution of the Court’s judgments, notably those revealing an underlying systemic problem.

In a Resolution concerning this issue, the Court is invited to identify, in the judgments that find a violation of the Convention, what it considers to be the underlying systemic problem and the source of this problem. The Court is also invited to notify other Council of Europe organs and the general public of any judgment containing indications of a systemic human rights problem.

Finally, I will revert to the main issue: states have the main responsibility for ensuring that the European system of human rights is effective.

We must therefore ask ourselves how states can ensure effective compliance. This question is not limited to the execution of judgments. Effective implementation goes deeper and beyond formal execution. It requires a full revision of legislation and administrative practice, in order to prevent the Court from being overloaded with cases of great similarity.

I believe it is indispensable that states and the Court develop an even closer partnership in addressing this most pressing issue.

I hope that this seminar, which is bringing together prominent practitioners and academics, will inspire a spirit of partnership in which we can enhance our understanding of these complicated issues.

I also hope that this forum will help to identify practical measures within the framework of the adopted reform package.

Before giving the floor to the President of the European Court of Human Rights, I should like to convey my particular thanks to the Council of Europe Secretariat and to the Court for their extremely useful assistance in the preparations for the seminar.

Thank you for your attention. I wish you all a fruitful and constructive day of discussions.
CONSEQUENCES FOR THE ECtHR OF PROTOCOL NO. 14 AND THE RESOLUTION ON JUDGMENTS REVEALING AN UNDERLYING SYSTEMIC PROBLEM

PRACTICAL STEPS OF IMPLEMENTATION AND CHALLENGES

Mr Luzius Wildhaber

President of the European Court of Human Rights

Your Royal Highness, Minister, Excellencies, distinguished colleagues,

In the note accompanying the draft agenda for this meeting, it was stated that the seminar would consist of a free and informal exchange of ideas. I take this as an invitation not to be overly diplomatic. I must nevertheless start by congratulating the Norwegian Chairmanship on their initiative in organising this event. It is important because it recognises that the opening for signature last May of Protocol No. 14 to the European Convention on Human Rights is, as I told the Ministers in May, not the end of the story. In some respects it is not even the end of the chapter, because Protocol No. 14 leaves quite a lot unsaid. Much, in terms of its implementation, is left open and its effectiveness in helping the Court deal with its still growing case-load will depend on the Court's preparedness to exploit to the full the procedural tools provided. Rest assured the Court has every intention of doing so, but I should make clear at the outset that there is one thing that Protocol No. 14 will not do. It will not itself reduce the volume of cases coming to Strasbourg; it will not turn off the tap; it will not even slow down the flow. That fundamental truth has, among other things, budgetary implications. It means for instance that, if we are to be able to process cases within a reasonable time, the Registry will have to continue to grow, perhaps not as fast as it might have without Protocol No. 14, but let there be no mistake, the Court will remain a drain on the Council of Europe's budget. If, as has been suggested in some quarters, the Council of Europe is to be subject to zero nominal growth, not just zero real growth, difficult choices will have to be made. Governments will have to redefine their priorities if the human rights protection system set up by the European Convention, which of course involves not only the Court, but other sectors of the Council of Europe, is to retain its credibility and effectiveness. The Convention system has, in more than one sense, a life of its own; it cannot be contained within a non-growth budget for any period of time without risking serious damage. Insufficient funding will in itself place limits on access to the Court. Just as governments are held responsible for the functioning of their national systems of justice, they must also be for the Convention supervisory mechanism. So I will begin with that unpopular and undiplomatic message: an effective human rights protection system in Europe will continue to
cost governments more money, although – we would say – not very much money compared with the potential long term benefits of stabilised democracy and the rule of law.

There is something else that Protocol No. 14 will not do. Since 1998 the Court’s backlog has been growing inexorably. If we define the backlog as cases in respect of which the Court’s objective of completing each of the different procedural stages within one year (for example one year between allocation and first examination and one year between communication and admissibility), the total backlog stood on 1 September 2004 at over 21,000 applications, approximately half of which are designated as Chamber cases. We are told that, on the most optimistic view, Protocol No. 14 will enter into force within 2 to 3 years. The backlog will continue to grow during those years. Even assuming Protocol No. 14 makes it possible to increase the Court’s productivity significantly, a solution will therefore have to be found for the backlog. It is true that the worst backlog situations concern only a limited number of countries. There are cases which have been pending for an unacceptably long time, thus frustrating one purpose of the Convention protection system which is to identify flaws in the national protection of fundamental rights in a timely way. Neither the individual applicant nor the respondent government can be satisfied with a judgment that may come so long after the events that it loses much of its relevance. As the guardians of the system, we cannot be satisfied with it either.

What sort of solution? The idea of a task force has been tried. One difficulty is that much of the backlog consists of the more complex cases requiring the attention of the more experienced Registry lawyers, diverting them from current cases, which in turn may accumulate to build up a new backlog. Perhaps the starting point should be a detailed inventory for the countries with the largest backlog to see whether there are not groups of cases in respect of which some settlement can be reached with the respondent state; I shall come back to this idea later on when considering systemic problems. Another suggestion that has been made is the setting up of an ad hoc Chamber to specialise in backlog cases. In any event further thought must be given to this problem because if Protocol No. 14 enters into force without a solution to the backlog the chances of its achieving its aims will be seriously compromised.

But let me come back to Protocol No. 14. One of the guiding notions of the Convention is that of balance; balance between conflicting rights, balance between the individual interest and the general interest. If balance plays an important role in the substantive application of the Convention, it is also a crucial element in the operation of the supervisory mechanism. Here the balance is between national protection and international protection; both components must function effectively if the system is to work. In recent years that balance has been upset to the detriment of the international component. Far too many cases come to Strasbourg which should, in accordance with the principle of subsidiarity, have been decided by the domestic courts. This is not merely a question of the implementation of the Convention rights and freedoms in the domestic order; it is above all the establishment of appropriate and effective remedies. The Strasbourg Court cannot bear a disproportionate burden in enforcing the Convention; that burden has to be shared with the domestic authorities. Indeed the underlying aim of the Convention is to create a situation in which the great majority of Convention complainants do not have to come to Strasbourg, because their complaint has been satisfactorily addressed at national level.

It seems to me that the basic philosophy of Protocol No. 14 and the accompanying measures is or at least should be to recover that balance, to restore the national component of Convention protection to its proper and I would say inevitable place in the system. At the same time the Protocol aims to streamline the machinery.

As regards the first element, the Recommendations and Resolution adopted by the Ministers at the same time as Protocol No. 14 largely speak for themselves: Recommendation Rec (2004) 5 on the verification of the compatibility of draft laws and administrative practice with the standards laid down by the European Convention on Human Rights, Recommendation Rec (2004) 6 on the improve-
ment of domestic remedies and Resolution Res (2004) 3 on judgments revealing an underlying systemic problem. The Court does not underestimate the importance of these instruments. They correctly identify the sources of many of the Court’s problems. Similarly Recommendation Rec (2004) 4 on human rights in university education and professional training can no doubt make a valuable contribution; unquestionably training in Convention law is essential if national courts are to be expected to apply it. The Court and its Registry are increasingly solicited to take part in national judicial training schemes and do so willingly, though at some point it will be necessary to consider whether this activity is impinging too much on the judicial work and whether it would be possible to organise, together with other interested Council of Europe actors, a co-ordinated approach on a slightly different footing. In any case all these measures are helpful but, as the explanatory report observes, their effects will only be felt in the medium term.

In response in particular to the Recommendation on the improvement of domestic remedies and the Resolution on judgments revealing an underlying systemic problem, the Court adopted a judgment on 22 June of this year in which it found for the first time the existence of a systemic violation in what has become known as a pilot judgment. I would remind you that in its different opinions submitted to the Steering Committee for Human Rights the Court repeatedly urged the introduction of a Convention provision formally establishing a “pilot judgment procedure”. That proposal was rejected by the government experts, who noted nevertheless, and I quote from their interim activity report of 23 November 2003, “the pilot judgment procedure proposed by the Court could be followed without there being a need to amend the Convention.” Well the Court took the experts at their word in the Broniowski judgment, which provides a definition of systemic violation in the following terms as: “where the facts of the case disclose the existence, within the [relevant] legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied [their Convention rights]” and “where the deficiencies in national law and practice identified ... may give rise to numerous subsequent well-founded applications”. In the particular case the Court found that the violation “originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons”. The Court indicated further that “general measures should either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found to have been in breach of the Convention or provide equivalent redress in lieu”. In the operative provisions the Court held notably that the respondent state must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining claimants or again provide them with equivalent redress. Moreover, and this is an important element, consideration of applications derived from the same general cause would be adjourned pending the adoption of the necessary general measures.

This was, I think we can say, a groundbreaking judgment and one in which the Court has been at pains to spell out its judicial policy. It states, and I quote, “measures adopted must be such as to remedy the systemic defect underlying the Court’s finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause”. This is entirely consistent with the aim of restoring the balance in the relationship between international protection and domestic system. It shares out the burden of Convention enforcement. Faced with a structural situation, the Court is in effect saying to the respondent state and to the Committee of Ministers that they too must play

7. See, for example, paragraphs 43 to 46 of the Court’s position paper of 12 September 2003.
10. Ibid.
11. See § 194.
12. See § 198.
13. See § 193.
their role and assume their responsibilities. As a result the respondent state will hopefully introduce general measures capable of providing redress to both current and future applicants. This will in turn help to ease the case-load pressure in Strasbourg. So this approach is wholly justified both in terms of the philosophy of restoring the balance and on the practical level of physically reducing the number of well-founded cases which the Court and its Registry will have to process through to a judgment on the merits. As far as the individual applicants are concerned, it may well be that a greater number of individual applicants will secure redress more rapidly than if the Court were to attempt to process and adjudicate each application in turn. We know that there is a limit to the number of cases that can be dealt with at any one time, which is why there is an accumulation of some 12,000 substantial cases waiting to be examined. To seek to process large numbers of cases raising the same issue or shortcoming within the national system would run the risk of paralysing the system, preventing the Court from devoting sufficient attention to other individual cases and therefore possibly also from identifying new structural situations.

This is also relevant to the backlog, to which I referred earlier and much of which is composed of groups of cases whose individual settlement would prove extremely time-consuming. Here too a pilot-judgment type of approach may be appropriate. One feature of cases deriving from structural situations is that they are almost by definition well-founded. The most complex issue will be the determination of compensation, which is something for which the Court is singularly ill-equipped. We simply lack the expertise in Strasbourg to carry out sophisticated property valuations for example, even if we had the time to devote to such exercises. We must therefore look for ways to transfer that task to other bodies, preferably domestic bodies or possibly, as I shall explain later, to special Claims Commissions.

Before I leave the question of pilot judgments, and in obedience to the invitation to be frank, I should say that, although some of our repetitive cases come from the older contracting states, the majority of the most serious structural or systemic problems derive from the newer contracting states. This was of course foreseeable. States which were only just emerging from decades of non-democratic government, often within a fragile economic environment, were required to ratify the Convention within months of joining the Council of Europe, rather than being granted a reasonable period within which to bring their legal systems into conformity with the Convention. Many of these states also faced the enormously difficult task of responding to the demand for redress for the injustices committed by their predecessors. It was inevitable in that situation that there should be structural problems of Convention compliance. We – that is the Court, the Council of Europe, the Convention system – are paying for that now and I think that pilot judgments should also be seen in that context: the identification and resolution of problems that should have been dealt with before the ratification of the Convention. By saying to those governments there is a widespread problem that has to be resolved in a way that provides redress also to the complainants in Strasbourg and by leaving them a reasonable period within which to achieve that, we go some way towards repairing what I believe, with the benefit of hindsight, was an historical mistake.

It is perhaps paradoxical that I should speak first of all about a measure which was not included in Protocol No. 14 and indeed expressly not included, if I may put it like that. But one important thing that has come out of the discussions leading to the adoption of Protocol No. 14 is a widespread realisation of the gravity of the problem facing the Court, and even within the Court itself there were some who did not fully appreciate the situation only a short time ago. Protocol No. 14 will have – is already having – a collateral effect. The pilot judgment procedure is an example of how the Court is prepared to look beyond the terms of Protocol No. 14 in its search for additional solutions, because additional solutions will be necessary.

Naturally I accept that not every situation giving rise to what we call repetitive cases is suitable for the pilot-judgment approach adopted in Broniowski. Here we come to the streamlining effect of Protocol No. 14 and its answer to this problem, which remains rele-
Reform of the European human rights system

A Work in progress 63

vant and to which the Court will also no doubt have frequent recourse. This is the amended Article 28 extending the power of three-judge Committees which will henceforward be able not just to declare applications inadmissible, but also to declare them admissible and decide on the merits if the underlying question is the subject of “well-established case-law”. The explanatory report makes clear that this provision is aimed principally at repetitive cases, or what in the past we have referred to as manifestly well-founded cases. Just as we expect applicants to accept a drastically slimmed down procedure for manifestly inadmissible cases, it is not unreasonable for governments to be asked to make some procedural concessions where the application is manifestly well-founded, while retaining the right to question the use of this accelerated summary procedure.

This new procedure assumes and requires a degree of good faith on both sides. The Court must not seek to use it for cases in respect of which there is a genuine doubt about whether they fall into the relevant category or about their admissibility. On the other hand, governments must also refrain from opposing the application of the new Article 28 § 1 (b) in cases where such opposition is not justified. Governments will not be entitled to veto its application, but I would say that the Court would be unlikely to override a justified challenge to its use. If the opposition is systematic, however, the hoped for effect will not be achieved. I think we should be clear about what this provision means. We are saying essentially that governments will in effect not be contesting the finding of violation in a given category of cases. Once they have accepted that a case falls within that category and that there are no obstacles to admissibility, the complaint on the merits will not be contested. Governments should also observe some restraint in advancing admissibility arguments. If admissibility is systemically challenged for the principle, we will not be making any savings of time and resources. There remains what is often the most time-consuming aspect of these cases, namely the determination of just satisfaction and here, as I suggested in relation to pilot judgments, it seems to me there may be room for new solutions, perhaps involving outside agencies, a special Claims Commission, an arbitration commission or – and we always come back to the same point – ideally a remedy at national level, transferring the task back to where it can be carried out most efficiently. If an international solution has to be found (for example a team of international experts), special budgetary arrangements would be necessary. This would have the advantage of increasing transparency in that the real cost of dealing at international level with unresolved structural situations in the domestic legal system would be clearly identified.

It will not of course be possible for the Court formally to make use of the new Article 28 competence before the entry into force of the Protocol, but it does provide us with an incentive to explore even further the scope for streamlining working methods and procedures for this category of case and perhaps reorganising the work of Chambers, including making greater use of silent procedures. It may be that Sections can integrate into the organisation of their programme the use of existing Committee formations, which could examine, in addition to inadmissibility, the admissibility and merits of certain categories of repetitive cases. The draft judgment could then perhaps be approved by the remaining four Judges (including the national Judge) through a silent procedure. We should also now investigate avenues for dealing with the Article 41 question in a rapid and efficient way, preparing the ground for the new Article 28 power. As I have just said, this should involve wherever possible returning the problem to the national arena. This is of critical importance in reducing the Court’s case-load.

I am relatively optimistic that the combination of pilot judgments and the amended Article 28 can have a considerable impact on the Court’s case-load, if, and this is perhaps a big if, governments keep their side of the bargain, if governments accept that they have a responsibility to remedy structural situations effectively.

Coming now to the question of the massive inflow of manifestly inadmissible cases, which constitute around 90% of all applications lodged, allow me just to recall that the Court’s proposal throughout the Protocol No. 14 dis-
cussions was for a separate filtering body, a feasibility study into which had been recommended by the Evaluation Group. No feasibility study was ever carried out and without such a detailed investigation the Steering Committee was never going to be able to come up with concrete proposals. In passing, let me reiterate that more effective domestic Convention implementation, however desirable and however effective it may be in reducing in the longer term well-founded applications, does not necessarily reduce manifestly inadmissible applications.

As you know Protocol No. 14’s answer to this problem is the establishment of a single judge procedure; a single judge will be empowered to declare applications inadmissible under the same conditions as a three-judge Committee at present, in other words where he or she can do so without further examination of the application. The single judge, who cannot be the national judge, will be assisted by non-judicial rapporteurs, who according to the explanatory report, will perform the function currently carried out by the Judge Rapporteurs. There are two things to say here: firstly this new procedure does give the Court more flexibility; it entails vesting greater responsibility in the registry or recognising a responsibility which already exists to some extent. It increases judicial capacity in this field. It will no doubt be possible to introduce less formal procedures and thus to speed up the processing of inadmissible cases. But there is a price for this and this is my second point. The degree of judicial scrutiny will be considerably diminished. Applicants coming to Strasbourg, for whom the procedure is already pared down to the minimum and who receive only the barest reasoning for the rejection of their complaints will enjoy significantly fewer safeguards. We should not conceal this fact. It is the inevitable consequence of the growth of the system far beyond its original conception and design. Moreover in principle these are cases which do nothing to enhance the protection of human rights, the strengthening of the rule of law and democracy; their examination and determination does not directly pursue the Court’s aim of ensuring that the Contracting Parties observe their engagements under the Convention. Yet we know that behind each application there lies a human story, often a dramatic one. We also know that the Convention and its enforcement mechanism have generated enormous expectations throughout the member states of the Council of Europe and that the frustration and lack of understanding of applicants whose cases fall outside the Court’s jurisdiction is a real problem, which increasingly in itself creates work for the Registry.

We will need to consider what preparations can be made for this new procedure and to what extent we can anticipate its entry into operation. Work is already under way in the Registry to examine the options, including a possible restructuring of the Registry with a part of it, under the responsibility of the Rapporteurs, devoted exclusively to the work of processing inadmissible cases. As with the new power of Committees, we can explore ways of using the current Committees so as to prepare for the single judge. For example the work of Committees could be detached from that of the Sections to lay the ground for when the judges carry out this function completely independently of their Chamber business. It is too early to go into further details, but once the Court starts work in its new composition on 1 November, the Standing Committee on Working methods will be mandated to take forward the proposals which are now being prepared.

The most controversial provision of Protocol No. 14 is the amendment of Article 35. The compromise solution reached introduces a new criterion, that of significant disadvantage, which is however subject to two further conditions, that of respect for human rights and the stipulation that an application cannot be declared inadmissible on this ground if the complaint has not been duly considered by a tribunal at national level. The emphasis is correctly placed on the need for remedies at national level; the question remains as to whether determination of this condition will not entail a lengthy examination of substantive issues which would defeat the purpose of the

14. See, for example, paragraphs 47 and 48 of the Court’s position paper of 12 September 2003.
Reform of the European human rights system

provision. In any case, under the transitional rules, the single judge will not be able to apply this provision for the first two years following the entry into force of the Protocol, during which time Chambers and, where necessary, the Grand Chamber will have to develop the necessary case-law principles to define the notions contained in it. There is of course no reason why in the period leading up to the entry into force of Protocol No. 14 the Court should not already begin a process of reflection on the scope of these notions and consider to what extent the three elements, significant disadvantage, respect for human rights and examination at national level, may provide guidance for the Court in its present work.

One measure in Protocol No. 14 is already proving effective. This is the joint procedure under Article 29 § 3 of the Convention. This actually codifies a growing practice which enables the Court to deal with cases more rapidly and without unnecessary duplication and delay which is inherent in the separate treatment of admissibility and the merits. Once again there will be cases where this approach is not suitable, but the Court is applying this measure now whenever it can. This is a further indication that where it is possible to anticipate the entry into force of the Protocol we will do so.

I must now come to a conclusion. Let me leave you with four main messages; the first is that I remain convinced, particularly in the present international climate, of the absolute necessity of preserving this unique system for the international protection of fundamental rights, of maintaining this quite fragile flame which still today serves as a beacon of light whose sometimes flickering rays reach out even beyond the frontiers of our Europe. It must remain at the heart of the Council of Europe’s activity. In this connection, it is, I understand, suggested that the Council of Europe’s third summit will concentrate on terrorism. It is only natural that governments should see that as a major and topical concern. They should not however forget that human rights are both a target of, and in the long term probably the most effective weapon against, terrorism.

My second message is that Protocol No. 14 on its own will not be sufficient, that unless governments assume to the full their responsibilities under the Convention, both at national level and in the Committee of Ministers, the system will not be able to work satisfactorily. We must as I said earlier restore the balance.

Thirdly, despite what may have come across as a somewhat lukewarm reception for the Protocol, I do unreservedly encourage states to ratify Protocol No. 14 as rapidly as possible. Certainly the Court will proceed on the basis that it will enter into force within the next two years and will adapt its working methods and procedures accordingly.

Finally, and this may be the most difficult message for us and for you to accept, work has to continue on the future evolution of the Convention system. The figures speak for themselves.

Thank you for your attention.
Follow-up to the Committee of Ministers’ Recommendations on the Implementation of the Convention at the Domestic Level and the Declaration on “Ensuring the Effectiveness of the Implementation of the ECHR at National and European Levels”

Mr Pierre-Henri Imbert

Director General of Human Rights, Council of Europe

Ladies and gentlemen,

It is a great pleasure for me to address today some issues relating to the implementation of the Convention reform measures adopted last May by the Committee of Ministers of the Council of Europe. I also extend, on behalf of the Secretary General, our gratitude to the Norwegian authorities for this initiative, which is most timely. Indeed, this seminar is a useful reminder that the adoption of the reform package does not constitute the end of the story. Yes, the drafting of the reform texts at European level has now finished. But this does not mean we should all sit back. The reform process is now merely entering a new phase, focused on implementation. It is absolutely essential now to ensure that the texts adopted produce their effects as soon as possible. This seminar therefore provides an excellent occasion for a frank discussion of the implementation measures needed, not only in Strasbourg but also, perhaps most importantly, at home, in your own countries. It is essential that all actors and institutions concerned mobilise themselves without delay in order to exploit to the full the important potential which this reform offers in terms of maintaining and strengthening the effectiveness of the Convention at home and in Strasbourg.

You have just heard from President Wildhaber what consequences Protocol No. 14 will have for the Court. This Protocol is undoubtedly the centre-piece of the reform, but it is also part of a wider package of interdependent measures adopted by the Committee of Ministers, and most of my presentation will focus on those other measures. But before going into that, allow me to recall the fact that the member states have committed themselves to ratifying the Protocol speedily so as to ensure its entry into force within two years, that is: before May 2006. A rapid entry into force is not only important in its own right, to allow the Protocol to produce practical results as soon as possible. It is also necessary to allow for an early stock-taking of its impact on the Court’s effectiveness. Two years seems a relatively short time, certainly compared with the time needed for the entry into force of Protocol No. 11, but it is not for nothing that the Steering Committee for Human Rights (CDDH) and the Committee of Ministers agreed on this deadline. In fact, given the urgency of the entry into force of Protocol No. 14, I call on all those
concerned to regard this two-year period as a maximum and strive for a ratification date well before, if possible by the middle of next year. This is not unrealistic, far from it. In this connection, it may be useful for you and for colleagues in the capitals who are responsible for preparing and accompanying the national ratification process to take note of a short aide-mémoire prepared by the Directorate General of Human Rights recapitulating some practical points which may help you at home in promoting a rapid ratification of Protocol No. 14. These points may be briefly summarised as follows:

(i) the amendments contained in Protocol No. 14 represent no important restructuring of the control system of the Convention. To use the words of its Explanatory Report (§ 35): “Unlike Protocol No. 11, Protocol No. 14 makes no radical changes […] The changes it does make relate more to the functioning than to the structure of the system.” It should therefore be much easier to ratify swiftly;

(ii) it seems highly improbable, given the nature of the amendments in Protocol No. 14, that ratification would require any substantive changes of domestic legislation;

(iii) ratification of Protocol No. 14 as such does not entail any direct budgetary consequences. Such financial considerations should therefore not be a complicating factor during the domestic ratification processes. One could even argue that, if there is any direct financial dimension to the Protocol at all, it is simply that the efficiency and capacity increases it brings will mean more “value for money” for member states! Of course, there is wide agreement that budgetary measures are necessary in order to reinforce the Registry so as to realise the Protocol’s full potential. But such measures are at all events necessary, with or without Protocol No. 14. I recall that a special programme to increase the resources for the Court and for the execution of judgments was already adopted in 2002, well before the adoption of the Protocol;

(iv) we know from the experience of many members of our expert committees how important and useful it is to explain in plain language and in summary form the content of a treaty to other domestic authorities involved in the ratification process. Those other authorities often lack the relevant expert knowledge or simply have not followed the European drafting process. It is mainly for the benefit of the non-initiated that paragraphs 35 – 46 of the Explanatory report contain a helpful, 1-page summary of the changes introduced by Protocol No. 14. I invite you to arrange for a translation in your national language(s) and to use this text in contacts with other ministries and of course for your parliaments.

I believe that these different points and reminders should help to secure a rapid ratification process in the member states and thus a rapid entry into force of the Protocol.

It is clear that Protocol No. 14, once in force, will increase the Court’s case-processing capacity. But, from the outset of the negotiations on the reform, all governments were keenly aware that the reform cannot and should not stop there. It is crucially important to ensure that the inflow of cases and the Court’s workload are mitigated. This cannot, almost by definition, be realised through procedural amendments to the Convention itself. It is at the national level that the relevant measures should be taken to address the root causes of the phenomenon of the increasing inflow of cases. The Committee of Ministers has stressed this in the strongest terms in its Declaration of May 2004:

“…it is indispensable that any reform of the Convention aimed at guaranteeing the long-term effectiveness of the European Court of Human Rights be accompanied by effective national measures by the legislature, the executive and the judiciary to ensure protection of Convention rights at the domestic level …”.

This not only a matter of making the reform a success, it is also simply a question of member states assuming their primary responsibility for securing the rights and freedoms, in accordance with Article 1 of the Convention and the principle that the role of
the Convention organs is subsidiary to that of national authorities.

As the Secretary General of the Council of Europe aptly stated at the Ministerial Conference in Rome which launched the reform process: “human rights protection begins and ends at home”. In other words, the European system of human rights protection is of a circular kind. Effective national systems and structures should be able to prevent or remedy human rights violations at home. Only where national systems fails does the Strasbourg system step in, when the Court is seized, notably by individual applications. But after the Court has given judgment, the emphasis shifts back to the national arena where action must be taken to take the individual and/or general measures required to execute the judgment, under the supervision of the Committee of Ministers. Failure or too much delay in taking such measures will inevitably generate further individual complaints to the Court.

National measures

What are the main measures recommended for action at the national level?

The Seminar materials include the texts of the various Recommendations adopted by the Committee of Ministers. I strongly encourage all participants to study these Recommendations and their annexes carefully, for they contain very practical examples of measures and initiatives that could be adopted to strengthen the capacity of national legal systems to provide effective human rights protection, with a specific focus on measures that can help reduce the flow of cases to Strasbourg.

Three main sets of measures are being recommended.

The first Recommendation (Rec(2004)4) concerns university education and professional training in the Convention and the caselaw of the Court. Such education and training should be included as components of the core curriculum of law degrees, as a component for the professional training for judges, prosecutors and lawyers and in the training for personnel in other areas of law enforcement, particularly the police, the security forces, prison officers, hospital staff and immigration services. As a personal comment, I will not hide from you that I find it rather surprising that such Convention education and training is still not in place in all member states. This should become a routine practice everywhere. In this context, I should also mention that the Committee of Ministers is expected soon to discuss the advisability of a European programme to assist states in the implementation of this Recommendation, especially as regards the professional training for judges.

The second Recommendation (Rec(2004)5) deals with the verification of the compatibility of draft laws, existing laws and administrative practice with the Convention standards. Like the first Recommendation, it is primarily geared towards the prevention of violations, thereby avoiding litigation in Strasbourg. The main focus is on systematically verifying that draft laws are “Convention-compatible”, because by adopting a law that has been so verified, the state reduces the risk that that law gives rise to violations subsequently established by the Court. The Recommendation also encourages states to set up mechanisms for checking existing laws and administrative practice for compatibility with the Convention. Indeed, it has happened on several occasions in the history of the Convention that even a judgment against State X has led to changes of law or practice in State Y, simply because the two legal systems were similar on the point at issue. In such cases, it is certainly better for State Y to remove the problem quickly than to sit back and wait until the first complaints start to arrive in Strasbourg.

The third Recommendation (Rec(2004)6) is concerned with the improvement of domestic remedies. Member states should ascertain that such remedies exist for anyone with an arguable complaint of a violation of the Convention and that these remedies are effective. In addition, they should, after a judgment of the Court identifying a structural or general deficiency in law or practice, review the effectiveness of existing domestic remedies and where necessary create effective remedies to avoid repetitive cases coming before the Court.
Reform of the European human rights system

in Strasbourg. Special attention must be paid to the existence of effective remedies concerning the length of judicial proceedings. This Recommendation pursues several objectives. It seeks not only to ensure full implementation of Article 13 of the Convention and to avoid cases coming to Strasbourg which have not been properly examined by a national authority and which create extra work for the Court, but also to encourage the establishment of remedies for repetitive cases at the national level so as to avoid the need for the Court to give judgment on the merits of large numbers of cases which merely form a repeat of a case already decided by the Court in a pilot judgment.

States should where necessary introduce such domestic remedies not only as a way of dealing with future cases (avoiding the need for individuals to go to Strasbourg), but also to the extent possible, retroactively, for people who have already suffered the same disadvantage as the successful applicant in the pilot case. That would undoubtedly simplify the Court’s handling of any such pending repetitive applications.

As a first step to the implementation of these three Recommendations, I would urge participants to take matters in hand within their own countries, for example by setting up task forces of ministries directly concerned to review critically the existing law and practice in all three areas and make proposals for legislative or practical measures to be adopted by the government and/or parliament.

It is clear that not only legal measures are required, but also practical ones, especially in the field of Convention training for the legal community. Those who have responsibility for providing professional legal training should be mobilised to review the situation and as appropriate ensure the integration of Convention standards in training curricula. As I said, the Committee of Ministers will soon be considering whether the Council of Europe should help them in this regard. Even if, more than 50 years after the adoption of the Convention, it may seem strange to say so, it is necessary to ensure that the standards of the Convention (including the case-law) become genuinely integrated into the domestic law of states. The Convention and its case-law are still too often considered as alien and disturbing elements.

For the implementation of these Recommendations, inspiration can be drawn from the Recommendations themselves and their annexes, which contain a wealth of examples of good practice. I would also encourage you to exchange ideas and practical experience during your discussions today, especially those in Working Groups 2 and 3. The Convention system is in need of urgent progress in the implementation of these various national measures, for they constitute a unique means, perhaps the unique means, of exercising a mitigating effect on the inflow of individual applications into the Convention system. The Committee of Ministers has recognised this in the Declaration adopted in May and has set up a specific mechanism to review progress made by member states in their implementation of these texts. The CDDH will, by June next year, submit a first progress report to the Committee of Ministers. It is largely up to you and your colleagues in the capitals to ensure that good progress can indeed be reported on that occasion.

Execution of Court judgments

Allow me now to move on to some main challenges regarding the execution of the Court’s judgments. To quote the Explanatory Report to Protocol No. 14 (§ 16), “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.” In addressing this area, I will certainly not be exhaustive, but focus on some topical issues clearly meriting reflection at today’s seminar.

First, I should point to the changing nature of the cases that come to the Court and subsequently to the Committee of Ministers for execution supervision. In the past, some have said that almost all the cases brought to Strasbourg concerned complaints about minor or rather sophisticated violations of the Convention. Even supposing that that assessment was accu-
rate at the time – I personally believe that it is somewhat exaggerated – those days are definitely over. One only needs to look at the judgments delivered in the past few years, or indeed at the cases currently pending before the Court. The cases have led to findings, or involve allegations, of very serious violations. Some cases stem from areas of (unresolved) conflict.

In addition, today much more than in the past, the Court decides cases with a more or less prominent political connotation or dimension. Some have criticised the Court on this score: they consider that it is – wrongly in their view – taking on a political role. I strongly disagree. First of all, the Court does not "take on" any role, its role is defined in the Convention itself and – as far as its contentious jurisdiction is concerned – is essentially that of taking judicial decisions on the cases that are brought before it. It is true that the political dimension or background of human rights cases brought before the Court is today often more prominent than in the past, but it would be wrong, even rather disingenuous, to blame the Court for that. After all, in most if not all cases this is simply due to the fact that serious problems that are not solved by political means (Cyprus, Transdniestria, Chechnya) tend to have a negative impact on the enjoyment of the Convention rights and thus generate complaints to Strasbourg. Sometimes one even wonders: if the Court would not address such problems, who else would on behalf of the Council of Europe? It is often the failure to solve such problems by political means which leads to consequences and complaints on which the Court is obliged to render a legal judgment on the basis of the Convention. In other cases, the political connotation of a complaint is not at all self-evident: it receives a political load merely because of specific political sensitivities in a country (think, for example, of certain expropriation and freedom of expression cases, or cases seen as a threat to the position of a traditional church). Here again: countries that have accepted the legal obligations of the Convention must also accept that some of their traditional practices may have consequences which the Court qualifies as violations of the Convention. I must stress the legal nature of these obligations. The fact that a case has political connotations does not prevent it from raising human rights issues under the Convention capable of judicial determination on legal grounds.

A second, even more recent, development which has an impact on the Committee of Ministers' supervisory role is the fact that the Court's judgments, in certain cases, are becoming more explicit than in the past as to the kind of measures that the respondent state must take in order to put an end to the breach of the Convention and make reparation for its consequences. There is a series of judgments concerning Turkey (starting with Gencel v. Turkey of 23 October 2003) about the lack of independence and impartiality of the state security courts where the Court has indicated a retrial in conformity with Article 6 as an appropriate means of reparation. Other examples are the Assanidze v. Georgia judgment of 8 April 2004 and the Ilascu and Others v. Moldova and Russia judgment of 8 July 2004. In both cases, the Court specified that the applicants should be released from their arbitrary detention. A last example, this time concerning general measures of execution, is of course the Broniowski v. Poland judgment of 22 June 2004, where the Court not only stated that general measures were required but also indicated what the aims of such measures should be and even to some extent the kind of measures to be taken.

The Broniowski judgment also exemplifies a third new phenomenon in the Court's approach. President Wildhaber has explained how the Court has swiftly responded to the Committee of Ministers' Resolution inviting it to mark a judgment as a "pilot judgment" if it reveals an underlying problem affecting the rights of many other individuals who are in a situation comparable to that of the successful applicant. The Court was also invited to indicate, in such judgments, the source of the underlying problem. In other words, such a pilot case forms the tip of the iceberg, in that many other people have suffered the same violation as a result of the same problem. I must confess that I am not very happy with the expressions “systemic” or “structural” problems for such situations, because they seem to refer only to situations where there is an endemic or really structural and widespread
problem or dysfunctioning in the national legal order (such as non-execution of domestic courts’ judgments, general slowness in the administration of justice, unacceptable prison conditions in a country, etc.). But the Broniowski case shows that there are other situations where the Resolution can also be applied: it concerned not a systemic but a rather specific problem (the state had not, or not sufficiently, given effect to the property rights of persons whose possessions came to fall outside Polish territory after the change of the eastern border of Poland made at the end of the Second World War). A specific problem, yes, but one which affects some 80,000 people! While the title of the Committee of Ministers’ Resolution refers to “an underlying systemic problem” only, it is more important to recall that its purpose is clearly to help avoid a situation where the Court has to pronounce on large numbers of repetitive cases after it has already clarified the legal position under the Convention in a pilot case. For this reason, it is perhaps better to speak of judgments revealing a problem—whether systemic or specific—which affects a category or “class” of persons. Of course, it is understood that this category may be very broadly drawn if there really is a systemic problem: persons deprived of their liberty, persons with criminal, civil or administrative cases pending before the courts, etc.

I am drawing your attention to the difference between these two sources of (potential) repetitive cases (structural problems vs. specific problems) not as a purely theoretical exercise but because it has implications for the execution of judgments and its supervision by the Committee of Ministers. The consequences are quite different. Whilst specific problems affecting large numbers of people (as in Broniowski) can be addressed through specific measures which normally would not need a long time to take, solving a truly systemic problem will often be a more difficult and time-consuming task, involving a comprehensive set of measures to tackle it.

Finally, Broniowski also illustrates another novelty (but see, mutatis mutandis, the practice of the Court pending the adoption of the Pinto Law in Italy) in the Court’s approach: the Court has decided, pending the execution of the pilot judgment, to suspend its examination of all 167 similar Polish cases that have already been brought before it. This obviously adds a great deal of extra pressure on the execution process and constitutes an important further incentive to solve the underlying problem rapidly. It also places an enhanced responsibility on the Committee of Ministers in evaluating the adequacy of measures taken in execution of the judgment: those measures must ultimately remove the need for those 80,000 other people affected to turn to the Strasbourg Court.

What does all this imply for the execution practice? What national measures, procedures or mechanisms could be devised to meet these various challenges and, similarly, what should the Committee of Ministers do at the European level to ensure that its supervisory task meets them?

Obviously, it is up to you today to propose and discuss concrete answers and suggestions, especially in Working Groups 2 and 3.

I would like to offer a few thoughts myself to stimulate your debates:

- As concerns the execution of judgments on issues with political aspects, it is clear that such cases in particular demand a strong resolve and maintaining an acute sense of collective responsibility within the Committee of Ministers in order to see to it that judgments are fully executed. But the first responsibility lies with the country directly concerned. It is not helpful, and even dangerous, for it to contest the findings of the Court, whose jurisdiction it has accepted. Here I would plead for a different regard to the Court and its judgments. It is not the Court which creates a political problem, the case merely reveals it and the Court identifies its consequences in human rights terms. The Committee of Ministers should remind respondent states that they have joined the Convention system not for themselves but for the benefit of their populations and the protection of their fundamental rights. States should be pleased that such problems and deficiencies are exposed by the Court for it gives them an extra impetus to solve them, for the benefit of their people. The Council of Europe is the only international organisation where politically loaded issues are
dealt with through a judicial approach. That is a great advantage, for it permits progress in a step-by-step, pragmatic manner. Especially in sensitive cases, Court judgments should be used by government agents and their ministries as a lever to persuade other authorities and the parliaments of the need to take legislative or other action. Also at the international plane, governments have much to gain politically by taking execution measures, especially in sensitive cases. The Loizidou case comes to mind as an obvious example.

As concerns the Court’s new practice of including in its judgments more explicit indications of execution measures: this is a welcome development, which does not really contradict the general principle of free choice of means of execution since, as the Court has indicated, in certain cases the nature of the violation dictates the course of action to be followed. This will undoubtedly facilitate execution and help the Committee of Ministers to determine how to carry out its supervisory role. In this context, I recall the example of the Ilascu case (involving the taking of all necessary measures by Moldova and Russia to put an end to the continued arbitrary detention of two of the applicants and secure their immediate release). The case has been on the agenda of the Ministers’ Deputies every week since the beginning of September. There is thus an agreed sense of urgency given the nature of the objective fixed by the Court itself. This practice should be developed further.

As concerns the Court’s identification of underlying problems in pilot judgments: I refer to the distinction I made earlier. If the problem is really systemic it is not reasonable to demand general measures in the short term to remedy the problem. But it is legitimate and even necessary for the Committee of Ministers to ask that the state concerned rapidly produce a comprehensive plan of action and timetable on how it plans to tackle the problem. This will frequently require close inter-ministerial co-operation and co-ordination in the country. My suggestion for such cases would be that special task forces be set up between relevant ministries and authorities to prepare such a plan of action and vigorously implement it. It would also seem appropriate to transmit progress reports not only to the Council of Europe, but also to national parliaments and national human rights institutions. They, and human rights NGOs, can be instrumental in promoting sustained implementation.

On the other hand, in pilot cases where the underlying problem is specific, the state concerned should proceed rapidly to legislative or other measures to remove the source of the problem and create appropriate remedies or compensation mechanisms (a matter also addressed in the Committee of Ministers’ Recommendation on the improvement of domestic remedies (Rec (2004) 6), possibly in combination with offering friendly settlements. The execution of pilot judgments calls for a strong determination on the part of the Committee of Ministers to see early results, even more so where the Court has decided to suspend its examination of the repetitive applications.

A few general remarks concerning the execution of judgments and the role of the Committee of Ministers. Accelerating and improving the execution of judgments must be the overriding general objective. I have outlined some of the challenges that the Committee of Ministers faces. But I would not want to leave you with the incorrect impression that this role of the Committee of Ministers is generally difficult or problematic. It remains a fact that execution of judgments works well in the great majority of cases. Most problems are solved in the course of the supervision of execution. It is also true that the Committee has over the years made substantial progress in developing its practice, sometimes also inspiring the Court’s own practice. Examples are the requirement that states pay default interest in case of late payment of just satisfaction to the applicant, or the reference to non-respect of the state’s obligations under Article 46 which was included in an Interim resolution in the Loizidou case, taken up by the Court in its Ilascu judgment and indeed also by the new provisions on execution in Protocol No. 14. I also refer to the
excellent initiative of the Norwegian Chair-
manship of streamlining the working methods
of the Ministers’ Deputies when supervising
execution of judgments.

I would plead, though, for a stronger impli-
cation of other ministries (Justice, Interior,
etc.) in the supervision of execution of judg-
ments against another country. This supervi-
sion role is quasi-judicial by nature but too
often it is left only to Foreign Ministries, where
quite naturally diplomatic considerations and
the need to preserve good bilateral relations
play a strong role. In a way, these factors may
even lead to an unhelpful politicisation of the
execution question. It would really help main-
tain and develop the common European legal
space created by the Convention and the quasi-
judicial nature of the role of the Committee of
Ministers if those other ministries would feel
more concerned by the execution process and
were aware of its real nature and spirit.

Finally, I must point to the fact that the
Committee of Ministers is not only a Conven-
tion organ tasked with the supervision of judg-
ments. It is also the executive organ of the
Council of Europe. As such it has both the
responsibility and the possibility to ensure
that, wherever necessary, the wider Council of
Europe is mobilised to help carry forward the
execution of judgments. I welcome the keen
interest shown by the Parliamentary Assembly,
which follows closely the execution practice,
notably through parliamentary questions and
regular reports. The usefulness of involving
other institutions of the Council of Europe
(like the Commissioner for Human Rights –
who will now be mentioned in the Convention
as a result of Protocol No. 14 – or the Venice
Commission) has also been stressed by the
CDDH in its report of April 2003. The idea is
not, of course, that they would duplicate the
role of the Committee of Ministers, but that
they can, within their own area of competence,
take useful supportive action to help bring
about speedy and full execution of judgments.
Too often, the Council of Europe is seen only as
a constellation of mechanisms to monitor
respect for human rights. But the Council of
Europe does much more than monitoring. It
also provides concrete assistance to member
states to help them comply with human rights
standards. We should intensify efforts to
ensure greater synergies between these assist-
ance programmes and the monitoring mecha-
nisms. There are already good examples con-
cerning not only the Convention but also other
mechanisms such as the Framework Conven-
tion for the Protection of National Minorities.
The CPT is also examining ways to promote
concrete assistance activities to help states in
their follow-up to the recommendations made
to them. Existing or new assistance pro-
grames should also be geared towards
helping a country to overcome certain difficul-
ties in complying with a judgment of the Court.

Concluding remarks

Ladies and gentlemen,

I have offered you a rapid overview of some
key issues concerning the implementation of
the comprehensive reform package adopted
last May. I hope that my presentation will have
made clear how interdependent these issues
are, whether they concern the entry into force
of Protocol No. 14, the role of the Committee
of Ministers, or the measures to be adopted
within the national legal orders. This interde-
pendence is not surprising. As I said at the
beginning, the Convention system for the pro-
tection of human rights is characterised by a
circular kind of interaction between the
national and the European levels. Human
rights protection begins and ends at home. It is
now up to you, to national authorities, both
ministries and parliaments, to take up this
challenge in a equally comprehensive manner,
where necessary with the help and support of
the Council of Europe. It is only thus that we
can all ensure that this reform becomes a suc-
cess.

On behalf of the Council of Europe, I wish
this Seminar every success. I thank you for
your attention. ★
CONCLUSIONS OF THE SEMINAR

Summary

There was general agreement that Protocol No. 14 must be ratified as soon as possible. The Court and its Registry should do everything they can to anticipate its entry into force. However, additional measures would also be called for. National measures by parliaments, governments and the courts are an indispensable component of the reform package. Member states are urged to examine closely and make use of the Recommendations, Declaration and Resolution adopted by the Committee of Ministers in 2004. Irrespective of Protocol No. 14, additional budgetary measures will be needed in view of the growing case-load of the Court. The Committee of Ministers has overall responsibility for seeing to it that the reform of the European Human Rights System becomes a success.

In particular, there was general agreement on the need to restore the balance between national Convention protection and international protection; both components must function effectively if the system is to work. Far too many cases come to Strasbourg which should, in accordance with the principle of subsidiarity, have been decided by the domestic courts. This requires above all the establishment of appropriate and effective remedies at the national level. The underlying aim of the Convention is to create a situation in which the great majority of individuals with complaints about violations of Convention rights do not have to come to Strasbourg, because their complaint has been satisfactorily addressed at national level.

Introduction

Participants focused on Protocol No. 14 to the European Convention on Human Rights and the declaration, recommendations and resolution adopted by the Committee of Ministers in 2004, as key components of the reform package. In their deliberations participants drew particular benefit from substantive presentations of Mr Luzius Wildhaber, President of the European Court of Human Rights, and Mr Pierre-Henri Imbert, Director General of Human Rights, Council of Europe, updated statistical analyses prepared by the Court on the increases in the case-load of the Court, and an Aide-mémoire on ensuring a rapid entry into force of Protocol No. 14 prepared by the Directorate General of Human Rights of the Council of Europe.

This document compiles observations of the Norwegian Chair at the end of the meeting. Particular emphasis was put on practical steps to be taken in order to implement the reform package swiftly and effectively, consistent with steps recommended by the Committee of Ministers of the Council of Europe. This is not a negotiated document and the Norwegian Chair is solely responsible for its contents. In the view of the Chair, the following points reflect views which enjoyed broad support among participants of the seminar.

Conclusions

There was broad support for the following conclusions:
I. Issues relating, in particular, to the Court

1. Protocol No. 14 must be ratified as rapidly as possible so as to benefit as soon as possible from the capacity and efficiency increases it will bring to the Convention system. Attention is drawn to practical guidance provided in the aide-mémoire issued by the Directorate General of Human Rights.

2. The European Court of Human Rights and its registry are encouraged to anticipate the Protocol’s entry into force by adapting, as far as possible, their working methods and procedures. Speeding up processing of cases could be aided by a review of the structure of the Registry and the early introduction of certain working methods designed for single judge formations and new Article 28 powers.

3. Irrespective of Protocol No. 14, the Court’s caseload will continue to grow. As a consequence, the Registry will need additional resources, which may be lower than currently envisaged as a result of the entry into force of the Protocol.

4. It was acknowledged that Protocol No. 14 and the accompanying measures will not solve the specific problem of the Court’s huge backlog, which will continue to grow at least until Protocol No. 14 enters into force. The Court, together with the Secretary General and the Committee of Ministers, will have to discuss ways and means of solving this problem.

5. Work will also have to continue on the future evolution of the Convention system. Particular interest attaches to pilot judgments, which seem to be the most effective way of dealing with certain structural situations. It may moreover be useful, in this context, to distinguish between specific situations and endemic problems – which may call for different measures (see below).

6. Consideration may be given to amending the Rules of the Court to take account of cases revealing systemic problems. When a case which is potentially of this kind is communicated to the respondent state, the state might be asked to state its view as to whether there is an underlying problem affecting a class of individuals. This would give the state an advance indication as to the possibility of a pilot judgment and might also assist the Court in identifying systemic problems.

7. It was underlined that member states should ensure dissemination of leading judgments of the Court in the national language(s) in accordance with Recommendation Rec (2002) 13. This cannot be a responsibility of the Court, but should be an important task of states.

8. In order to reduce the flood of unmeritorious cases, the Court, the Council of Europe as a whole, member states and civil society should take measures to ensure that prospective applicants receive sufficient and independent information about the Convention’s basic admissibility criteria. Reference was made to the potential role, where appropriate, of information offices within the general human rights protection system, seen in the light of experience being gained at the Warsaw Council of Europe Information Office.

9. The balance must be restored between the national and international levels of human rights protection. The Court in Strasbourg is at present bearing a disproportionate part of the burden. Governments must assume to the full their responsibilities under the Convention, both when taking national measures and as members of the Committee of Ministers.

10. Intensified interaction is needed between the Committee of Ministers, the Court, the wider Council of Europe, member states and civil society in order to improve enforcement of the Convention at national level.

11. The Court was invited to look into ways and means of making its annual report, which should include, in particular, any findings with regard to structural situations, more accessible to the other institutions of the Council of Europe as well as to national policy-makers, including in parliamentary assemblies. Some form of executive summary highlighting the main issues could be drawn up.
II. As concerns steps to be considered with a view to speedy and effective implementation of the Committee of Ministers’ Recommendations to member states concerning measures to be taken at national level

12. The Committee of Ministers should assist member states in ensuring that adequate training in Convention standards – in all relevant fields of law – is fully integrated in university education and professional training in conformity with Recommendation Rec (2004) 4; the idea of a European programme to assist member states in implementing this Recommendation, especially as regards professional training for judges, was strongly endorsed.

13. Furthermore, the role that may be played by civil society in implementing the above-mentioned Recommendation was underlined. So was the particular need for continuous training for judges and other relevant groups of professionals, due to the continuously evolving nature of the Court’s case-law (“Formation continue”).

14. To facilitate the implementation of the various Recommendations and the Committee of Ministers’ regular review of it, member states should consider the possibility of setting up national task forces of ministries directly concerned to review critically the law and practice in all three areas (training and education; verifying compatibility of (draft) laws and practice with the Convention; improvement of domestic remedies), prepare a plan of action for measures in these areas, and oversee its implementation.

15. Emphasis was put on the need also to engage national parliaments or legislatures, in addition to the Parliamentary Assembly of the Council of Europe, as particularly useful partners in a dialogue on the need for appropriate national measures involving legislative steps. It was agreed that such contacts, where appropriate, should be considered by the Committee of Ministers and the Secretary General of the Council of Europe, and not by the Court itself. In such a context the summary annual report referred to under item 11 above, was considered of particular importance.

16. In addition, the Committee of Ministers might arrange for a review meeting to be convened, for example, at the end of 2005, to take stock of progress achieved and to ensure transparency.

III. As concerns steps to be considered at European and/or national levels when dealing with violations stemming from underlying systemic problems capable of generating large numbers of repetitive cases

17. There was general recognition of the need to anticipate and address systemic problems even before they lead to the adoption of a pilot judgment. The Commissioner for Human Rights could play an “early warning” role in this respect, including by bringing issues to the attention of the Committee of Ministers and the Parliamentary Assembly.

18. The Committee of Ministers might give terms of reference to the Steering Committee for Human Rights (CDDH) to ensure that, whenever the Court adopts a pilot judgment, the CDDH examine whether there are broader consequences also for countries other than the respondent state and, if appropriate, to propose a recommendation aimed at solving the problem.

19. With regard to pilot judgments which reveal truly structural or endemic problems, the Committee of Ministers should demand that the respondent state rapidly produce a comprehensive plan of action with a time-table for solving the problem. The Department for the execution of judgments should offer assistance if needed. The plan of action should be made public. Thus, civil society could assist the Committee of Ministers in ensuring that the plan is implemented.

20. Following a pilot judgment which reveals a truly structural or endemic problem, the respondent state should consider establishing a national task force between relevant ministries and authorities to prepare such a plan of action and ensure its sus-
21. With regard to pilot judgments which reveal a specific problem (but one which affects a large number of individuals), the Committee of Ministers should follow a fast-track supervision procedure and insist that the state concerned rapidly solve the problem so as to avoid overloading the Court with a large number of repetitive cases.

22. In appropriate cases, and without detracting from the legal obligations incumbent on Respondent states under Article 46 of the Convention, assistance from the Council of Europe to help a state execute a pilot judgment could also include financial assistance; the possible role of the Council of Europe Development Bank was specifically mentioned.

23. The Committee of Ministers should consider adopting an annual report on its activities with regard to supervision of the execution of the Court’s judgments, highlighting the most salient developments and problems, so as to enhance transparency and publicity.

24. In repetitive cases, the determination of just satisfaction is often a complex and time-consuming aspect, which may raise particular challenges e.g. of valuation related to property rights. Possible ways and means of dealing effectively with a multitude of such claims might be considered further by the Court together with the Committee of Ministers (one possibility would be for the Court to “outsource” such work to independent experts). As another example, reference was made to the possibility that, when a systemic problem has been identified raising particular valuation problems, the Committee of Ministers could, as appropriate, consider a separate international mechanism or encourage the state concerned to set up a national claims commission. Further study of these issues may however be needed, in light of differences of opinion at the seminar.

25. The pilot judgment procedure developed by the Court in the Broniowski v. Poland judgment of 22 June 2004 was welcomed as an effective way of dealing with violations affecting a category or class of persons. The Court was, however, invited to take care when selecting, from among a group of similar pending cases, a particular case for a pilot judgment so as to make sure that the case in question is really well-suited for statements concerning general measures.

IV. Furthermore, as concerns additional steps to be considered in order to improve and accelerate the execution of the Court’s judgments, notably those revealing an underlying systemic problem

26. In order to assist the Committee of Ministers’ supervision of the execution of pilot judgments, it might be useful to distinguish between, on the one hand, pilot judgments revealing truly structural or endemic problems and, on the other hand, pilot judgments revealing a specific problem which affects a large number of persons, as in the Broniowski case.

27. Direct application by national courts of the Court’s case-law and individual judgments would contribute greatly both to the effective implementation of the Convention and to accelerating the execution of certain pilot judgments as it would reduce the need for time-consuming legislative measures.

28. In a case of a consistent failure of a respondent state to execute a judgment, the Committee of Ministers should consider, in addition to the possible institution of infringement proceedings as provided for in Protocol No. 14 (when the Protocol has entered into force), the possibility of excluding the member state concerned from assuming leading positions or certain functions in the Organisation, or, even, suspending the member state’s voting rights in the Committee of Ministers. Reference was furthermore made to Article 8 of the Statute on expulsion of the state from the Council of Europe, as a last resort.

29. The responsibility of the Committee of Ministers with regard to improving and
accelerating the execution of the Court’s judgments was stressed. The ultimate purpose is to ensure greater respect for human rights obligations. Member states were urged to prepare themselves thoroughly in advance of Deputies’ meetings devoted to supervision of the execution of Court judgments, and to involve also ministries other than the Ministry for Foreign Affairs in those preparations.

30. The need was stressed for the Committee of Ministers to mobilise also other Council of Europe bodies in order to help overcome, in appropriate cases, certain difficulties encountered in the execution of a judgment. For example, targeted expertise could be provided through the Venice Commission or the Directorate General of Human Rights; the Commissioner for Human Rights can in his own work act in complementarity with ongoing Committee of Ministers’ supervision and thus produce useful synergies; the Parliamentary Assembly, the Secretary General and/or the Commissioner for Human Rights might be useful partners for approaching national parliaments if execution problems are linked to the legislative process.

31. In accordance with the terms of Recommendation No. R (2000) 2, member states which have not already done so, were encouraged to adopt as soon as possible legislation permitting the reopening of national proceedings found to be in violation of the Convention.

32. The Committee of Ministers should follow a fast-track supervision procedure in cases requiring urgent execution measures because of what is at stake for the individual applicant.
THE IMPROVEMENT OF DOMESTIC REMEDIES WITH PARTICULAR EMPHASIS ON CASES OF UNREASONABLE LENGTH OF PROCEEDINGS

Workshop held at the initiative of the Polish Chairmanship of the Council of Europe’s Committee of Ministers

Strasbourg, 28 April 2005

Proceedings
Welcome speeches

Address

Mr Adam Daniel Rotfeld

Minister of Foreign Affairs of the Republic of Poland

Excellencies, ladies and gentlemen,

It is my pleasure to welcome you this morning – as the Chairman of the Committee of Ministers of the Council of Europe – to the workshop on the improvement of domestic remedies.

I am very pleased that the workshop takes place within the 57th meeting of the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights. This provides us with a unique opportunity to share national experiences and discuss domestic solutions in the field of effective remedies, with particular focus on the excessive length of judicial proceedings.

The Polish Chairmanship of the Council of Europe put forward the initiative of organising such workshop bearing in mind one of the priorities of its Presidency – and notably – strengthening human rights and ensuring the effectiveness of the European system of human rights protection.

I believe that this workshop constitutes also a timely prologue to discussions planned within the agenda of the Third Summit of the Council of Europe, which will be held in Warsaw on 16-17 May 2005.

Ladies and gentlemen,

The positive influence of the European Convention on democratic societies is remarkable and well known. However, we should remember that the success of the Convention still depends to a large extent on the interaction between the domestic systems of human rights protection and the European umbrella held by the European Court of Human Rights in Strasbourg.

In my short speech I wish to draw your attention to the memorandum adopted by the Plenary Court on 21 March 2005. We can find there some important issues concerning the European Convention system, which – according to the Court – deserve special attention during the Third Summit. Let me now address some of these issues.

Firstly, it goes without saying that the system’s effectiveness demands various steps to be taken at national level. Two main things should be indicated in this regard: a rapid ratification of Protocol No. 14 as well as conscientious implementation of the Recommendations adopted by the Committee of Ministers in May 2004.

Especially as regards the Recommendation on the improvement of domestic remedies, it should be noted that states were urged to ascertain that domestic remedies exist for anyone having an arguable complaint of a violation of the Convention, and that these remedies are effective. It has been almost a year since this Recommendation was adopted. It is hoped that the member states not only translated this Recommendation into national languages, but also took action with a view to its full implementation.

Of course, the process of reviewing the effectiveness of the existing domestic remedies may take more than one year. However, the states were encouraged to do all they can in order to ensure that effectiveness of domestic remedies is being given a priority.
The improvement of domestic remedies

I should also mention that the efforts for ensuring the effective system of domestic remedies are co-ordinated and encouraged within the European Commission for Democracy through Law (Venice Commission). The participants to this workshop are presumably familiar with the draft report on national remedies in respect of excessive length of proceedings, prepared by the Venice Commission in March 2005. I believe that such initiatives should be promoted and brought to the attention of all decision-makers in the member states.

Secondly, the Court’s memorandum points out some main challenges ahead of the European System of human rights protection. The governments should take note of the fact that Protocol No. 14 will not by itself decrease the number of cases coming to Strasbourg, nor will it resolve the problem of the Court’s existing caseload. What is particularly important in this regard, is that the system requires further changes. Long-term options and strategies need to be formulated.

In other words, we must ask ourselves how do we imagine the European system of human rights in the future? What system do we want to leave the generations to come? It is the vision of the system in the 21st century, which should guide our next steps and actions.

I subscribe to the idea that the Third Summit of the Council of Europe should address the questions indicated above. Moreover, comprehensive discussions should be launched both at international as well as national levels, in order to identify likely scenarios and prepare adequate responses. These long-term strategies will allow for a better co-ordination of the government’s action. They may also provide the Court with necessary input for a continuing dialogue with governments aimed at preserving its efficiency.

As Minister for Foreign Affairs of the Republic of Poland, I can assure you that during the Third Summit there will be plenty of opportunities to focus on the Court’s future. It is also the Summit’s aspiration to offer a framework for discussions on the long-term strategies for the European Convention system. The debate should include independent experts, eminent academics, as well as distinguished national and international judges.

Thirdly, the challenges for the system include the accession of the European Union to the European Convention on Human Rights. This issue also involves an examination of the EU’s internal remedies in accordance with the principle of subsidiarity. The negotiations on the EU’s accession will require a close look at the institutional and procedural solutions.

The exchange of experiences between the European Union and the Council of Europe should be developed both before as well as after accession. I believe that both organisations have much to offer in terms of initiatives in the field of improving effectiveness of national legal systems. By way of example – the proposal for an EU directive on certain aspects of mediation in civil and commercial matters (presented by the Commission) reflects a trend which is also close to the Council of Europe’s efforts aimed at ensuring a better access to justice.

Ladies and gentlemen,

Let me now say a few words about some legal initiatives of the Polish Chairmanship of the Committee of Ministers. We have prepared them convinced that strengthening human rights requires a forward-looking approach. We should constantly react to new challenges and needs. On the eve of the Third Summit we should think in what areas the Council of Europe action is not sufficient yet and requires a more creative attitude. Poland would like to contribute to this reflection and has prepared some ideas for consideration.

At this seminar we are discussing means by which we could better guarantee appropriate quality of domestic legislation and practice as regards the right to a fair trial. However, we should not limit ourselves to this aspect of Article 6 but we should also think about the subjects entitled to this right. In this context let me draw your attention to the important evolution of the Court’s case-law extending the guarantees of Article 6 to the victims of crimes. This issue is worth our deeper examination and drawing conclusions. Maybe we should...
consider institutionalising this tendency in a new Protocol to the Convention.

Protection of victims of crimes is becoming a more and more important part of the actions of the Council of Europe established to defend the rights of the most vulnerable groups of persons. Poland is ready to support them. In this task we should not forget about a particular category of victims – children. Their right to protection from all forms of violence is also present in the case-law of the European Court. Nevertheless, the effective protection of children from domestic violence still faces many obstacles both in law and in practice of many states.

In our opinion the action of the Council of Europe should be a package comprising all the relevant measures: education, social policies and standard setting. However, awareness raising and social policies are not sufficient if legal regulations are not precise.

Therefore, drawing inspiration from the case-law of the European Court, Poland would like to propose – for further reflection – to examine an idea of drafting a legal instrument on protection of children from domestic violence. Such an instrument should aim at facilitating the implementation of their rights by removing possible gaps in the law or practice that reduce the level of their protection against violence.

Ladies and gentlemen,

This seminar and these initiatives aim at strengthening the effectiveness of the European Convention on Human Rights system. However, we should not forget about the remaining conventions and protocols of the Council of Europe amounting now to about 200 instruments. This rich and diverse treaty system constitutes a real treasure, which requires our special attention and constant efforts. While planning and drafting new instruments we should – at least from time to time – look backwards and draw conclusions. The Third Summit provides us with a good opportunity in this respect.

Some conventions have never entered into force. Some have become obsolete. Some require amendments or improvement of practice. Some have been forgotten but still may be useful. Other should be adjusted to the new requirements and challenges. Some are worth opening for the accession of countries outside the Council of Europe.

Therefore Poland proposes to carry out a comprehensive review of the Council of Europe convention system with the intent of strengthening its effectiveness, updating to new requirements and promoting common standards. It would be a demanding task. Nevertheless, it would streamline the Council of Europe convention system and in this way increase its efficiency and confirm the unique role of the Council of Europe as a standard-setting pan-European organisation able to respond to the new challenges of the 21st century.

Let me once more express my strong conviction that this workshop will contribute to a better understanding of how to ensure an effective system of remedies at national level.

I also believe that your presentations and discussion will constitute an important contribution to the actions taken with view of reducing the caseload of the Court. Indeed, we should remember that the practical measures and remedies within your national legal systems are the key to success.

Before I give the floor to Mr Wildhaber I wish to express my gratitude – on behalf of the Polish Chairmanship – to the Secretariat of the Council of Europe for their constructive assistance in preparing this workshop.

I hope you will be having a thought-provoking discussion.

Thank you for your attention.
Mr Luzius Wildhaber

President of the European Court of Human Rights

Mr Chairman, Minister, ladies and gentlemen,

I see so many eminent specialists among you that I will go straight to the heart of the problems. And I wish to make three remarks.

The first remark is one that I should perhaps not make as President of our Court. But I want to insist on the importance of effective remedies, both at the domestic and the European levels. The Convention is all about remedies. In a sense, the existence of effective remedies is more important than the wording of the Convention itself. This being said, I shall withdraw my remark at once and shall proceed to the second remark.

Our Court says in its case-law that the states are responsible for organising the judicial system so that it can live up to the requirements of Article 6 of the Convention. The same is true, of course, of our Court, and much to my regret, I am bound to say that the Council of Europe and its member states have not organised and equipped our Court in a way that would allow it to fulfil its tasks properly. The figures that we use differ all the time, but the direction of the figures is always the same. The consolidated figures for the year 2004 show that some 44 100 applications were submitted to the Court; we pronounced 734 judgments; 20 350 cases were declared inadmissible or struck out; some 11 160 applications were disposed of for administrative reasons; and some 12 000 cases could not be handled in this time-span and remain pending. The Secretary General has commissioned two audits, one from the internal auditor, one from an external British auditor. I shall not give you all the details of the audits, but in essence they say that the Court would need the double of its budget and of its staff to cope with all incoming applications, and if it were to cope with its backlog speedily, it would need still more means. The Court’s budget is at present 40 million euros; the external auditor says that by 2007 the budget should rise to 165 million euros; the total budget of the Council of Europe stands at 186 million euros.

In the real world, the Court will not get 165 million euros in 2007, for all sorts of reasons. All in all, the alternatives are quite self-evident. There are in reality, five options.

Firstly, you continue with the present system and give the Court more money. Not 2% more, but massively more, double the budget, as the audits advocate. This is unlikely to happen.

Secondly, access to the Court might have to be restricted. This was of course discussed in the context of Protocol No. 14, and the outcome was Article 35, which by itself will not be sufficient to turn the tap, although Protocol No. 14 should nevertheless be ratified speedily.

Thirdly, more and more cases should be dealt with by the national courts within the domestic legal systems. This would in a sense be ideal. However, our experience shows that up to now this has not been easy to bring about.

Fourthly, an approach that is always popular in politics is to do nothing and let the backlog accumulate further.

Fifthly, in a complex world, the solution is likely to be a complex and a mixed one. This is what I believe will happen. In the light of the two authoritative audits, to do nothing cannot be an option. The steady increase of applications to the Court is a sign of the success of the Court and the Convention. In no way can it be blamed on the Court.

My third remark is focused on the topic of today’s seminar. The length of proceedings is the classical category of what we call “repeti-
There are perhaps between twenty and thirty categories of repetitive cases, and they reach from the non-execution of final court judgments via the composition of national courts, the lack of payment of adequate indemnities for evictions, claims for restitution of nationalised property, or widowers' children's rents, all the way to follow-up cases in situations of conflict or civil war. However, the problem of the length of proceedings is the most widespread one and concerns about half the member states, normally those who do not have effective remedies. In some of the past five years, fully 60% of our judgments on the merits concerned the length of proceedings. It is my conviction that in a field where there are literally hundreds of judgments of our Court, the problem should be repatriated to the domestic legal systems. You do not need a European Court of Human Rights in order to find out that ten years in one instance is somewhat long. Our Court's case-law has perhaps shifted the focus too much to the question of the payment of an indemnity. Let us not forget that the primary aim of the finding of a violation must be the restitution in integrum, the repair of the violation of Article 6 of the Convention, and this must mean that first and foremost the procedures which have lasted too long must be brought to an end. If you speak of domestic remedies, you should never forget that aspect.

And now I wish you a lot of success. If you are successful, you will have served well the applicants, the national courts and governments, and finally our Court. Let us therefore hope that you will be successful.
Mr Krzysztof Drzewicki

Former Chairperson of the CDDH, Chairperson for the Workshop

I have the great pleasure to welcome the initiative of the Polish Chairmanship of the Council of Europe to organise a Workshop on the Improvement of Domestic Remedies, with particular emphasis on cases of unreasonable length of proceedings. The very choice of the theme, so significant for effective protection of human rights, is a success in itself. Our expectations are however far greater – the Chairmanship has intended to address the problem of domestic remedies with the aim of their improving through appropriate legislative and judicial endeavours. A search for proper national solutions to the problem of effective remedies may best be achieved by a wide debate and exchange of experience – the aims expected for the achievement by this Workshop.

1. Identification of the underlying problem

The problem of the length of judicial proceedings has become more and more important because for decades it has continued to be on the regular increase and has expanded geographically in Europe. Upon close glance, the European situation can tentatively be characterised by distinguishing two groups of states affected in substantially different ways by the “malaise” of protracted proceedings.

A first group of states have shown apparent symptoms of a more serious stage of development of this “malaise” – a structural stage. It affects widely and profoundly the whole organisational and functional system of judiciary bringing about multidimensional and persistently paralysing effects and consequently a large-scale denial of fair trial. Such a situation has traditionally been discernible in Italy (albeit predominantly in civil cases), but it has recently made substantial progress in Austria, France, Croatia, Czech Republic, Greece, Hungary, Poland, Portugal, Slovakia, Ukraine, Russia and others.

A second group is made up of established and well-functioning democracies tradition-
ally renowned for their efficient administrations of justice (e.g. Nordic countries, Germany, the Netherlands, Ireland or the United Kingdom). Although some increase of length-of-proceedings cases has been recorded in these countries, on the whole however they still show the ability to counteract symptoms of unreasonable length of proceedings before their courts.

From yet another perspective it is often submitted that most of the cases involving breaches of the “reasonable time” guarantee come from civil law jurisdictions and involve much longer periods of time than would normally be found in common law courts. It is in this context that one should note a complex case from a common law country concerning defamation proceedings against applicants for producing and disseminating an allegedly defamatory leaflet within an anti-McDonalds campaign. As established by the European Court of Human Rights, the very trial took place “between 28 June 1994 and 13 December 1996. It lasted for 313 court days, of which forty were taken up with legal argument, and was the longest trial (either civil or criminal) in English legal history”. Such a “record-breaking” length of proceedings might actually be perceived in many other countries as a reflection of very high performance of the administration of justice.

2. Causes of the excessive length of judicial proceedings

Identification of causes is usually a helpful device in designing a strategy for preventing and remedying a phenomenon at stake. Such a diagnosis is however not an easy task because there is no single cause generating or contributing to excessive length of judicial proceedings. Its causes differ from country to country and are deeply determined by a prevailing legal system and legal culture.

One may cautiously submit about the whole of Europe that excessively long judicial proceedings have been caused above all as a side-effect of gradual strengthening of the judiciary as the “third power”. It has appeared to be a natural, though delayed, reaction against gradually increasing strength of the “second power”. This process has thus been generated by the increased importance of the rule of law leading to increased calls for controls of the legality of government action by the courts as well as the development of complex economies and technological innovations calling for more conflict resolution by the state, including through the courts. The development of human rights protection largely through judicial guarantees contributed in itself to the increase of cases submitted to the courts, and consequently to longer duration of their judicial determinations.

The whole post-war period in Europe may be characterised as a period of constant extension of the scope of judicial powers. It may tentatively be subsumed into three dimensions:

- *ratione materiae* extension of judicial powers to new issues and areas;
- extension of judicial powers to pre-judicial stages of proceedings; and
- extension of judicial powers to post-judicial stages of proceedings.

The first group concerns issues and areas, which earlier were not under the jurisdiction of the courts of law but were later given judicial guarantees. This trend is best reflected by the

---


19. See Final Decision as to the Admissibility of Application No. 68416/01, 6 April 2004, pp. 8-9, and the judgment: Case of Steel and Morris v. the United Kingdom, judgment, 15 February 2005, paragraph 19. The complex character of this record-breaking trial is also reflected in the following facts: transcripts of the trial ran to about 20 000 pages, there were about 40 000 pages of documentary evidence, and in addition 130 witnesses gave oral evidence.

20. Among the protracted proceedings the most “famous” is the Greek case of “olive grove”, which within temporal jurisdiction of the European Court lasted “only” 9 years, although in the domestic proceedings it was instituted in 1933 – see the case of Yagtzilar and Others v. Greece, judgment, 6 December 2001, paras. 27 and 31. Other well-known lengthy cases took, before reaching Strasbourg, 28 years – case of Brigandi v. Italy (19 February 1991); 18 years – case of Tusa v. Italy (27 February 1992) or 19 years – case of Poiss v. Austria (23 April 1987).
process of establishing constitutional courts, administrative courts and labour and social security courts. Some of the new courts have emerged from the existing courts of law but have been granted more autonomous positions within the judiciary. All these courts have usually been granted further powers. Within this category of extensions one should not overlook the extension of judicial guarantees to regulatory offences (all of them or on appeal solely), technical areas (in the field of maritime law, patent law, etc.) and to appellate stages of disciplinary procedures of professional corporations (e.g. medical, veterinary, academic, military and other ones).

The second category of powers demonstrates extensions of judicial guarantees to pre-judicial stages (e.g. determinations on pre-trial detention, their further extensions, appeal to courts against certain decisions of prosecutors in the course of the investigative stage of proceedings).

The third category of powers shows the extension of judicial guarantees to post-judicial phases, such as questions falling within the enforcement, executive and penitentiary proceedings, as reflected in the activities of bailiffs and penitentiary courts.

While identifying the causes of increasing length of judicial proceedings in Europe one cannot overlook those, which are specific for individual countries or their groups. It seems that the peculiar situation in Italy has become strongly embedded in legal culture. Yet another specific feature is characteristic of new members of the Council of Europe from formerly autocratic countries (e.g. Spain, Portugal and central and eastern Europe). This group of countries has been undergoing profound transformations of their systems of governance, including the administrations of justice. They had thus not only to cope with an all-European modern increase of judicial powers (the above first and second categories of extensions) but also to arrange for a profound reconstruction of their judicial systems and restoration of the independence and impartiality of the courts. In addition, judges from Central and Eastern Europe had also to meet challenges in new areas, previously unknown to them, like those resulting from market economy.\(^\text{21}\)

In conclusion it may be submitted that we have to do with a fairly diversified range of causes of the lengthy judicial proceedings. Before addressing them they must first be precisely identified. Otherwise the recommended countermeasures may prove to be futile and ineffective.


3. Counteracting the undue length of judicial proceedings

Bearing in mind the multitude and diversity of causes contributing to the excessive length of judicial proceedings in Europe it must be concluded that any efficient countermeasures should consequently be designed in a way tailoring them to the nature of causes addressed. The choice of proper remedies should thus be preceded by a comprehensive diagnosis of the causes at stake.

Under pressure from the democratic societies the countries affected by the “malaise” in question started to address the phenomenon of undue length of proceedings and to adopt remedial measures. In numerous countries special programmes of organisational and financial support for the judiciary have been launched. But only in some of them have these efforts brought the envisaged results.\(^\text{22}\) In other countries the improvement of the proceedings has appeared to be slow or hardly perceptible, often resulting in further accumulation and not reduction of the backlog.

The end result has in any event contributed to the continuing sense of the denial of justice. The ineffectiveness of measures taken in many countries generated further internationalisa-
tion of the problem of excessive duration of judicial proceedings. This trend has become discernible in the activities of numerous bodies of the Council of Europe, with a leading role assigned to the European Court of Human Rights. Its legal basis contains an explicit standard to that end. Under Article 6, paragraph 1 of the European Convention on Human Rights, “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal”. This provision gave the European Convention a pioneering position in the normative formulation of the protection against undue length of judicial proceedings and, more importantly, in developing the jurisprudential concepts and criteria for assessment of “reasonable time” standard.

In the course of time, the number of cases concerning alleged violations of the right to trial within reasonable time has been regularly increasing. At present, this category of cases constitutes the largest number of complaints on a single issue. As submitted elsewhere, “In 2003, out of total 703 judgments delivered, a third – 263 – were about the length of proceedings in national courts”. Actually, it means that there were many more complaints lodged with the Court on this single issue but they had been disposed of at stages of registration, admissibility or friendly settlement. This shows not only that the European Court has to devote more of its time than ever before to the length-of-proceedings cases but above all one may conclude that our legal systems have not always been able to ensure efficient justice within a reasonable time.

The European Court of Human Rights worked out its doctrine on the reasonable time rule of court proceedings, including criteria for assessment of their length. The Court has pointed out that the Convention places a duty on the States Parties to organise their legal systems so as to allow the courts to comply with the requirements of Article 6, including that of trial within a “reasonable time”. For decades, however, the Court has been hesitant to elaborate on the issue of taking specific remedial actions against undue length of judicial proceedings, in spite of having at its disposal a “dormant” arrangement of Article 13 under the guise of the right to an effective legal remedy. The European Court’s typical determination in such cases contained a traditional conclusion whereby once a violation of “reasonable time” standard from Article 6, paragraph 1 is found there was no separate examination of an alleged breach of the right to an effective remedy under Article 13.

Likewise, the Committee of Ministers, within its powers of supervising the execution of judgments (Article 46, paragraph 2 ECHR), confined itself to requiring of states “regular” remedial measures of individual and general character. Thus for years the Committee of Ministers made no effective attempt to encourage states in setting up effective domestic remedies. One must, however, admit that in the context of the restrictive interpretation of Article 13 in conjunction with Article 6 by the Court, the Committee’s liberty has been fairly limited.

22. In the case of Buchholz v. Germany (6 May 1981, paras. 39-63), the European Court of Human Rights appreciated the legislative, organisational and budgetary measures taken when the German Government had experienced the backlog of labour court business in the 1970s. Since those measures were largely successful in expediting the proceedings before the labour courts, the Court did not find a violation of the “reasonable time” standard in this case. 23. In addition to the work of existing intergovernmental bodies and the Parliamentary Assembly, length of judicial proceedings is also on the agenda of a newly established body – the European Commission for the Efficiency of Justice (CEPEJ). For more see P. Albers, “The Role of the CEPEJ in Promoting the Efficiency of Justice”, in Report of the seminar “Implementation of human rights: the efficiency of justice in the Council of Europe and its member states”, op. cit., pp. 51-56. 24. See N. Mole, op. cit., p. 89.


26. For more on the procedure for execution of judgments and their supervision see Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2, of the European Convention on Human Rights, on 10 January 2001 at the 736th meeting of the Ministers’ Deputies. The Rules replaced earlier instruments on the application of executive provisions of the European Convention.
Confronted with a continuous “flood” of cases against excessive court proceedings and low progress in remedying the situation at domestic levels, the European Court decided to change fundamentally its attitude in regard to the provision of legal remedies in regard to allegations of unreasonable length of proceedings.

4. Shifting the interpretation

The change in question came with the Court’s judgment in the case of Kudla v. Poland of 26 October 2000 in which the Court departed from its “half-way” approach and stressed that it was important to make sure whether there was an effective remedy in such cases in order to conform with Article 13 of the Convention. The Court consequently found violation in the fact that in addition to violation of Article 6 itself there was also a breach of Article 13 by the very absence of an effective domestic remedy in Poland against excessive duration of judicial proceedings. Obviously, these new elements of the judgment constitute its ratio decisionis and not obiter dicta. Therefore, along with Poland, all other States Parties were actually invited to reconsider their positions on the issue of introducing domestic remedies to address judicially protracted proceedings, be they criminal, civil or otherwise. First, the steady increase of cases under Article 6, paragraph 1 made the Court apply the criteria for assessment of excessive duration of proceedings more liberally and flexibly. This trend brought about above all a gradual shortening of time-periods for assessing whether a proceeding was excessive or not. Until about mid-1990s only very serious and substantial delays of the domestic judicial proceedings resulted in finding a violation of the Convention. Subsequently, a lot more of much shorter proceedings were considered excessively long. With a feedback effect, the more liberal interpretation prevailed, the more and more new applications were filed with the Court.

Second, the increase of applications against allegedly unreasonably long proceedings showed the embarrassing inability of the Court to deal with them in a fully judicial way and in “a reasonable time”. This became discernible when the Court abandoned its earlier practice of profound assessment of the facts and law of individual cases. Instead, the Court moved gradually to “an overall assessment” and subsequently to an even more “summary” assessment by reference to a general formula whereby “an accumulation of identical breaches” of “reasonable time” requirement “constitutes a practice that is incompatible with the Convention”. Such resort to a pattern of structural violations was merely followed by a statement that the length of proceedings in a specific case constituted a “further example of the practice referred to above”. By such a brief and “quasi-automatic”


28. See M.-A. Eissen, The length of civil and criminal proceedings in the case-law of the European Court of Human Rights, Strasbourg: Council of Europe Publishing, 1996, Human Rights Files No. 16, pp. 20-21, who recalled that the Court began its examination of cases “with a statement marked by an intellectual modesty, relativism and realism”: “the reasonableness of the duration of proceedings covered by Article 6 […] must be assessed in each case according to its circumstances”.

A WORK IN PROGRESS
examination of cases by resort to a generalised assessment, the Court marked a departure from individual consideration of specific circumstances of submitted applications. It dealt with cases as clusters or aggregates and not as individual complaints. This way the Court became rather an administrative body than a judicial institution. Needless to say, conceptual value of those judgments has appeared to be very poor for development of case-law and legal theory.

One may submit therefore that the European Court of Human Rights contributed to the crisis of the whole system. When additional financial and staff resources designed for overcoming the crisis did not bring about the expected results, the Court reacted by a change of its position on Article 13. The principle of subsidiarity, formerly somewhat overlooked in many instances, became the main instrument for pointing to domestic legal orders as targets to be addressed. The Kudla judgment forwarded therefore so vigorously a message that the main thrust of addressing length-of-proceedings cases was to encourage domestic legal systems to establish effective remedies.

Following the impetus given by the Court in this crucial judgment, several solutions have been put forward by member states and in order to ensure the existence of effective remedies. This process was further encouraged by the conclusions of the European Ministerial Conference on Human Rights, held in Rome on 3-4 November 2000, thus a few days after the Kudla judgment had been delivered. In a legal parlance reflecting broader meaning than that of Article 13 ECHR, Resolution I boldly encouraged member states to “ensure that the exercise of the rights and freedoms guaranteed by the Convention benefits from an effective remedy at national level”³⁰.

Consequently, the question of domestic remedies became an essential part of the task to guarantee the long-term effectiveness of the Court, the task translated to specific terms of reference for the Steering Committee for Human Rights (CDDH) and the Liaison Committee with the European Court of Human Rights. Reflections of the former focused on three areas, including that of “prevention of violations on a national level and improvement of domestic remedies”³¹.

Within this dimension of endeavours for guaranteeing the long-term effectiveness of the Court, the work by the CDDH and its subordinate body – the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR) – contributed to the adoption of Recommendation Rec (2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies. Its text goes beyond a mere set of recommended guidelines for States Parties and the appendix thereto also contains an extensive examination of the workings of Article 13, opportunities of its dynamic reinterpretation in regard to the whole catalogue of substantive rights of the Convention and for the needs of developing domestic remedies. Not surprisingly, both the Recommendation and its appendix contain separate sections devoted specifically to domestic remedies against unreasonably long proceedings.³²

At the same time, the Committee of Ministers and the member states also reinforced their action to come to grips with the root problems both in the context of the execution

²⁹. For manifestations of those trends in case-law see Salerno v. Italy, judgment of 12 October 1992, para. 19, and Bottazzi v. Italy, judgment of 28 July 1999, paras. 22-23, as well as the dissenting opinion of one judge on the latter.

³⁰. See Resolution I paras. 10 and 14 i. The President of the Court, Mr Luzius Wildhaber, emphasised in his speech that the Kudla judgment was explicitly referred to as one of five major challenges facing the Court. See Proceedings. European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th Anniversary of the European Convention on Human Rights. Rome, 3-4 November 2000. Strasbourg: Council of Europe Publishing, 2002, pp. 39 (texts adopted by the Ministerial Conference are reproduced ibidem, at pp. 165-174).

³¹. See Final Activity Report of the CDDH “Guaranteeing the long-term effectiveness of the European Court of Human Rights”, adopted by the CDDH on 8 April 2004 (see para. 6 and Section A) in Guaranteeing the long-term effectiveness of the European Court of Human Rights. Collected texts, Strasbourg: Council of Europe, 2004, pp. 8-12.

³². See item III of the operative part of the Recommendation and paras. 20-24 of the appendix thereto. See both texts – ibidem, pp. 69-76.
of the European Court’s judgments and on the intergovernmental level and notably through the setting up of the CEPEJ and tasking it with examining a set of issues from the perspective of reforming domestic judicial systems.

5. Challenges ahead

All the above developments prompt further action within the broader goal of strengthening the European Court of Human Rights which has been continuously encountering an ever-increasing number of applications, among which those against unreasonably lengthy judicial proceedings unequivocally prevail.

This is why today we should concentrate on what has been achieved so far with respect to the improvement of domestic remedies in order to help ourselves to better see what remains to be done. Therefore the purpose of this Workshop is to share national experiences. Three rapporteurs will present this afternoon the Czech, Italian and Polish approaches. I would like to encourage participants to a lively, rather informal, exchange of views. It is good to note that, so far, 18 member states have already sent information to the Secretariat on national experience.33 I would like to encourage the others to do so in the future. This will help the DH-PR in the work entrusted to it by the CDDH.

For these needs, let me recall briefly the background of this exercise. Our Workshop is placed in the context of the follow-up to the Committee of Ministers’ 114th session (12-13 May 2004). At that occasion, the Ministers decided that the Council of Europe had to ensure “the effectiveness of the implementation of the European Convention on Human Rights at national and European levels”, which means, inter alia, that the Ministers’ Deputies will review, on a regular and transparent basis, the implementation of a number of major recommendations addressed to member states. Among them, Recommendation Rec (2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies became the main reference point.

Taking into account national examples of good practice, member states were recommended to “ascertain, through constant review, in the light of case-law of the Court, that domestic remedies exist for anyone with an arguable complaint of a violation of the Convention, and that these remedies are effective, in that they can result in a decision on the merits of the complaint and adequate redress for any violation found”. They were called to “review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court”. Finally, member states were recommended to pay particular attention to the “existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings”.34

Let me insist on the importance of the topic, both for the Parties to the ECHR and for the Court:

- For the Parties to the ECHR – Having in mind the subsidiary character of the supervision mechanism set up by the Convention, it is for member states to ensure that domestic remedies are effective in law and in practice, and that they can result in a decision on the merits of a complaint and adequate redress for any violation found. The nature and the number of applications lodged with the Court and the judgments it delivers show that it is more than ever necessary for the member states to ascertain efficiently and regularly that such remedies do exist in all circumstances, in particular in cases of unreasonable length of judicial proceedings.

- For the Court – The availability of effective domestic remedies for all arguable claims of violation of the Convention should permit a reduction in the Court’s workload

as a result, on the one hand, of the decreasing number of cases reaching it and, on the other hand, of the fact that the detailed treatment of the cases at national level would make their later examination by the Court easier. The improvement of remedies at national level, particularly in respect of repetitive cases, should also contribute to reducing the workload of the Court.

The DH-PR has been called, at this stage, to collect and assess information. But it is clear that the next step will be to ensure proper assistance to member states which request help in the implementation of this Recommendation. Let us hope that this Workshop will be fruitful in providing the DH-PR with “food for thought” for its further work in this field.
STATE OF DEVELOPMENTS
FROM THE ECHR PERSPECTIVE

GUARANTEEING THE LONG-TERM EFFECTIVENESS OF THE ECHR: THE IMPORTANCE OF EFFECTIVE REMEDIES

Mr Michal Balcerzak

Nicholas Copernicus University, Torun, Poland

Let me start by saying that it is a great privilege for me to have an opportunity to address some preliminary issues at this workshop. Having regard to the distinguished speakers who opened today’s workshop, as well as eminent experts who are going to present their interventions later, I have to say that I consider my task here as an entrée rather than the main course.

Nevertheless, I should start by stressing that hardly anyone would be in a position to undermine the importance of domestic ways which are used to redress human rights violations. The remedies provided for in internal legal systems of the State Parties are crucial both in terms of the long-term, as well as the short-term effectiveness of the system. It is interesting that we rarely clarify what we mean by the long-term effectiveness as distinguished from the short-term one. It may prima facie appear as a secondary consideration, but in fact it is not insignificant.

Controversial as it may sound, I am of opinion that both Protocol No. 14 as well as the Recommendations of the Committee of Ministers (adopted in May 2004) which deal with effectiveness, concern a short-term perspective. These instruments were designed to improve the effectiveness of the system in the short run, that is to prevent it from a breakdown. But they are relevant in a perspective of four or six years. My submission is that the so-called long-term perspective concerns decades rather than years. We should not avoid discussing the desired vision of the Convention system in a more distant future.

In these terms, domestic remedies have a main role to play. In the long run, the point of gravity of the system cannot lie in the Court and its Registry. There is a serious need to decentralise the Convention system and truly base it on an assumption that domestic legal protection is a front line. It follows that we should strive at restoring the true meaning of the principle of subsidiarity. The priority must be given to these domestic actions which allow for improved and better tailored domestic remedies. In fact, it is not the Council of Europe who has a primary task of ensuring an efficient remedial protection of human rights – it is a challenge for the member states.

To sum up my first argument – there is hardly any vision of the Convention system in a long perspective without domestic remedies. But also – let us take a step forward and ask ourselves the following question: is there any long-term vision of the system at all? If not, perhaps it is time to elaborate one?

As I am supposed to deal with the issue of effective remedies, I decided to discuss briefly the right to an effective remedy, as guaranteed under Article 13 of the European Convention. Firstly, it should be reminded that the right to an effective remedy is an accessory guarantee,
which means that it has actually no independent role to play in the Convention system. An applicant may not claim a violation of Article 13 in abstracto, i.e. with no link whatsoever to a material right or freedom secured by the Convention or additional protocols thereto. The dependent character of Article 13 is similar to Article 14 of the Convention (prohibition of discrimination).

The dependence of Article 13 does not imply that the application of this guarantee must be preceded by violation of the rights and freedoms established by a national authority. Initially the European Commission of Human Rights took an opposite view, having assumed that the words are violated (in French: ont été violés) in the text of Article 13 require a preemptive establishment of the alleged violation. In fact such interpretation would deprive this guarantee of its meaning – if a violation has already been established in domestic law, then an applicant must have had recourse to an effective remedy before a national authority. Fortunately, that ambiguity was cleared up by the Court in its Klass v. Federal Republic of Germany judgment of 1978.

The line of reasoning adopted by the Court in the Klass judgment was confirmed five years later in the Silver and Others v. the United Kingdom case of 1983. In the same judgment the Court elaborated on the specific attribute of the “claim” which may give rise to an issue under Article 13: where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before national authority in order both to have his claim decided and, if appropriate, to obtain redress (§ 113 of the Silver judgment). It should be noted that the Court has never formulated any specific hints as regards the “arguability test”. Some criteria were put forward by the European Commission of Human Rights in the Boyle and Rice v. the United Kingdom case: in the Commission’s view such a “claim” should (a) concern a right or freedom guaranteed by the Convention; (b) not be wholly unsubstantiated by the facts; and (c) give rise to a prima facie issue under the Convention. The Court’s case-law has not explained further the arguability test introduced in the Silver judgment. It seems that the arguability is determined by the Court ad casum.

Effectiveness of a remedy does not require certainty as to a favourable outcome, but on the other hand no prospects for success would not satisfy the requirements of Article 13 either. The remedial effectiveness inherent in Article 13 corresponds with the obligation to exhaust the domestic remedies before lodging an individual complaint to the Strasbourg Court (Article 35 (1) of the ECHR). The case-law of the Court clarified that there is no obligation to exhaust remedies which are ineffective or unavailable. The standard of remedial effectiveness in both Article 13 and Article 35 (1) seems to be uniform.

Let me refer also to one of the milestones in the Court’s jurisprudence which concerned Article 13. In the Kudla v. Poland judgment of 26 October 2000 the Grand Chamber of the Court reversed its case-law as regards the relationship between Articles 6 (1) and 13 of the Convention. The Court has decided that there was no absorption of the safeguards of Article 13 by those of Article 6 (1) where the alleged violation concerned the right to trial within a reasonable time. Therefore the Court has found it necessary to examine separately the applicant’s complaint under Article 13. One of the most significant reasons for such a change in the established case-law was the growing frequency of violations of the reasonable time requirement laid down in Article 6 (1). The Court has underlined “the important danger” that exists for the rule of law within the national legal orders of the States Parties when excessive delays in the administration of justice occur in respect of which litigants have no domestic remedy (§ 148 of the Kudla judgment). It took almost four years before Poland adopted new legislation introducing a separate remedy against unreasonable time of proceedings. The Polish experience with the new Act will be discussed later this afternoon by Mr Kazimierz Jaskowski, Judge at the Supreme Court of Poland.

Summing up a short overview of the guarantee enshrined in Article 13 of the Convention, I wish to raise another issue and notably, can we speak of a “European standard of effective remedies”? On the one hand – yes, we have
The improvement of domestic remedies

some guidance from the Court of how to assess effectiveness of the available remedies. But on the other hand, European standards in terms of effective remedies should not be understood as obligations to shape the domestic solutions in the same way. Domestic remedies can hardly be unified across Europe. Another issue is whether the member states could not benefit from exchanging experiences with domestic remedies. I believe that a right opportunity to do so would be provided within the follow-up process of the Recommendation Rec (2004) 6 on the improvement of domestic remedies.

My third and last point concerns domestic courts and their role in ensuring both the short-term, as well as long-term effectiveness of the Convention system. I wish to refer to an idea submitted by some experts and academics of setting up national human rights courts which would be linked by a “special” bond with the Strasbourg Court and could provide a new perspective to the procedural protection of human rights within member states of the Council of Europe. Although I agree that radical solutions are sometimes necessary in terms of improving effectiveness of remedies at the domestic level, the idea of establishing national human rights courts sounds debatable for one basic reason: the great majority of States Parties to the Convention already have human rights courts, which we know as constitutional courts. Is it not better to equip these courts with adequate tools and allow them to be effective in providing procedural protection “at home” rather than setting up new judicial bodies?

It should be remembered that though many domestic legal systems provide for a constitutional complaint, such mechanism is often far from being a perfect remedy to stop the flow of cases to Strasbourg. Of course, constitutional courts cannot deal automatically with every single case which could end up in the ECHR. Nevertheless, let me just take the example of my own country, where applicants as a matter of fact cannot bring a constitutional complaint to challenge violations of human rights if the normative basis of the authorities’ actions does not raise a suspicion of being contrary to the Constitution. Applicants from Poland can challenge the law but not a violation of human rights which occurred in application of legally correct basis. I believe that the scope of the constitutional complaint should be reconsidered and made somewhat broader.

My second argument against special human rights courts would be made by a comparison with EU law. Domestic courts are regarded as courts of the Community law. Why should we not say it loudly that every court in member states of the Council of Europe is in fact a court of the European Convention? As we know, the Convention has so far been incorporated into every legal system of the States Parties. Every national judge must know and apply the jurisprudence of the Court. I am very strongly tempted to say that the domestic courts should see the European Court as a precedent-setting authority. It is also rarely heard of, but in my humble opinion the Strasbourg Court is a court of precedents. Nothing to be ashamed of.

Summing up, if there is any relief coming for the ECHR or – with some exaggeration – any hope left for the effectiveness of the Convention system, it is from the side of domestic courts and domestic judges. And bearing in mind the fact that judges are usually not eternal, I want to conclude by saying that for the long-term effectiveness of the system we should turn our attention not only at the direction of domestic remedies, but first and foremost at university education and professional training of those who apply European Convention in practice.

Thank you for your attention.
THE EFFECTIVENESS OF REMEDIES FOR COMPLAINTS
OF LENGTH OF PROCEEDINGS –
RECENT CASE-LAW AND PROBLEMS35

Mr Michael O’Boyle

Registrar of Section 4, European Court of Human Rights

In the time allotted I cannot seek to cover the field which is very extensive – I propose to limit myself to a discussion of a few points concerning the concept of “effectiveness” in the Court’s case-law and to mention some of the problem areas as reflected in pending cases.

One of our judges has recently been discussing the ECHR with a group of judges from the USA. He mentioned the large number of cases concerning length of proceedings currently pending before the Court and asked how US judges dealt with the issue. He was surprised to hear one judge saying that in his court there was simply no problem at all and no complaints of protracted procedures. When asked how that Court achieved this he replied that there was a very effective rule in operation which worked miracles. Judges were told that if there were delays they would have to pay any damages out of their own pockets! This rule had a very immediate deterrent effect. Needless to say, there is nothing in the Court’s case-law which supports such an extreme position since the guiding principle is that it is left to each of the states to find its own cure for the problem in the light of its distinct legal tradition.

What emerges from the cases is that indeed there is no uniform remedy – or as the court has put it in its Kudla v. Poland judgment – no prevailing pattern in the member states as to the form such a remedy should take. The cases reveal very different approaches in the different jurisdictions – in some countries a constitutional remedy (Slovakia) – in others (Poland and Italy) tailor-made remedies brought into effect as a result of the Strasbourg proceedings.

The issue of remedies for length of procedure cases is intimately bound up with the question of the effectiveness of the Court and the principle of subsidiarity. Thus the Court recognised in Kudla v. Poland when it held that Article 13 required the state to introduce an effective remedy in respect of such complaints – and most recently in Michalak v. Poland “that if Article 13 were to be interpreted as having no application to the right to hearing within a reasonable time – individuals will be systematically forced to refer to the court in Strasbourg complaints – which should be addressed in the first place within the national legal system. In the long term the effective functioning on both the national and the international level of the scheme of protection set up by the Convention is liable to be weakened.”

The force of the Court’s remarks is borne out by the very large number of cases raising these issues pending before the Court against a wide variety of states – Italy/Poland/France/Croatia/Slovakia – to name but a few; and the high percentage of the Court’s judgments (roughly 60%) devoted to such issues.

The key question addressed time after time in the decided cases is whether there exists an effective remedy – either for purposes of the non-exhaustion rule or under Article 13. So – what does the Court mean by “an effective remedy”?

35. Reproduced from speaking notes.
Easy to state – not so easy in practice to apply!

The Court has held in *Mifsud v. France* – that Article 13 offers an alternative: a remedy is effective if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays which have already occurred. Various points should be made in this context.

A remedy need not be a judicial one although this would be the ideal remedy. If it is not, the powers and safeguards of the administrative body concerned are relevant – the key test is whether the remedy in any given case is capable of having a significant effect on the length of the proceedings as a whole – is it capable of speeding them up or preventing them from being unreasonably long?

In *Mota v. Portugal* the national remedy in respect of a complaint concerning length of criminal proceedings was essentially an administrative one – he had the possibility of applying either to the Attorney General or a Judicial Service Commission for an order to expedite the proceedings under 108/109 Code of Criminal Procedure. The Court was satisfied that this would lead to the taking of necessary steps either to fix an immediate hearing date or closing the judicial investigation – the government had shown that such a remedy worked in practice – it was therefore a remedy to be exhausted.

In *Holzinger v. Austria* – dealing with civil proceedings – the Court also considered effective a remedy under Article 91 of the Courts Act which enabled a person to request the court responsible for the delay to transmit to the superior court a request to speed matters up and to fix a time limit for the next procedural step – the court was obliged to transmit the request to the superior court which could make the order in question or alternatively agree itself to the request. Again the Court found such an arrangement to be effective on the basis of demonstrable practice.

The emphasis in these cases is on the question of practice. Has the state actually shown on the basis on examples of decided cases that the remedy works in practice? The state must be able to point to actual cases where the remedy for length complaints has actually been granted.

In *Hartman v. the Czech Republic* the Court did not consider a constitutional appeal to be effective because it was not shown to make it possible to compel courts to expedite proceedings or to provide compensation for any damage resulting from their excessive length. There was thus a breach of Article 13 of the Convention.

Similarly in *Doran v. Ireland* – a case of civil length – the cases cited by the government did not indicate that a constitutional remedy before the Supreme Court was available to the applicant in respect of a complaint of length – or that there was the possibility of a court remedy for damages.

All the cases concerning non-exhaustion of domestic remedies stress the following: that while the remedy must be an accessible one in practice – mere doubt as to the prospects of success is not a valid excuse for not seeking to avail of it.

In the same vein, the Court has held that Article 13 requires a remedy to be put in place; but the effectiveness of such a remedy does not depend on the certainty of a favourable outcome (the *Kudla* judgment).

A question has arisen frequently as to the moment at which the Court assesses whether there is an effective remedy. Normally, the Court will examine whether there was a remedy at the time of the introduction of the application.

However, in length cases the Court has significantly departed from this rule “on an exceptional basis”. It will consider the issue of whether there was a remedy at the moment it considers the issue of admissibility. In this way it has rejected cases for failure to comply with the exhaustion rule – *Brusco v. Italy, Nogolica v. Croatia, Andresik v. Slovakia* – and recently *Michalak v. Poland*, all provide examples of this approach.
Some problem areas

The fact that the Court has upheld a remedy as being effective in previous cases is not necessarily the end of the story. Pending cases reveal a variety of knotty problems.

In cases concerning Slovakia, the Court has upheld the new constitutional remedy but is now confronted with the following issues:

33. Certain situations are not covered by the remedy developed by the Constitutional Court – e.g. where the proceedings have terminated – the remedy only covering pending cases;

34. The case-law of the Constitutional Court adopts a different approach to the assessment of duration, splitting the case into different procedural phases and assessing the length of these individually – as compared with the time-honoured approach of the Strasbourg Court which examines the “global” length of the proceedings;

35. There are also important issues concerning the smaller amounts awarded by the national courts compared to what would be awarded in comparable cases before the Strasbourg Court. This is, for example, a major contention in cases concerning awards under the Pinto law. The matter is now pending before the Grand Chamber in a series of Italian cases (Scordino v. Italy (No. 1)). The issue before the Grand Chamber concerns the Court’s assessment of the sums awarded by the national courts. At what point should such sums be considered too low? And to what extent is it legitimate to compare the amounts awarded by the national courts with the national country “tariff” that the Court applies systematically in its judgments in order to achieve a measure of consistency. What is acceptable – 30%, 50% or 70% of the applicable tariff? What weight should the Court give to the fact that the amounts awarded in Italian cases are a reflection of the Court’s earlier finding in its Bottazzi judgment that there existed in Italy an administrative practice in violation of Article 6 (1) of the Convention?

In addition, is the reasonableness of the quantum of the award to be assessed “not merely in the light of the duration of the proceedings but the value of the award judged in the light of the standard of living in the state concerned, and the fact that under the national system the money will be paid more promptly that would be the case if the matter fell to be decided by the Court under Article 41”?

As can be seen these issues before the Grand Chamber go to the heart of the issue of “subsidiarity” which – as I indicated at the beginning of my statement – is a distinctive feature of this whole area.

In conclusion, the many decided cases reflect a strong desire of the Court – for obvious pragmatic reasons related to the capacity of large numbers of such cases to encumber its docket – to repatriate this question to the national courts once it is satisfied that the general problem is being dealt with in a reasonable manner by the provision of an effective remedy.

The contentious questions concerning quantum, noted above, to be decided by the Grand Chamber, reflect a certain disquiet about the extent of redress afforded by certain national courts for quite significant delays in procedure. As is traditional in other areas of Convention law, what, at the end of the day, is to be considered as a “reasonable” solution to the problem of length of proceedings and what level of award is appropriate at national level (or, to use the language of “subsidiarity”, what might be regarded as not “manifestly inadequate”) – are questions of the highest importance in this area which are now in the lap of the Grand Chamber. ⭐
The improvement of domestic remedies

Effective remedies, notably in the case of unreasonable length of proceedings: recent developments in the Committee of Ministers’ supervision of the execution of judgments

Mr Fredrik Sundberg

Department for the Execution of Judgments, Directorate General of Human Rights

The question of the introduction of effective remedies in respect of violations of the right to trial within a reasonable time did not have any particular priority in the Committee of Ministers’ execution control before the Kudla judgment of October 2000.

Execution practice at the time required mainly effective general measures for the future. The Committee of Ministers usually left the states concerned to evaluate whether or not it was appropriate to create an effective domestic remedy for the period until the general measures reforms became effective.

It should be noted that the Committee of Ministers did not normally consider the creation of effective remedies as part of the obligation to take general measures unless a specific violation of Article 13 had been established. General measures were instead usually limited to structural changes making new violations of the European Convention on Human Rights (ECHR) impossible or at least improbable.

This state of affairs suffered only rare exceptions, such as the creation of the Italian remedy (the so-called “Pinto Law”) against unreasonably lengthy proceedings in 2001 (announced to the Committee of Ministers in 2000 as part of the major new action plan to solve this long standing problem – see the Committee of Ministers’ Interim Resolution on the subject: (2000) 135). Another exception was when existing remedies had been found inefficient by the Court or the then Commission in the context of the examination of the admissibility of the complaint (see e.g. Manoussakis v. Greece, where notably the excessive length of proceedings before the Greek administrative courts made it unnecessary to have recourse to them in order to exhaust domestic remedies).

This situation reflected the views of the governments at least at the time. It has survived even after the Kudla judgment, as Recommendation Rec(2004) 6 on effective remedies, one of the five major recommendations of the Committee of Ministers to the member states adopted in the context of the efforts to guarantee the long term effectiveness of the ECHR system, continues to consider that the states have a margin of appreciation in deciding whether or not it is appropriate to create an effective remedy for “clone” cases awaiting the structural reforms or whether it is better that such cases be decided by the European Court – see the explanatory memorandum.

This margin of appreciation has, however, suffered some limitations following the Committee of Ministers’ 114th meeting in May 2004 and the adoption of the Declaration “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels” in which the Committee of Ministers notably requested the Ministers’ Deputies “to take specific and effective measures to improve and accelerate the execution of the Court’s judg-
ments, notably those revealing an underlying systemic problem”.

One of these limitations came from the Court itself in the Broniowski case where the Court held that it was for the state concerned, and for the state concerned only, to set up the effective remedies required to solve all clone cases. Indeed, the Court stopped its own examination of such cases awaiting the setting up of an effective domestic remedy. This judgment was adopted notably in response to a formal call by the Committee of Ministers, also from May 2004, that the Court assist the Committee of Ministers’ execution control by identifying as far as possible in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem. The follow up to Broniowski has been slow and the Court has only rendered a handful of similar judgments since, leaving the great majority of cases revealing systemic or structural problems to follow the ordinary procedure and rules before the Committee of Ministers in the context of its execution control.

The Committee of Ministers has, however, itself improved its execution control on this point. Today, relying on the Committee of Ministers’ request to the Deputies in the above-mentioned Declaration of May 2004 and the commitments of Heads of States and Government at the Third Summit, the Deputies do look into the question of domestic remedies in all cases, whether or not a violation of Article 13 has been identified or not and this in particular in cases relating to excessively long proceedings.

If that examination reveals that the rapid creation of a domestic remedy would be of major assistance to prevent clone cases and is realistic in the circumstances, respondent states will be strongly encouraged not to limit their general measures to structural changes, but to create also effective remedies. These calls are particularly important where the reforms are unlikely to be able to prevent effectively all new violations, a typical example being reforms aiming at addressing the problem of unreasonably long proceedings. They are also important in situations where reforms may take considerable time creating a strong likelihood of clone cases awaiting the entry into force of the reforms. Another important improvement of importance in this context are the Deputies’ efforts to ensure that respondent states adopt, in co-operation with the Secretariat, comprehensive action plans for the execution of judgments within a maximum of six months from the date the judgments become final.

On the basis of the above developments in the practice of the Court and the Committee of Ministers, to which should be added the review carried out by the Steering Committee for Human Rights on behalf of the Deputies of the implementation of the Committee of Ministers’ five recent recommendations on the national implementation of the ECHR, the issue of ensuring effective remedies for ECHR violations has come in the forefront of the efforts to guarantee the long term effectiveness of the ECHR system, not only as a matter of policy, but also as a matter of day to day practice. The experience of the next few years will show how successful this major attempt at improving the efficiency of the ECHR system will have been. ★
The Czech Republic is no stranger to the problem of length of proceedings. There are several hundred applications pending before the European Court of Human Rights, which has already delivered several dozen findings of violation of Article 6 § 1 of the Convention and also a number of inadmissibility decisions on the ground that the application was manifestly unfounded.

The Czech legal system offers a number of methods of expediting proceedings for the purposes of Article 6 § 1 of the Convention. Parties are entitled to request an acceleration of administrative proceedings or of the preparation for trial of criminal cases, i.e. the preliminary proceedings before the case is brought to court. The draft new Criminal Code also provides that the criminal courts shall be able to take account of undue length of proceedings when determining a sentence.

The Court described the situation concerning judicial proceedings proper in its Hartman v. the Czech Republic judgment of 10 July 2003 (§§ 43-51). In its defence the government referred to the possibilities of appealing to a higher authority, appealing to the Constitutional Court or claiming compensation for damage caused by the length of proceedings. By comparison with the González Marín v. Spain judgment (of 5 October 1999), it would seem that the Czech system is similar to that existing in Spain – a hybrid system which is both preventive and compensatory in nature.36

Upon closer examination of the situation, the Court eventually dismissed the government’s preliminary objection of failure to exhaust domestic remedies, thereby partially abandoning its existing precedents with regard to the Czech Republic, since it had previously recognised the appeal to the Constitutional Court as a remedy to be exhausted (Český v. the Czech Republic, decision of 31 August 1999).

The Court repeated that appeals to a higher authority were not in themselves an effective remedy because they did not give litigants an individual right to compel the state to exercise its supervisory powers (Hartman judgment, § 66). The Court accepted that the Constitutional Court could speed up the course of proceedings but noted that it was not empowered to take practical steps to expedite the proceedings complained of or to award compensation for delays that had already

36. A “preventive system” is a system in which the remedy available makes it possible to speed up proceedings subject to delay. A “compensatory system” is a system where a right to compensation (usually pecuniary) exists for undue delay. A “hybrid system” combines both approaches. Austria and Portugal have preventive systems, France and Italy have compensatory systems, while Spain, Slovakia, Croatia and Poland have a combination of the two.
The first of these observations, relating to the lack of authority to take practical measures is somewhat debatable, as we shall see below. As for the second, the Court was also not convinced that lodging a claim for damages against the state could enable parties to obtain compensation for non-pecuniary damage — as incurred above all by litigants in cases relating to length of proceedings. Czech law has indeed traditionally confined itself to recognising only pecuniary damage, except in the field of protection of personal rights (one’s name, reputation and so on).

A. Consolidating preventive remedies

The purpose of preventive remedies is to expedite judicial proceedings and therefore to prevent further delay.

There were two basic options here (which are reflected in the Court’s case-law): either to give the Constitutional Court enhanced powers in the light of the criticism voiced by the Court in the Hartman judgment, or to amend or transform the appeal to a higher authority into a remedy of a different nature. It was the latter option that was chosen, not by amending the appeal to a higher authority but by adding something extra to the existing procedure: an “application for determination of a time-limit for completion of a procedural measure”.

This remedy is provided for in Section 174a of the Czech Courts and Judges Act (the equivalent of a Code on Organisation of the Courts). It is the next step following appeal to a higher body, a remedy which must have been exhausted beforehand, and applies to all kinds of judicial proceedings. It is modelled on the procedure laid down in Section 91 of the Austrian Courts Act, which the Court’s case-law has acknowledged as a remedy which must be exhausted before applying to Strasbourg (Holzinger v. Austria (No. 1), judgment of 30 January 2001, §§ 20–25).

Application for imposition of a time-limit is a remedy open to any party to proceedings who deems that they are subject to undue delay and is designed to end that delay. The request must be made to the court responsible for the delay and is considered by the superior court (in the supreme courts the decision on the application is taken by a division other than the one dealing with the case).

The request must be processed speedily: if it is not flawed (and the law specifies the substantive criteria to be satisfied) a decision on it must be taken within approximately one month. The decision is taken after the court responsible for the delay has given its explanations; no hearing is held, and the decision is not open to challenge other than through an appeal to the Constitutional Court, which is normally always possible subject to the conditions set out in the Constitutional Court Act.

The decision has to set a precise time-limit within which the court dealing with the case must complete the procedural measure under consideration.

Section 174a of the Courts and Judges Act has been in force only since 1 July 2004, and it is too soon to draw any conclusions from practical experience. The Czech Republic has not yet used it as a defence argument before the European Court of Human Rights. This procedure clearly offers no solution to the problem of proceedings which have already lasted for

37. The Czech Republic has a Supreme Court for civil, criminal and commercial cases, and a Supreme Administrative Court for proceedings against the public authorities. An application for imposition of a time-limit cannot be lodged against the Constitutional Court, since the latter is not part of the ordinary court hierarchy (Article 91.1 of the Czech Constitution) and the Courts and Judges Act does not apply to it.
too long. Other problems are also gradually emerging: for example, the higher court cannot decide what steps the lower court must take, as it is not for the former to assume the management of the latter’s case. It has been suggested that there is a risk of interference with the independence of the court dealing with the case. Moreover, it is sometimes hard to know which measure is to be completed at the stage reached in proceedings. Lastly, an application for imposition of a time-limit may become a further means of procedural obstruction, since the application must be forwarded to the higher court, which inevitably engenders delay despite the precautions taken.

We can nevertheless say that limited use has been made of the new Section 174a. Since most applications do not satisfy the statutory conditions and are consequently found to be inadmissible, only a small number are ultimately granted. Further thought must be given to this provision of the Courts and Judges Act. The Supreme Administrative Court moreover organised a seminar for members of the judiciary before the legislation came into force, and another seminar is to be held in due course.

B. Improving compensatory remedies

As already mentioned, the law on state liability for damage caused in the exercise of public authority provides for compensation within the meaning of the Civil Code, that is compensation for material damage and loss of earnings, and possibly bodily injury, but not for non-pecuniary damage. Although there have already been attempts to assert an entitlement to protection of personal rights so as to obtain compensation for non-pecuniary damage, the outcome of such cases is not certain, nor is it equivalent to what may be achieved by applying to the European Court of Human Rights.

The Ministry of Justice chose to enhance the law on state liability for damage caused in the exercise of public authority rather than touch the Civil Code. The amendment bill provides that, in addition, and, where applicable, even in the absence of pecuniary damage, just satisfaction shall be awarded for non-pecuniary damage arising from a breach of the law by the public authorities.

As regards length of proceedings in particular, the key provision setting out the situations in which compensation is due has been clarified to specify that official procedure is also flawed in the event of failure to fulfil an obligation to carry out a measure or deliver a decision within a time-limit laid down by law, or, if the law does not determine a time-limit, within a reasonable time. This provision is intended to reflect Articles 5 and 6 of the Convention.

As to the criteria for determining the amount to be awarded, the extent of non-pecuniary damage caused should generally be assessed in the light of the circumstances, and compensation may even be non-pecuniary in nature. Regarding length of proceedings, the criteria to be applied are those normally used by the European Court of Human Rights to determine whether reasonable time has been exceeded:

- overall length of proceedings,
- complexity of the case,
- conduct of the party claiming compensation,
- the way in which the case has been handled by the authorities,
- the importance of the subject-matter of the proceedings for the party concerned.

The claim to compensation for non-pecuniary damage can be pursued before the courts. However, applications for compensation must first be addressed to the Ministry of Justice. Only if the ministry does not grant the sums sought or if no agreement is reached between the ministry and the claimant can the latter bring the case to court. This system seems to have one basic advantage: it allows the ministry first to ensure that the amounts awarded are adequate in the light of the Stras-

38. The new provision was subject to constitutional review. However, the Constitutional Court did not accept any of the objections raised by the court which had referred to it the question of the constitutionality of Section 174a of the Courts and Judges Act.
bourg Court case-law and then to attempt to bring the courts handling these compensation claims to abide by that case-law.\textsuperscript{39}

The amendment bill contains a transitional provision departing from the principle of non-retroactive application of the law, which also holds good in the case of the law on state liability for damage caused in the exercise of public authority. The law will therefore provide for an exception to the rule: if the right to compensation for non-pecuniary damage caused by length of proceedings is not time-barred, the law should apply to such non-pecuniary damage suffered in the past. If the party concerned has lodged an application complaining of the length of proceedings with the Court and claims compensation in the domestic courts within one year of the date on which the law comes into force, he will be entitled to compensation. This transitional provision should enable applications pending before the Strasbourg Court to be “repatriated”.

For the time being this is only a bill, and it is impossible to predict its fate in Parliament. Compensation nevertheless remains the only possibly way to reduce the Court’s caseload of applications for excessive length of proceedings.

In conclusion, one thing seems clear: improving domestic remedies is a matter of time. Just as with the application for imposition of a time-limit for completion of a procedural measure, we shall have to await the anticipated entry into force of the reform of the law on state liability for damage caused in the exercise of public authority in order to know for sure whether these changes in the legislation fully satisfy the Czech Republic’s obligations under Article 13 of the Convention. The Constitutional Court was conceived as the Article 13 authority at national level. However, it cannot be overloaded with tasks, as that would lead to a devaluation of its role as guardian of the constitutional system and of human rights at domestic level. ★

\textsuperscript{39} It can be noted that the Grand Chamber of the Court, which has before it a number of cases against Italy that clearly raise the issue of how compensation awarded in the domestic courts is to be quantified, should refine this case-law in 2005 in order to make it more transparent.
The Italian experience

Mr Francesco Crisafulli

Legal Attaché, Permanent Representation of Italy to the Council of Europe

Background to the Act

Italy holds the inglorious record of the highest number of applications (lodged, declared admissible or resulting in a finding of violation) for breach of the “reasonable time” requirement.

My intention is not to understate the Italian authorities’ responsibility for this situation, but we now know – and Mr Wildhaber has just reminded us – that this problem, although it has assumed a greater magnitude, and above all greater visibility, in Italy than elsewhere, is nonetheless not confined to this country but concerns approximately half the member states of the Council of Europe.

On account of the dilatory nature of its proceedings, Italy was accused of being the greatest “supplier” of applications to the Court and therefore the main culprit for an excess caseload on the verge of paralysing the European human rights protection system.

Incidentally, we now know that this was not the true picture: since the entry into force of the Pinto Act – the subject of my presentation, with which you are all familiar, at least in its general lines – the number of Italian applications has fallen drastically, and today the country is far from being the main source of the Court’s caseload. This has not prevented the most prestigious bodies of the Council of Europe from foretelling in dramatic terms the possibility of the Court’s paralysis (the past and present causes of which are clearly of a very different degree of gravity) and setting in motion the reform process which has produced Protocol No. 14 and the accompanying instruments.

The fact remains that Italy felt guilty, and that played an important part in its decision to draft an instrument designed to bring about an effective, and above all rapid, decrease in the number of “reasonable time” applications.

This was indeed the chief goal pursued by the initial drafters of the bill: reducing the number of applications to Strasbourg and, consequently, the Court’s caseload. I am betraying no secrets – at most a piece of unofficial information – if I tell you that the idea of the Pinto Act originally developed here in Strasbourg out of discussions between two eminent Convention specialists, both directly involved, in very different capacities, in the work of the Court.

Law No. 89 of 2001, named the Pinto Act after the Italian member of parliament who initiated it, was thus the outcome of a debate that focused more on the Court than on the applicant and addresses the Court’s expectations rather than the problems of the Italian judicial system. In one respect this is where its advantage lies (reflected in the speed with which its effects were felt), but it also constitutes a limitation. Moreover, it was with the latter aspect of the initiative in mind that Mr Imbert, Director General of Human Rights, voiced certain reservations from the outset as to the appropriateness of the bill brought before parliament.

General lines of the Pinto Act and its operation

As you know, Section 2 of the Act allows any party to criminal, civil, administrative and even tax proceedings (which in itself goes beyond the actual requirements of Article 6, which the Court has been very reluctant to deem applicable to tax cases) to complain of a
breach of the “reasonable time” requirement and obtain financial compensation from a domestic court (the relevant court of appeal under the rules on territorial jurisdiction applicable to criminal proceedings involving judges). An appeal then lies with the Court of Cassation against the decision delivered by the court of appeal. However, the Act does not provide for any measures to expedite proceedings.

The application for compensation must be made either while the proceedings whose length is contested are pending or within six months of the date on which the decision ending the proceedings became final (Section 4).

As a transitional measure, parties wishing to complain of the length of domestic proceedings ended over six months before the Act’s entry into force could avail themselves of a provision allowing them to bring their case before the competent court of appeal within six months (subsequently extended to one year) from the date of the Act’s entry into force, provided that they had already lodged an application with the European Court of Human Rights and the latter had not yet ruled on its admissibility.

The intention was that combined enforcement of this Act and Article 35 of the Convention would allow (and indeed has allowed) the Court to declare inadmissible for failure to exhaust domestic remedies a very large number of applications – not only those to come but also those already pending. The Italian Government accordingly wrote to the Court to inform it of the Act’s entry into force and entered a general objection to the admissibility of all “reasonable time” applications pending.

**Unusual approach by the Court**

In an initial test case (*Brusco*) the Court noted the existence of Law No. 89 of 2001 of its own motion (contrary to its usual practice concerning objections to admissibility) and made use of it “retroactively”, so to speak, to reject the application (which had been lodged before the Act entered into force) on the ground of failure to exhaust domestic remedies.

Having thus, with this test-case finding of inadmissibility, established the principle by which it would subsequently be guided, the Court contacted all applicants who had lodged “reasonable time” complaints requesting them to apply to the domestic courts and warning them that, if they persisted in seeking a decision from the Court, they would run a serious risk of dismissal of their application in accordance with Article 35 (and the *Brusco* precedent). Those who refused to apply to the domestic courts (and there were some, since the Act was given a frosty reception by Italian lawyers, who did their utmost to boycott it) therefore saw their cases thrown out by a committee decision. The others had a choice: either abandon the proceedings before the Court (in which case the file was destroyed) or – what I believe to be the solution adopted in the majority of cases, or at least a very large number of them – request the Court to suspend consideration of the application pending the outcome of the domestic proceedings.

At present Italy (and the Court) is beginning to experience the rather undesirable side-effects of this approach, since applicants dissatisfied with the outcome of the domestic proceedings are reactivating their applications in Strasbourg, and we are facing a number of problems mostly linked to the conditions of the award of just satisfaction, determination of amounts and delays in the payment of the sums awarded.

I do not want to dwell on these matters here, since they are all the subject of proceedings pending before a chamber or even the Grand Chamber, and it would not be proper on my part to give the impression of wishing to exploit this opportunity to argue my case outside the courtroom, but I make no secret of the fact that the situation has taken a disturbing turn inasmuch as the Court seems to be questioning the remedy’s effectiveness, which naturally goes much further than a mere finding of violation in one or more specific cases and jeopardises the Act’s entire functioning and very existence.

I would merely like to say that, in my opinion, the chief issue now confronting the Court is how to strike a fair balance between the need
for clarity and precision in its established precedents and the need to respect national margins of appreciation and to safeguard the particularities of each state’s situation.

The first of these two requirements is inescapable for a Court which perceives itself as “constitutional” or, as Professor Balcerzak has suggested, “a court of precedent”, whose task is to establish minimal rules and general principles intended as guidance for all European states. The second requirement, however, is not only dictated by the system as a whole but also necessary to ensure that the Court’s case-law remains in touch with the reality which it is supposed to be shaping (but from which it is, at the same time, itself derived).

Whereupon I shall return to my main subject.

The wording of the Pinto Act: some comments and criticisms

On the positive side I would mention the fact that the Pinto Act specifically cites Article 6 of the Convention and reiterates expressly the main criteria laid down by the Strasbourg case-law for determining the reasonableness of the duration of proceedings, the state’s degree of responsibility and the extent of the damage sustained by an applicant.

This has proved a very wise decision. In particular, it very recently allowed the Court of Cassation to find an easier solution to certain problems and thereby eradicate uncertainties or inconsistencies contained in judgments delivered by the courts of appeal. The wording of the Act has permitted the Court of Cassation to establish in practice the requirement that the appeal court must abide by the Court’s precedents (in matters of compensation for breach of the “reasonable time” provision) without, however, obliging it to take a stance on the, in Italy, still thorny question of the efficacy of the Convention and its case-law in the domestic legal system.

Still on the positive side, I should also mention the concept of affording reparation for non-pecuniary damage through appropriate means of publication of decisions finding a breach of the “reasonable time” standard. This form of reparation (which also exists in other contexts in Italy) may, of course, be additional to the payment of compensation, but might also (why not?) replace it in certain circumstances which a court may deem incompatible with the awarding of monetary compensation. I therefore find it regrettable that in practice the national courts have never (as far as I am aware, but I think I am not mistaken) made any use of this possibility.

However, I would count among the negative aspects the wording of the provision determining the nature of the right that can be asserted in the national courts and the way in which the Act subsequently sets out the rules governing determination of the amount of compensation. This calls for a brief explanation.

Section 2 of the Act provides that “anyone sustaining pecuniary or non-pecuniary damage…on account of a failure to comply with the ‘reasonable time’ requirement in Article 6 § 1 of the Convention, shall be entitled to just reparation”. I would say in passing, without dwelling on the subject, that the terms pecuniary and non-pecuniary were perhaps not the happiest choice, as one might draw a distinction between “non-pecuniary” or “non-material” damage (i.e. not admitting an exact assessment in financial terms but nevertheless endowed with economic value) and “non-economic” damage (in the literal sense of pain and suffering): this distinction is indeed referred to in some judgments of the Court of Cassation (not necessarily concerning Pinto appeals) and can be – and sometimes has proved – a cause of problems in interpreting the Pinto Act, especially in cases concerning legal persons.

Let us return, then, to the wording of the law, whose initial provisions apparently identify two logically distinct events: firstly, the breach of the “reasonable time” requirement and, secondly, its consequence, namely the pecuniary or non-pecuniary damage arising from it. This would seem to suggest that the first element (violation) can exist without the second (damage).

That is indeed possible, and the case-law of the Court itself offers a few – albeit rare – examples in which the finding of a violation of Article 6 is not followed by the award of just
satisfaction, since the Court holds the finding to be sufficient in itself for reasons which (unfortunately!) have never been explained (to the great misfortune of the governments, which are unsure where they stand, but also the applicants concerned, who for no apparent reason have been refused the benefit of an award usually bestowed generously on all and sundry). The Pinto Act would nonetheless seem to have elevated this possibility to the status of a general rule which is inconsistent with the Convention organs’ most frequent practice.

On the other hand, in my view, the reference to damage is not entirely coherent with the concept of “just reparation” used immediately afterwards in the Act, which brings to mind the idea of flat-rate compensation more than genuine damages.

On the latter subject, it might be noted in passing that the Convention’s concept of “just satisfaction” is much closer to “just reparation” than to “damages” (or compensation): the Court’s judicial practice (not beyond criticism in my opinion) has indeed gradually transformed the nature of the reparation conceived by the drafters of the Convention, bringing it increasingly into line with real compensation, which is meant to be full and precise, covering separately the non-pecuniary and the pecuniary damage sustained, including all aspects of the latter (losses, lost earnings, etc.).

The criteria for calculating financial compensation laid down in the Pinto Act were taken from Article 2056 of the Civil Code (setting out the rules on quantification of compensation in cases of liability in tort). This accordingly brings us back to the concept of damage and compensation, and, by referring to this article, the legislators introduced criteria which may to some extent duplicate those to be applied in determining the very existence of a violation.

This has therefore very probably engendered a certain amount of confusion and has allowed a number of courts to find that a breach of the “reasonable time” requirement is not in itself sufficient to entitle an applicant to reparation and that damage, referred to in the Act as an (ulterior) consequence of the breach, must in turn be asserted if not proved.

In other words, the national courts have held, on a number of occasions, that damage cannot be considered ipso facto inherent in the very fact that the reasonable time requirement has been exceeded and that complainants must at least adduce evidence which, based on past experience and custom, allows the court to conclude that the delay has caused real damage and to assess that damage on an equitable basis.

This approach followed by the courts below has not been disowned by the Italian Court of Cassation, which has either endorsed it or else held that, as a court deciding points of law, it lacks jurisdiction to reassess what it regards as a question of fact (the existence and extent of any damage).

The ECHR severely criticised this approach in a case which has become quite well known (Scordino), in which, having examined a large number of judgments by the Italian Court of Cassation, it found that, given the state of domestic judicial precedents, an appeal to that court amounted to a remedy devoid of any prospect of success and applicants therefore did not need to exhaust it if their complaint merely concerned the amount of compensation awarded by the domestic courts.

Continuing this line of argument, the Court held that, since mere recognition of a violation by the courts was only the first aspect of the role served by a domestic remedy (the second being elimination of the violation and its consequences), lack of adequate compensation meant that applicants could not lose their status as “victims”.

It therefore declared the Scordino application admissible, and in its decision on the merits subsequently found a violation of Article 6 whilst declaring itself unable, as the case stood, to settle the matter of Article 41.

The admissibility decision and the decision on the merits in the Scordino case raise a number of issues which are currently being examined by the Grand Chamber (and that is why I would be uncomfortable speaking about this if Mr Wildhaber had not already left the room).

In deeming insufficient the compensation awarded to the applicant by the domestic court and holding this insufficiency to be enough to
The improvement of domestic remedies

maintain his status of “victim”, the ECHR has, in my opinion, raised to the rank of a principle what was only a common judicial practice, namely, the virtually systematic award of just satisfaction. Yet there is no direct reference to this practice in the Convention, and it had not previously been enshrined as a general or absolute rule. On the contrary, there were certain exceptions to it, which, as I have already pointed out, were not based on expressly stated reasons and which, quite naturally, are even less comprehensible after the Scordino case.

I find it perfectly normal that a court required to award compensation on an equitable basis should consider itself free to determine in all conscience whether, in each individual case, damage has actually been incurred and whether or not, in the light of all the particular facts of a case, the complainant deserves compensation. Of course, if the court has this power, it is also entitled to assess the extent of the damage and therefore the amount of compensation needed.

I also find it normal for that court to believe that it is not required to give extensive, detailed reasons for the choices that it makes in this field. This does not mean that it is free to act arbitrarily: on the contrary, it must be assumed that the court has relied on its knowledge of the facts and the various items of evidence in the file, together with its perception of the relevant circumstances, to reach its verdict. The fact remains that it is hard to give a detailed statement of the reasons underlying the quantification of compensation awarded on equitable principles, and – especially in the case of non-pecuniary damage – such compensation is assessed on a fixed scale.

My question is why this freedom of judgment is enjoyed by the ECHR alone and denied to the national courts, who are nevertheless expected to take responsibility for applying the Convention at first instance and safeguarding individual rights (and therefore constitute, as it were, a first tier of proceedings with the Court in Strasbourg acting as a court of appeal or court of cassation).

In asking this question I proceed from the principle that – as asserted in the Convention organs’ own case-law – it is the national court that has control over the production of evidence and the assessment of the facts. There can be no denying that the existence and extent of damage is for the most part a question of fact. And I think this is confirmed by the Scordino judgment, in which, in what appears to me a contradictory fashion, the Court on the one hand considers it has sufficient evidence to hold that the amount awarded to the applicant by the domestic court was insufficient (to the point of preventing the domestic remedy from having its anticipated effects) but on the other hand then deems that the state of the case does not allow it to settle the question of Article 41. How is it possible to assess the adequacy of compensation without first knowing what amount would have been “sufficient” and therefore having a basis of comparison? Must we conclude from this that, for the Court, the basis of comparison consists solely in the sums it has awarded in earlier cases (on equitable principles and without giving express grounds) without it being possible for us to know the criteria on which both the payment made in each case and the choice of precedents were based? And does this not conflict with the principle of the freedom of the national courts to assess the facts of a case (and the facts are important, since the Court itself wishes to know more about them before taking its decision)?

In my opinion, another reason for perplexity lies in the Court’s decision to dismiss the objection of inadmissibility for failure to exhaust domestic remedies raised by Italy because the applicant had not appealed to the Court of Cassation. Only a few months after the entry into force of the Pinto Act, the Court labelled the Italian Court of Cassation’s doctrine – which was inevitably still being developed at that stage – as inefficacious, which was perhaps premature and entailed a considerable risk of depriving the Pinto remedy of a good part of its chances of strengthening and consolidating its effectiveness.

It must nevertheless be acknowledged that the Scordino case helped prompt the Court of Cassation to produce some clarifying decisions.

Indeed, at the beginning of 2004 the plenary Court of Cassation finally settled the matter by specifically stating that non-
pecuniary damage is regarded in law as – if not *ipso facto* inherent in the delay in the strict sense – then at least a normal consequence of unreasonably long proceedings. As a result, the lower courts must presume its existence, save proof to the contrary.

I consider this to be a balanced solution – since *a priori* it cannot be ruled out that in some cases it may be shown that, despite the unreasonable length of proceedings, the complainant did not sustain damage justifying the award of monetary compensation – and I hope that it will in future satisfy the ECHR (which in a number of successive decisions has already demonstrated its confidence in this doctrine’s development).

One ultimate aspect of the Pinto Act which is open to criticism lies in the last paragraph of Section 3, which provides that the sums awarded by the courts of appeal shall be paid to the extent that resources permit, these resources being allocated annually in the budget.

To understand how and why this rule – which in truth seems odd – came about, you must realise that the Pinto bill went through some very sticky patches when the Parliamentary Finance Committee, which is responsible for examining the budget aspects of any bill entailing expenditure for the state, advised against it, holding that there were insufficient financial resources to meet the obligations that would be engendered by the future Act.

The provision in question enabled this obstacle to be overcome.

There are three comments to be made on this subject:

- On the other hand, whether the judgment being executed originates from the European Court or the domestic courts, the sums to be paid in any case come within the category of mandatory judicial expenditure, and it is strange, to say the least, that a law – and what is more a law which seems to be based more on a compensation scenario than mere reparation – should lay down a precautionary limit on the amounts that can be paid.

- In short, faced with the concerns of the Finance Committee, Parliament apparently chose the lesser of two evils by passing the law all the same, albeit with this restriction, which is nevertheless questionable as to its logic.

- It must be said, however, that the Parliamentary Finance Committee’s misgivings have not proved ill-founded. To give you some idea, the Act came into force in April 2001. By the end of that year, i.e. within approximately eight months, the courts of appeal had already registered 4 649 applications and ruled on 1 073. In the following two years, some 5 000 applications were registered annually (and the courts ruled on the same number), and in 2004, in the first six months alone, the number of applications registered had already reached 4 599.

- According to another table of statistics that has come to my attention, between 2001 and the first half of 2004 the courts of appeal granted some 7 000 applications for compensation.

- I do not have any information about the sums paid, but I believe that this gives everyone a rough idea. It is, of course, a veritable drain on the state’s coffers.

- I said at the beginning of my presentation that the Pinto Act was not intended to get to the root of the problem of unreasonably long proceedings but confined itself to introducing a compensatory remedy with the main aims of, firstly, of course, preventing Italy from constantly having to appear on the international scene in a dunce’s hat, but also, and above all, satisfying the European Court’s desire for a reduction in Italy’s contribution to its caseload.

- Once again, I am hardly divulging a secret if I point out that, as soon as the bill was published, the Director General of Human Rights, Mr Imbert, made no attempt to conceal his
reservations, stating that this new remedy might meet the Court’s requirements but would have no effect as far as execution of judgments was concerned.

This conclusion is to some extent understandable but perhaps a little too severe. Admittedly, the lack of any individual measures to expedite proceedings prevents the Act from settling problems arising in cases where the main proceedings are still pending. However, reasoning in terms of general measures, while the Pinto Act was certainly not intended to solve the structural problem of excessive delay in the Italian judicial system, it nevertheless introduced a domestic remedy which makes it possible to obtain compensation and has had the merit of forestalling further violation findings in Strasbourg. Is this not the main aim of such a measure? I think we must therefore dismiss the idea, sometimes voiced, that the only purpose of the Pinto Act was to “conceal” the problem from the Convention organs: a domestic remedy, as required by Article 13, indeed has the effect, and even the aim, of withdrawing (and therefore, inevitably, “concealing”, if you like) as many cases as possible from the supranational judicial system in order to settle them at national level. A choice has to be made: either one wants remedies to be made available and accepts that some problems may no longer be apparent, or may be less apparent, at international level, or else one prefers “transparency” and does without domestic remedies.

However, I agree that it would be advisable to amend the Pinto Act in order to provide, inter alia, for measures to expedite proceedings which a court of appeal has found to be in breach of the “reasonable time” provision.

In fact, a bill along these lines is currently being considered by the Italian Parliament. The text of this bill is long and complex, and I cannot go into particulars here; nor do I think that would serve any useful purpose, since the legislation may still undergo considerable changes before being passed – if it is passed.

I should like to point out, however, that the wording of the bill testifies to the misgivings experienced in Italy in respect of any measure enjoining the courts to adopt a certain approach to the conduct of proceedings. This reluctance is rooted in a particular interpretation (perhaps too broad and harsh) of the concept of the independence of the judiciary. At the same time, the question arises of the legitimacy, in equal treatment terms, of expediting proceedings in a specific case: something which quite obviously can generally be done, allowing for exceptions, only at the expense of another set of proceedings. And of course we must also ask ourselves how long a system of this kind could really be effective, since, in a context where judicial delay is endemic, it would inevitably lead to an enormous number of proceedings which had all been expedited under the measure and would merely displace the congestion without getting rid of it.

However, I should like to draw your attention to the fact that, unlike what appears to me to be the rule in states which already have experience of such measures for expediting proceedings, an application to deal with a case as a matter of priority and the corresponding order are envisaged not as stages in proceedings to establish that the “reasonable time” requirement has been exceeded but as preventive steps which parties can and must take as soon as they have reason to fear a prospect of delay and which constitute an admissibility criterion for a possible, and in any case subsequent, application for compensation.
Mr Kazimierz Jaskowski
Judge at the Supreme Court of Poland

Introduction

The 17 June 2004 Act on complaints against infringements of party’s right to be tried without undue delay (Dz. U.-Journal of Laws No. 179, item 1843 – The 2004 Act) is the first legislative act in Poland to regulate this issue. The 2004 Act deals with criminal and civil court proceedings, including enforcement proceedings performed by court enforcement officers under the supervision of the court, and with proceedings before administrative courts.

The 2004 Act entered into force on 17 September 2004. During the period of the six months following that date, by virtue of its Article 18, the Act has permitted the lodging of complaints with Polish courts by persons who had earlier lodged complaints with the European Court of Human Rights (the Court) – due to not having their cases tried within a reasonable time (the Convention, Article 6.1) – in the course of proceedings concerning those cases, where the Court has not issued the decision regarding the admissibility of complaint. Polish courts have notified the Minister of Foreign Affairs of the complaints lodged on that ground.

Origins of the 2004 Act

The adoption of the act under discussion was in line with the adjustment of Polish law to the requirements of Articles 6.1 and 13 of the Convention and 45.1 of the Polish Constitution. It stipulates: “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.” However, actually, it was the judgment of 26 October 2000 in the case of Kudla v. Poland (Application No. 30210/96) that gave rise to its adoption. As far as the scope of this discussion is concerned, the Court decided that the failure to be provided with a judgment within a reasonable time constituted a violation not only of Article 6.1 of the Convention, but also the violation of Article 13 (the right to an effective remedy before a national authority). The fact that as early as March 2005 the Court found two cases (Charzyński v. Poland, Application
No. 15202/2003 and Michalak v. Poland, Application No. 24549/2003) inadmissible as the applicants failed to exhaust domestic remedies because they had not made an application under the 2004 Act, has been received in Poland with satisfaction. Additionally, the 2004 Act constitutes part of the law in the area of responsibility of the state for the damage caused by the failure to issue a decision or judgment (see: “Compensation”, page 115).

Before the adoption of the 2004 Act, a party in the proceedings enjoyed the right to file an application to the European Court of Human Rights (since 1 May 1993), and a complaint (a request for faster hearing of the case) of administrative nature to the president of the relevant court or the Minister of Justice. The legal bases for such measures were: the Common Courts System Law and the Supreme Administrative Court Act.

Principles of the 2004 Act

In accordance with the reasons for the government draft bill concerning the 2004 Act, the proceedings instituted in the course of a complaint against their lengthiness are incidental proceedings to be conducted within the framework of the proceedings concerning the substance of the case, i.e. of the proceedings being the object of the complaint. This statement is confirmed by particular provisions of the 2004 Act. Such approach to the proceedings in question, i.e. the idea of handling them as incidental proceedings, makes the interpretation of not always clear provisions of the 2004 Act, easier.

The 2004 Act applies to civil, criminal, administrative, and enforcement proceedings. The complaints are heard by the courts being superior to the courts against which the complaints have been lodged. Where the complaints have been lodged against enforcement proceedings, it is the circuit court that is to serve as the superior court in this respect. The complaints against the lengthiness of proceedings conducted before the Supreme Court or before the Supreme Administrative Court are heard by the courts against which the complaints have been lodged. At the Supreme Court, the complaints against the Civil Law Chamber are recognised by the Labour Law, Social Security and Public Affairs Chamber and the other way round. The complaints lodged against the Criminal Law Chamber are recognised by the Supreme Court Military Chamber and the other way round. The proceedings are single-instance ones. Due to the fact that they are incidental proceedings, the Constitutional provisions granting a party the right to appeal against the judgments and decisions issued during the first instance proceed-
proceedings, those procedural regulations to be the ones applicable to the proceedings being appealed against. A compulsory representation of the party has not been provided for in respect of complaint in the course of criminal procedure. Thus, complaints against lengthy criminal proceedings conducted by the Supreme Court may be lodged by the parties personally. That is why, in civil proceedings – as shown in the statistics attached hereto, the predominant number of the complaints lodged with the Supreme Court are returned to the parties without having been resolved. While lodging complaints, the parties may request having professional counsels appointed for them, where the parties cannot afford the costs thereof themselves. Then, having been provided with the parties’ relevant declarations concerning their financial conditions, the court appoints counsels \textit{ex officio}, their retainers being paid by the state.

**Judgment on lengthy proceedings**

After the verification of the admissibility of the complaint and of the court’s competence to hear it, the court is obliged to verify the grounds for charging the proceedings as lengthy. The 2004 Act (Article 2.1) defines lengthy proceedings as the proceedings taking longer than it is necessary for clarification of the facts of the case and legal findings being material for resolution of the case or longer than necessary for closing of the enforcement proceedings. The prerequisites for assessment whether the proceedings have or have not been lengthy have been shaped as those used by the Court. Article 2.2 points out such their characteristics as: timely and accurate performance of court acts with the view to issue the judgment or decision as regards the substance of the case or the acts of the court or of the court enforcement officer performed with the view to carry out and close enforcement proceedings, while taking into account the nature of the case, its complexity as regards the facts of the case and legal issues, its importance for the complainant, the issues that have been resolved, and the conduct of the parties, in particular, the complainant. The lengthiness of proceedings may result not only from the court’s idleness, but also from its activity (Article 1.1).

The complainants pay a fixed fee in the amount of 100 zlotys (around 25 euros). They may be exempted from the said payment on the same grounds and principles as those applicable to the appointment of the counsel \textit{ex officio}. It remained unclear whether the complainants lodging complaints against the lengthiness of the proceedings in the cases in which they were not obliged to pay the court fee were to be under the obligation to pay the said 100 zlotys fee. This question was clarified by the Supreme Court in its resolution of 19 January 2005 (case SPP 109/04), in which the Supreme Court stated that the complaints in the cases concerning the labour relationship were exempted from the 100 zlotys court fee. The principal Supreme Court’s argument in that regard was that the complaint proceedings were of incidental nature in respect of the main proceedings being the object the complaint.

Having decided that the proceedings have been lengthy, the court may adjudicate two other questions (2004 Act, Article 12). It may instruct the court hearing the case to take relevant steps and adjudicate the award of an adequate amount of money, not exceeding, however, 10,000 zlotys (around 2500 euros).

In case SPK 10/05, the Supreme Court found the proceedings in the given criminal case lengthy, where it took the court of appeal nearly 19 months to prepare the grounds for its judgment for the party, and adjudicated the award of 2,500 zlotys (around 600 euros).

Two cases concerned the relationship between the lengthiness of the proceedings and the court’s performance. In one of those cases (III SPP 48/04), the Supreme Court found that the proceedings for granting a disabled pension were lengthy, and adjudicated the award to the complainant of 2,000 zlotys (around 500 euros). The proceedings in question were lengthy as a result of the court’s performance where, while re-trying the case, the court reversed the first instance court’s judgment for the second time sending the case back to it for hearing. This was contrary to regulations on civil law procedure. In those circumstances, the court of appeal
should have made a reformatory judgment since the hearing of evidence required only to be supplemented, while sending the case for re-trial to the first instance court has been provided for by law where the pronouncement of judgment requires the conducting the whole hearing of evidence proceedings. In the latter of the cases (SPP 106/4) the complainant maintained that the court’s suspension of the proceedings was in violation of law. As a result, the proceedings were prolonged. The Supreme Court dismissed the complaint after having found that the suspension had had grounds in the regulations concerning the civil law procedure. It has then, indirectly, acknowledged that the application of suspension contrary to law may result in lengthy proceedings.

**Instructions to make relevant steps**

Pursuant to Article 12.3 of the 2004 Act, upon the complainant’s request, the court may instruct the court recognising the case from the point of view of its substance to make relevant steps within a particular time. The range of such instructions may not exceed the scope of assessed facts of the case and legal findings.

On the one hand the said provision gives the court recognising the complaint that the proceedings have been lengthy, the possibility to exert a binding effect on the court recognising the case form the point of view of its substance, while, on the other hand, it safeguards the court’s independence. The court judgments and decisions to come will have to work our the thin borderline between the admitted intervention of the court recognising the complaint and the independence of the court recognising the case from the point of view of its substance. While setting that borderline it will be necessary to take into account at least two circumstances.

Firstly, it is to be pointed out that the procedure being the subject of this discussion functions within the judicial authority. That is why there is no danger that the constitutionally guaranteed independence of judicial authority will be infringed. Every court procedure provides for a possibility to have the first instance court judgment changed or reversed by a superior court, this by no means being an infringement of the first instance court’s independence. However, this should be done with observance of the fundamental principles governing the court procedure. And, where the complaint against the lengthiness of proceedings should be taken into account, the parties in the proceedings are the persons who lodge the complaint, and – where they enter into proceedings – the state, represented by the president of the court whose proceedings have been appealed against (or the court enforcement officer). The other party in the proceedings conducted with the view to recognise the case from the point of view of its substance does not participate in the proceedings aimed at adjudicating the lengthiness of proceedings. This is the main reason why the court recognising the complaint against the lengthiness of proceedings may not issue binding decisions regarding the facts of the case and legal findings of the case being recognised from the point of view of its substance.

Secondly, we should not forget the aim of the complaint proceedings for adjudicating the lengthiness of the process, i.e. the enforcement of its faster performance. That is why the instructions under consideration should first of all set forth the particular time limit for undertaking relevant actions by the court hearing the case from the point of view of its substance. In the so far unique Supreme Court decision in which that solution has been applied (case III SPP 34/05) it has been found that the proceedings were lengthy due to the fact that the court failed to fix the date of the appeal trial for longer than nine months. The court was instructed to fix that date for the day not being later than one month following the date of the service of the judgment.

**Compensation**

Pursuant to Article 12.4 of the 2004 Act, while hearing the complaint, the court may, upon the complainant’s request, adjudicate the award from the state or – in the case of enforcement proceedings – from the court enforcement officer, of “an appropriate amount of
money” not exceeding 10 000 zlotys (ca 2 500 euros).

The said provision does not define the prerequisites for fixing of the said “appropriate amount”. It should, then, be assumed that it is to be fixed while taking into account all circumstances of the case. The court should consider the complainant’s financial and moral losses. The said appropriate amount of money is, then, in its principle, of mixed nature. It is to be understood partly as damages in financial form, and partly as compensation for moral loss. The upper limit of the appropriate amount of money is not high. But, the amount adjudicated to be awarded in the course of simple procedure is to be paid within the two months following the date of filing of the complaint. Moreover, it must be taken into account that the complainant may seek full damages under the civil code.

And, as it is to be seen, under the 2004 Act, Article 15, the party whose complaint has been heard, enjoys the right to seek from the state or, from the state and the court enforcement officer jointly and severally, a redress of the damage caused due to pronounced lengthy proceedings, this being done in the course of separate proceedings. The court decision to hear the complaint against the lengthiness of proceedings is binding upon the court in civil proceedings for damages or for compensation. This provision is in close conjunction with Article 417 § 3 of the Civil Code under which, if a damage was inflicted by the failure to issue a pronouncement or decision, where the obligation of their issue is provided for in legal provisions, the redress of such damage may be demanded after the non-compliance with law of such failure to issue a pronouncement or decision was stated in the course of appropriate proceedings, unless separate provisions provide otherwise. The said regulations make the situation of the party in civil proceedings who has been awarded with the pronouncement of lengthy proceedings, more advantageous. this situation is more advantageous since the party in civil proceedings is not charged with the burden of proof that the court’s or the court enforcement officer’s performance was contrary to law. The said party must only prove suffered loss, the amount of the loss, and the reason and cause relationship between the loss and the court’s or court enforcement officer’s performance.

A party who has not, however, lodged a complaint against the lengthiness of proceedings enjoys the right to seek damages for the loss caused by lengthy proceedings – under the Civil Code, Article 417 (i.e. on general principles), after the final and binding judgment has been issued in the proceedings regarding its substance.
Information

The Supreme Court

Complaints before the Supreme Court

<table>
<thead>
<tr>
<th></th>
<th>2004</th>
<th>Until 31 March 2005</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Civil and criminal</td>
<td>Civil</td>
</tr>
<tr>
<td>Received</td>
<td>125</td>
<td>82</td>
</tr>
<tr>
<td>Dismissed</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>Allowed</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Handled in another way*</td>
<td>92</td>
<td>110</td>
</tr>
</tbody>
</table>

a. In particular, returned to the party due to the lack of counsel (civil cases), rejected due to being lodged after the fixed time-limit, sent to other courts having relevant competence.

The Supreme Administrative Court

Complaints against infringement of the right to be heard before court without unreasonable delay – received and handled.

Movement of cases PP in 2004

<table>
<thead>
<tr>
<th></th>
<th>Received</th>
<th>Handled</th>
<th>To be handled</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>In aggregate</td>
<td>Allowed</td>
<td>Dismissed</td>
</tr>
<tr>
<td>General Administrative Chamber</td>
<td>136</td>
<td>99</td>
<td>4</td>
</tr>
<tr>
<td>Commercial Chamber</td>
<td>3</td>
<td>2</td>
<td>–</td>
</tr>
<tr>
<td>Financial Chamber</td>
<td>13</td>
<td>3</td>
<td>–</td>
</tr>
<tr>
<td>Total</td>
<td>152</td>
<td>104</td>
<td>4</td>
</tr>
</tbody>
</table>
Proceedings

Movement of cases PP in 2005 (1 January–20 April 2005)

<table>
<thead>
<tr>
<th></th>
<th>Left to be handled in 2004</th>
<th>Received in 2005</th>
<th>Received in aggregate (columns 2 plus 3)</th>
<th>Handled</th>
<th>To be handled</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>General Administrative Chamber</td>
<td>37</td>
<td>162</td>
<td>199</td>
<td></td>
<td>178</td>
</tr>
<tr>
<td>Commercial Chamber</td>
<td>1</td>
<td>–</td>
<td>1</td>
<td></td>
<td>–</td>
</tr>
<tr>
<td>Financial Chamber</td>
<td>10</td>
<td>12</td>
<td>22</td>
<td></td>
<td>21</td>
</tr>
<tr>
<td>Total</td>
<td>48</td>
<td>174</td>
<td>222</td>
<td></td>
<td>199</td>
</tr>
</tbody>
</table>
The Slovak experience

Ms Marica Pirošíková

Co-Agent of the Slovak Republic at the European Court of Human Rights

Like Italy, the Slovak Republic reacted swiftly to the Kudla v. Poland judgment. Constitutional Law No. 90/2001 Z.z. created an effective internal remedy, namely the constitutional complaint (Article 127 of the Constitution of the Slovak Republic, in force since 1 January 2002), allowing natural and legal persons to complain of a violation of their rights. If the violation of fundamental rights or freedoms has been caused by a failure to act, the Constitutional Court may order the authority which has violated the rights or freedoms in question to take the necessary action. In its decision on a complaint, the Constitutional Court can also grant appropriate financial compensation to the person whose rights have been violated.

The European Court of Human Rights (hereafter “the Court”) first considered the effectiveness of this remedy in its Andrásik and Others v. Slovakia judgment (decision of 22 October 2002 relating to Applications Nos. 57984/00, 60237/00, 60242/00, 60679/00, 60680/00, 68563/01 and 60226/00), to which Mr Michael O’Boyle also referred in his address. It was in that decision that the Court found for the first time that the constitutional complaint was an effective remedy with regard to unreasonable length of proceedings. Mr O’Boyle also said that in 2004 the Slovak Republic had been notified of a number of applications concerning cases in which the Constitutional Court, ruling on constitutional complaints under Article 127 of the Slovak Constitution, had, as reparation for violation of the “reasonable time” provision, granted just satisfaction that was significantly lower than that awarded by the Court, or else none at all, arguing that by their conduct the applicants had substantially contributed to the origin and the length of the proceedings.

As regards the earlier Slovak legislation, I should like to point out that, under Article 130 § 3 of the Constitution, as in force until 30 June 2001, an appeal (podnet) could be lodged with the Constitutional Court by any natural or legal person asserting a violation of their rights. According to its case-law based on the former Article 130 § 3 of the Constitution, the Constitutional Court lacked jurisdiction to draw legal inferences from a violation of the rights set out in Article 48 § 2 of the Constitution, which provides, inter alia, that everyone has the right to a hearing without undue delay. Nor could the Constitutional Court award compensation to the person concerned or impose a penalty on the public authority responsible for the violation. In the Constitutional Court’s view, it was therefore incumbent on the authority concerned to provide redress to the person whose rights had been violated.

With effect from 1 January 2002 the Constitution was amended so as to allow individuals and legal persons to complain of a violation of their fundamental rights and freedoms under Article 127, the relevant part of which provides:

1. The Constitutional Court shall decide on complaints lodged by natural or legal persons alleging a violation of their fundamental rights or freedoms or of human rights and fundamental freedoms enshrined in international treaties ratified by the Slovak Republic ... unless the protection of such rights and freedoms falls within the jurisdiction of a different court.

2. When the Constitutional Court finds that a complaint is justified, it shall deliver a decision stating that a person’s rights or freedoms set out in paragraph 1 were violated as a result of a final decision, by a particular measure or by means of other inter-
ference. It shall quash such a decision, measure or other interference. When the violation found is the result of a failure to act, the Constitutional Court may order [the authority] which violated the rights or freedoms in question to take the necessary action. At the same time the Constitutional Court may return the case to the authority concerned for further proceedings, order the authority concerned to abstain from violating fundamental rights and freedoms ... or, where appropriate, order those who violated the rights or freedoms set out in paragraph 1 to restore the situation existing prior to the violation.

3. In its decision on a complaint the Constitutional Court may grant adequate financial satisfaction to the person whose rights under paragraph 1 were violated.

In its decision in Andrášik and Others v. Slovakia, the European Court of Human Rights considered that this was an effective remedy, capable both of preventing the continuation of the alleged rights violation, in that the authority concerned could be ordered to take the necessary action without undue delay, and of providing adequate redress for any violation that had already occurred. It referred to Constitutional Court decisions III ÚS 17/02 and I ÚS 15/02, whereby persons who had complained of the length of proceedings before the ordinary courts obtained relief of both a compensatory and a preventive nature. I quote from the Court’s judgment:

3. The Constitutional Court’s practice

... On 30 May 2002 the Constitutional Court delivered decision No. III. ÚS 17/02-35 in which it found, upon a complaint under Article 127 of the Constitution, a violation of Article 4 § 2 of the Constitution and of Article 6 § 1 of the Convention as a result of undue delays in proceedings concerning the plaintiff’s action for recovery of property filed with the general court on 24 February 1999.

The Constitutional Court’s decision stated that the first-instance court dealing with the case had remained inactive for a total period of fourteen months and that the property claimed by the plaintiff was necessary for the everyday life of the latter and of her children.

The plaintiff had claimed 25 000 Slovakian korunás (SKK) in compensation for non-pecuniary damage resulting from the length of the proceedings. The Constitutional Court decided, with reference to the particular circumstances of the case and to the practice of the European Court of Human Rights under Article 41 of the Convention, to award SKK 5 000, noting that the district court in question was obliged to pay that sum within two months after the Constitutional Court’s decision had become binding. Finally, the Constitutional Court ordered the district court concerned to proceed with the case without delays.

In its decision of 10 July 2002 in a case registered as No. I. ÚS 15/02 the Constitutional Court found a violation of the plaintiffs’ rights under Article 48 § 2 of the Constitution. At the moment of the delivery of the Constitutional Court’s decision the civil proceedings complained of had been pending for more than six years at first instance. The Constitutional Court examined their length in the light of the criteria established by its case-law, namely the complexity of the matter and the conduct of the parties. It established delays in the proceedings imputable to the court dealing with the case, the total length of which amounted to twenty-two months.

In view of this finding, the Constitutional Court ordered the general court concerned to proceed with the case without further delays. The Constitutional Court granted in full the plaintiffs’ claim for SKK 20 000 each in compensation for non-pecuniary damage, and pointed out that the general court in question was obliged to pay those sums within two months after the Constitutional Court’s decision had become final. The decision expressly stated that, when deciding on the above claim, the Constitutional Court had also considered the relevant case-law of the European Court of Human Rights. Reference was made to the Court’s judgment in the case of Zander v. Sweden (25 November 1993, Series A No. 279-B).
The Constitutional Court has subsequently delivered several other decisions to the same effect ...

... the Court is satisfied that the complaint under Article 127 of the Constitution is an effective remedy in the sense that it is capable of both preventing the continuation of the alleged violation of the right to a hearing without undue delays and of providing adequate redress for any violation that has already occurred. The recent Constitutional Court decisions referred to above, by which persons complaining about the length of proceedings before general courts obtained relief of both a compensatory and a preventive nature show that the remedy in question is effective not only in law, but also in practice. Accordingly, this remedy is consistent with the presumption that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights.

Regarding the decision in 

Andrášik and Others v. Slovakia,

I wonder what message the Court was seeking to convey to the Constitutional Court of the Slovak Republic concerning the amount of just satisfaction to be awarded as redress for violation of the “reasonable time” provision. On the basis of the Court's finding that the remedy was effective in practice, based on Constitutional Court Decisions Nos. III ÚS 17/02 and I ÚS 15/02, could the Constitutional Court not have concluded that the Court held amounts of this order to be sufficient? Yet, two years after that judgment, the Slovak Republic found itself in a situation comparable to that of Italy in the Scordino case, for in 2004 the Court notified the Government of the Slovak Republic of a number of applications concerning violation of the right to a hearing within a reasonable time further to decisions of the Slovak Constitutional Court delivered pursuant to Article 127 of the Constitution and asked it the following question:

Can the applicant continue to qualify as a victim within the meaning of Article 34 (see mutatis mutandis Scordino and Others v. Italy (decision), No. 36813)?

In the light of the above context, amongst other things, the Slovak Republic requested permission from the President of the Court to submit observations on the Scordino v. Italy case. If the Court does not lay down clear criteria constituting adequate guidance for national authorities ruling on the amount of compensation for non-pecuniary damage caused by unreasonable length of proceedings, it is likely to be faced with other applications similar to that in the Scordino case despite the existence of effective internal remedies. In the long run such a situation will again bring with it the risk, mentioned by the Court in the Kudla v. Poland judgment, of the Convention's system of human rights protection becoming less effective at both the national and international levels.

In the second part of my paper I should like to present a new remedy against unreasonable length of proceedings in the Slovak Republic, which entered into force on 1 July 2004. This is Law No. 514 of 28 October 2003 on liability for damage arising out of the exercise of public authority. I shall quote certain provisions of this law which might become a model for other countries:

Section 1

Scope
The present law shall cover:

a. State liability for damage caused by public authorities in the exercise of public authority;

b. Liability of local and regional authorities for damage caused by the said authorities in the exercise of decentralised authority;

c. Friendly petitions for damages and state action to reclaim compensation from public officials who have committed a fault for which the state is liable.

Section 9

Incorrect official procedure

1. The state shall be liable for damage arising out of incorrect official proce-
Section 15

Friendly petition

1. The right to compensation for damage arising out of an unlawful decision, an unlawful arrest, unlawful custody or any other deprivation of personal liberty, a sentence, a security measure or a decision regarding pre-trial detention, and the right to compensation for damage arising out of incorrect official procedure, shall first be argued on the basis of a friendly petition (hereinafter “petition”) lodged in writing by the injured party with the competent body according to Sections 4 and 11.

2. If the petition is lodged with a body lacking jurisdiction, that body shall refer the matter to the competent body and notify the injured party. The effects of lodging the petition shall remain unaffected.

Section 16

1. If the competent body does not allow the friendly petition for compensation for damage, in whole or in part, within six months of the date of its receipt, the injured person may claim the compensation covered by the petition, in full or for the part not satisfied, through legal proceedings.

2. A person shall be required, at the request of the competent body, acting on behalf of the state, to communicate without undue delay all facts of importance to the friendly petition.

Section 17

Type and amount of compensation for damage

1. Compensation shall be provided for losses and loss of earnings.

2. If the simple finding of violation does not constitute sufficient reparation in the light of the damage arising out of an unlawful decision or incorrect official procedure, monetary compensation shall be awarded for the non-pecuniary damage where there is no other alternative.

Section 22

...
for compensation, as described above, does not suffice to eliminate these problems; wide-ranging reforms are required in terms of legislation, organisation, technical support and additional court staff. The Slovak Republic has implemented reforms in this area, but without any substantial improvement in the situation – which all goes to confirm that the problem is an extremely complex one. ★
The Department for Constitutional Affairs has responsibility for the civil and criminal justice systems in England and Wales (aspects of which are shared with other government departments). As a lawyer within the Department for Constitutional Affairs, I have followed the discussions today with particular interest. It is a privilege to be able to contribute some short comments on the British experience to this most helpful and timely initiative of the Polish authorities, especially following on from the distinguished speakers that have already addressed us.

Before turning to consider the reasonable time requirement under Article 6 in particular, I would like to make some brief observations about the general protection for Convention rights in the United Kingdom. In 1998, the United Kingdom Parliament enacted the Human Rights Act, which has now been in force for almost five years. The Human Rights Act for the first time provided a vehicle for the transmission of most Convention rights directly into the domestic law of the United Kingdom. The Act requires the domestic courts to take into account the jurisprudence of the European Court of Human Rights in respect of any issue arising under the Convention with which they are seized (Section 2). The Act provides a scheme of remedies for the better protection of Convention rights in domestic law. For example, all those who apply and interpret legislation are required to do so in a way that is compatible with Convention rights where it is possible to do so (Section 3).

The keystone of the Human Rights Act is, however, the duty it places on public authorities, by providing that they act unlawfully if they act incompatibly with Convention rights (Section 6). This duty is enforceable by way of a cause of action under the Act in the domestic courts. The courts may then grant a wide range of remedies, including injunctions, declarations, orders quashing the decisions of public authorities and orders requiring public authorities to act or to refrain from acting in a particular way. In a wide range of cases, the courts may also award damages for the violation of Convention rights, where such an award would be appropriate (the court is expressly directed to take into account the principles applied by the Strasbourg Court in awarding compensation under Article 41 of the Convention: Section 9 (4)).

The thinking behind the Act was twofold. It was intended to allow the British judiciary to contribute, together with the judiciaries of other Contracting Parties, to the rich debate as to the values of the Convention that should guide the evolution of its jurisprudence. But it was also to provide an effective forum for the resolution of cases domestically, without the necessity of an application to Strasbourg. Some would say that this was long overdue.

In particular, it was our hope and has been our experience that this will repatriate the repetitive cases that President Wildhaber noted this morning could prove so diverting of the Strasbourg Court's own limited resources. By way of illustration, the Court decided in the 1990s two important cases of precedent, Benham v. the United Kingdom (1996) 22 E.H.R.R. 293 and Perks v. the United Kingdom, App. No. 25277/94 and others, judgment, 12 October 1999. These cases established the circumstances in which imprisonment would

---

40. N.B. This is the slightly expanded text of a floor speech made in the Workshop on 28 April 2005. It is not intended to be a comprehensive account of the policies of Her Majesty’s Government in the fields considered.
be unlawful under Article 5 (1) (b) of the Convention in cases of judicial error in the United Kingdom. Over a hundred clone applications followed in the wake of these judgments, many relating to judicial acts occurring over a decade ago. The last of these groups of clones was determined in Strasbourg at the beginning of March this year. That such cases had to be brought before the Strasbourg Court at all, to consider a question under the Convention which is essentially referential to domestic law, was hardly the best use of the Court’s precious time. It is with some relief that I can say that all cases such as these can now be appropriately addressed under the Human Rights Act. Applicants need only come to Strasbourg if they remain dissatisfied with the outcome of the domestic proceedings.

Turning to the Human Rights Act in the context of the unreasonable length of proceedings, the first point to make is that courts and tribunals are expressly defined to be public authorities under that Act. The duty under Section 6 of the Act accordingly applies to the courts and tribunals of the United Kingdom and this means that they cannot countenance delay, as it is understood under Article 6 of the Convention, in their own proceedings.

The practical effect of this is to some extent limited, because the expeditious resolution of proceedings has already, and independently of the obligations of the Convention and the Human Rights Act, been placed at the heart of civil and criminal procedure in England and Wales. However, Article 6 can be relied on in judicial proceedings in a number of different ways. In civil cases, for example, the reasonable time requirement could be used to press an argument to compel a court to act in a way so as properly to progress the case. Reliance could also be placed upon it in order to have sanctions imposed on a dilatory party where appropriate (for example, denying such a party a proportion of his costs). In criminal cases, a defendant may recover damages if delay occurs in the proper investigation and prosecution of a case. Noting the example given by the Chairman, Mr Drzewicki, earlier today, it could also be argued that a sentence should be reduced to acknowledge and remedy unreasonable delay. A criminal prosecution may also be stayed on the grounds that it would be an abuse of process as a result of delay, but this will be ordered in England and Wales only where the resolution the trial has been compromised as a result (for example, through the decay of evidence over time).

What may not be claimed under the Human Rights Act are damages for a violation of Article 6 resulting from a judicial act done in good faith. However, complaints concerning delay (along with others) may be submitted to Her Majesty’s Court Service. If upheld, compensation will be paid in appropriate cases under administrative arrangements.

The Chairman, Mr Drzewicki, made a comment this morning which I found particularly striking. He distinguished between taking steps to cure the causes of delay and merely providing remedies that addressed the symptoms of delay. It is with this distinction in mind that I would like to draw the attention of the Committee to the reforms that have been made to the civil justice system over the last decade and which are presently being undertaken to the criminal justice system.

The reasonable time requirement of Article 6 naturally gives rise to particular issues in a country with an adversarial tradition, such as the United Kingdom. This is especially pronounced in civil litigation, where, save in cases to which the government is a party, the only involvement by the state will be in the form of the judge.

If one were to look at the civil justice system of England and Wales 10 to 15 years ago, one would have found an adversarial system with a largely passive judiciary, that often simply reacted to the steps taken by the parties. This was widely seen as producing impediments to justice. Procedure could be tactically abused by litigants, who were free to engage in trench warfare, trying to wear each other down before ever the substance of the matter was heard. It also gave rise to delays which whilst not manifestly excessive in Convention terms, were seen domestically to be unacceptable in the generality of cases. For example, in 1994 the period between the issue of proceedings and the setting down for trial was, in the High Court in London, on average 163 weeks and in the county courts, on average 80 weeks.
Delay had long been recognised in the United Kingdom as an enemy of justice. Conscious of this and conscious of the clear jurisprudence of the European Court that a system of civil procedure that depends on the parties to take the initiative with regard to the progress of the proceedings does not relieve a Contracting Party of its obligations under the reasonable time requirement (see, e.g., Scopellitti v. Italy, judgment, 27 October 1993, §25), the then Lord Chancellor, Lord Mackey of Clashfern, commissioned a comprehensive analysis of the difficulties which beset the civil justice system. This work was led by Lord Woolf of Barnes, then a Lord of Appeal in Ordinary and now our most senior judge, the Lord Chief Justice.


Without effective judicial control... the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment where the litigation process is too often seen as a battlefield where no rules apply. In this environment, questions of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable.

In his final report, Lord Woolf proposed a radical prescription for the systemic failures he had identified in the institutions and culture of civil litigation in England and Wales. It was a prescription to address the causes, not to mask the symptoms. That prescription was adopted in a consolidated code of civil procedure made in 1998, called the Civil Procedure Rules, which came into force in 1999.

The first departure in the Civil Procedure Rules is an attempt to distil the fundamental values that should underpin civil litigation into a single overarching statement of principle. This is called the overriding objective, is found at the beginning of the Rules and is the compass by which the courts should exercise all their procedural powers. Although essentially a statement of the obvious, the practical and symbolic importance of the overriding objective should not be underestimated. Rule 1.1 of the Civil Procedure Rules provides (emphasis added):

**The overriding objective**

1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable—

a. ensuring that the parties are on an equal footing;

b. saving expense;

c. dealing with the case in ways which are proportionate—

(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;

d. ensuring that it is dealt with expeditiously and fairly; and

e. allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

Rules 1.2 and 1.3 also state a fundamental value of the new procedural code. On the one hand they require the court to give effect to the overriding objective in all instances where it exercises its procedural powers or interprets the code and on the other hand they require the parties to litigation to help the court further the overriding objective. In other words, civil litigation is required to be a partnership between judges and litigants.

Lofty statements of principle are fine in so far as they go, but are as nothing if in practice they are ignored or if the practical tools necessary to give effect to them are lacking. Fortunately, this has not been the experience under the Civil Procedure Rules. Central to the transformation of the institutions and culture of civil litigation was not only the imposition of a duty on judges to manage cases actively, in contrast to the reactive culture of the past, but also the provision to them of the means so to do.

Although this thinking permeates throughout the whole approach of the Civil
Procedure Rules, perhaps I can seek to illustrate it with three examples.

First, there are the general duty and the general powers to manage cases in accordance with the overriding objective (see in particular rule 1.4 and Part 3). The court is required to do a number of things in actively managing a case, for example to identify the issues at an early stage, to fix timetables and control the progress of the case, to decide how the issues might most efficiently be resolved and to make appropriate use of new technology. Similarly the court may extend or shorten the time for complying with procedural requirements, summon the parties and their representatives to court, strike out parts of a litigant’s case (for example, if there are no reasonable grounds for raising it) and make orders imposing sanctions on parties unless they comply promptly with the directions of the court. Importantly, these powers need not await an application by a litigant, but may be raised by the court on its own motion.

Secondly, the new procedural code contains important rules applying to the pre-action stage (i.e. before the issue of proceedings), called the Pre-Action Protocols. The failure to comply with the Protocols may result in the imposition of sanctions in any subsequent litigation. Their purpose is to promote settlement without recourse to litigation and to ensure that where litigation does later issue, the case is better prepared, and the key issues are identified, from the outset.

Thirdly, a system of tracks has been instituted in most civil litigation. After proceedings have issued, the parties are permitted a relatively short period of time to plead out the case (setting out the basis of the claim and the defence in extremely skeletal written form). After this process has concluded, the case will be allocated to one of three tracks, depending on its value and complexity. The tracks are the small claims track (for the most straightforward litigation), the fast track (for litigation of middling complexity and value) and the multi-track (for complex litigation). The procedural code is then tailored around the track in question, for example an expedited and simplified procedure applies to the small claims track. A suggested timetable with short deadlines is provided for the fast track, which aims to progress the case from allocation to hearing within 30 weeks. A suggested timetable is not provided for the multi-track, as the nature of such litigation can vary tremendously (from a question as to whether a contract worth GBP 25 000 is enforceable to group litigation concerning the solvency of a reinsurance pool where GBP 100 million is at stake). However, in multi-track cases, the importance of expeditious resolution is not ignored. The court and the parties are required to agree a bespoke timetable for the resolution of the case and to ensure that the litigation is appropriately managed through case management conferences.

Although the reforms proposed by Lord Woolf were met with a measure of trepidation in certain quarters when first proposed, they have generally been well-received by judges, practitioners and litigants. The general consensus is that they have operated to simplify and render more efficacious civil procedure, at the same time as reducing delay. For example, in the last quarter of 2004, the period between allocation to a track and trial was less than 15 weeks in 84% of small track cases, less than 30 weeks in 80% of fast track cases and less than 50 weeks in 75% of multi-track cases.

But the attitude of those with responsibilities for the civil justice system is far from one of complacency or self-congratulation. Rather the process of reforming civil justice is very much regarded as an ongoing one, both to introduce further improvements to the system and to ensure that the existing rules are kept in a good state of repair. The stewardship of the code rests with a standing committee of senior judges, lawyers and representatives from relevant consumer and voluntary sector organisations. Following appropriate consultation, it is this committee that approves changes to the code. A policy division of the Department for Constitutional Affairs keeps civil procedure policy under constant review and both responds to and initiates new policy proposals. Ideas for new ways of improving civil procedure are collected from a wide range of sources – from practitioners, from organisations with an interest in civil justice, from the judiciary, from within my Department and indeed from helpful colloquia such as this.
I wish to turn to consider much more briefly the position of the criminal justice system in England and Wales. The adversarial tradition has not produced the same difficulties in criminal proceedings, because prosecutions are almost always brought by the Crown. However, until comparatively recently, the approach of the judiciary was essentially as passive and reactive as it was in civil proceedings. The efficacy of criminal procedure was also diminished because it was scattered and diffuse, to be pieced together from numerous Acts of Parliament, from secondary legislation, from different sets of rules applying in different types of criminal courts and from common law practice.

However, the work undertaken to modernise civil procedure has been replicated for the criminal justice system mutatis mutandis over recent years. This resulted in the publication of a consolidated code of criminal procedure, which came into force in April of this year. Perhaps unsurprisingly, this is called the Criminal Procedure Rules. This code contains an overriding objective and confers on the criminal courts the same aggressive powers of case management as those enjoyed by their civil counterparts. Two particularly pertinent requirements of the overriding objective of the Criminal Procedure Rules are (as provided in rule 1.1 (2)):

Dealing with a criminal case justly includes—
...
c. recognising the rights of a defendant, especially those under Article 6 of the European Convention on Human Rights;
...
e. dealing with the case efficiently and expeditiously ...

Greater case management had been introduced gradually into criminal proceedings since the late 1990s. However, Lord Woolf, as Lord Chief Justice not only the most senior judge but the judge with particular responsibility for the criminal courts, has commented that the code is seen as essential to promoting a culture change in criminal case management.

Time prevents me from commenting on the numerous other initiatives that are being brought forward to modernise and improve the criminal justice system. However, one noteworthy feature has been the need to ensure effective cross-government co-ordination on criminal justice policy, which is spread between a number of government departments, in particular the Department for Constitutional Affairs, the Home Office and the Crown Prosecution Service. To that end a cross-government office, the Office for Criminal Justice Reform, has been established.

A wide range of initiatives are also being brought forward which involve soft law or administrative arrangements, for example ensuring the more effective management of the criminal courts at the administrative level and by seeking to reduce the number of cases that abort at the door of the court (perhaps due to a late change in plea). We have also sought to ensure that the criminal courts are more accommodating of the needs of witnesses, as the non-attendance of witnesses has an obvious capacity to disrupt and delay trials (for example, witnesses can now arrange to visit the courts in advance of giving evidence to familiarise themselves with the court environment).

The Chairman, Mr Drzewicki, commented kindly on the British system earlier today. In commenting on the Italian experience, Mr Crisafulli suggested that the culture in litigation was different in Italy from that in my country. Let me conclude by saying that we have not always got things right and there have been times where our system has been found wanting in Strasbourg on this issue. However, it is probably fair to say that delay in judicial proceedings is fortunately exceptional in the United Kingdom. But there is no magic in the British courts or the British culture on this issue and it was not always so. Rather can I suggest that such progress as we have been able to achieve has resulted from rigorously seeking to address the causes, rather than the symptoms, of delay, through fundamental and continuing reform.

With an eye very much to the ongoing nature of this work, I have found today’s discussions both interesting and innovating, and I thank the Committee for your time.
Further information

Further information about the issues raised in this talk can be found at the following websites:

- Generally: http://www.dca.gov.uk/thelegalsystem.htm/
- On the criminal justice system: http://www.cjsonline.gov.uk/
- The Civil Procedure Rules: http://www.dca.gov.uk/civil/procrules_fin/
- The Criminal Procedure Rules: http://www.dca.gov.uk/criminal/procrules_fin/
- Assessment of the operation of the Civil Procedure Rules: http://www.dca.gov.uk/civil/reform/ffreform.htm/
- The Human Rights Division of the Department for Constitutional Affairs: http://www.dca.gov.uk/hract/hramenu.htm/
THE EUROPEAN COURT OF HUMAN RIGHTS: AGENDA FOR THE 21ST CENTURY

Seminar organised by the Warsaw Information Office of the Council of Europe, in co-operation with the Polish Ministry of Foreign Affairs

Warsaw, 23-24 June 2006

Proceedings
Welcome Address

Ms Hanna Machińska

Director of the Information Office of the Council of Europe, Warsaw

Ladies and Gentlemen, Excellencies,

It gives me great pleasure to welcome all participants of the Seminar “European Court of Human Rights-Agenda for the 21st Century”. The debate on the reform of the European Court of Human Rights is held with the participation of the most renown experts in the field, representing both national and international institutions. Let me welcome representatives of the Registry of the European Court of Human Rights, the representative of the Commissioner for Human Rights, judge with the Court of Justice, representatives of the OSCE, government agents, representatives of the Ministries of Foreign Affairs and Ministries of Justice, the diplomatic corps, judges of the Supreme Court, Constitutional Court, Supreme Administrative Court, judges, prosecutors representatives of the National Bar Association, lawyers, representatives of the Ombudsman, scholars (including academics from Belarus), representatives of NGOs, and students. Such a broad representation of different circles shows how great is the interest in issues related to the functioning of the European Court of Human Rights. At the same time this proves that the European Court of Human Rights is seen in a broader context of the activities of other organs constituting the institutional system of human rights protection in member states of the Council of Europe. This system of “interlinked vessels” also includes Information Offices of the Council of Europe, which have for many years acted as promoters of knowledge and information about the protection of human rights, basic legal instruments available, as well as procedures to be followed in case of individual applications.

It is no coincidence that the idea of the Seminar was born in Warsaw. For 15 years now the Warsaw Information Office of the Council of Europe has been involved in a broad range of activities on human rights, organising training courses, conferences and workshops for judges and lawyers, popularising knowledge on human rights in academic and non-academic circles. In 2004 the Warsaw Information Office of the Council of Europe was selected for a pilot project of the Council of Europe entailing the creation of a lawyer’s position, whose mandate was defined in the following terms:

- providing general information about the ECHR and in particular the procedure before the European Court to those requesting such information from the Office;
- providing upon request detailed information on, and explanation of the admissibility requirement set out in particular in Article 35 of the Convention to persons contemplating lodging an application with the Court, supported where relevant by case-law examples;
- informing potential applicants about possible obstacles to the admissibility of an application to the Court by reference to the particular complaint and also to procedures existing at national level.

The Report of Lord Woolf underlined that “Although it is too early to draw conclusions about the long-term impact of this information office, it is clear that there is a great demand for information, and that the information provided can contribute to reducing the number of applications lodged in Strasbourg.

The approach of the Warsaw Information Office has been endorsed by the External Auditor, as well as at a high-level seminar in Oslo on the ‘Reform of the European Human Rights System’. The delegates at the seminar concluded, inter alia, that, in the light of Warsaw pilot project, further thought should
The ECtHR: Agenda for the 21st century

be given to using information offices to help reduce the flood of inadmissible cases.”

The concept behind the creation of a lawyer’s position was to seek an answer to whether by developing systems of informing the public about the criteria of admissibility to the ECHR, the Court would be “relieved” of the cases which should be resolved within national justice systems. A positive answer to this question could serve as an incentive for different institutional solutions. I should like to stress that the experience stemming from the present project is of utmost importance in indicating the need to implement a system of legal assistance, strengthening the existing institutions providing aid to citizens at the national level. We have also come to understand the great need to explain the content of the European Convention on Human Rights, as well as to promote the case-law of the European Court of Human Rights. I am convinced that the present debate will lead to numerous important reflections as to the ways of improving the functioning of the European system of human rights, and how to cope with the challenges faced by national systems in this respect.

Let me express my gratitude to all who have contributed to the organisation of this seminar, and in particular the Ministry of Foreign Affairs co-organiser of the Seminar for their support. I would also like to thank representatives of the Registry of the European Court of Human Rights for many of the valuable initiatives which have given rise to this debate here today. My words of thanks also go to the Council of Europe, for making it possible for this important debate to take place. Finally, let me thank Wardyński & Partners, the law firm, for their assistance in preparing the Seminar.
The third summit of the Council of Europe in Warsaw – inspiration for reconstructing the European system of human rights protection in the 21st century

Mr Stanislaw Komorowski
Under-Secretary of State at the Ministry of Foreign Affairs, Poland

Esteemed Guests, Seminar Participants, Excellencies, Ladies and Gentlemen,

I have the pleasure of welcoming you on behalf of the Ministry of Foreign Affairs, co-organiser of the seminar on “The European Court of Human Rights – Agenda for the 21st Century”, which begins today. It is indeed a rare occasion that brings together such a distinguished group of personalities professionally dedicated to the protection of human rights at national and international levels.

Neither the time nor place of our seminar is accidental. Some of you were in Warsaw just a year ago to take part in the Third Summit of the Council of Europe. The Warsaw meeting of that organisation determined the directions of its development for the next few years. And now, an opportune moment has come to launch an all-European debate on the future of the system of human rights protection of the Council of Europe. We are approaching the conclusion of the ratification process of Protocol No.14 to the European Convention on Human Rights and Fundamental Freedoms. As you know, the protocol introduces certain organisational and procedural changes. Still, in a broader perspective, the Strasbourg system faces further, daunting challenges.

Allow me to share with you some reflections concerning those challenges in the context of the Warsaw Declaration and Plan of Action adopted at the Third Summit. As you may recall, the member states affirmed, their determination to ensure long-term effectiveness of the European Convention of Human Rights, by using all appropriate measures. There is no doubt that the Strasbourg system is one of the most valuable achievements of European integration after World War II. Thus, it is the duty of all member states – not only to themselves, but to all present and to future generations of Europeans – to preserve the European Convention system in its best possible condition. Therefore, it is commendable that you will have an opportunity today to discuss the future modalities of that system, including the reforms of the European Court of Human Rights.

My first observation concerns the very philosophy of the human rights system in the Council of Europe. Despite numerous transformations in the political, economic and social life of our continent over the last six decades, there has been no fundamental change in the philosophical foundations or values at the root of the European Council. Intergovernmental co-operation in the framework of the Council is guided by observance of human rights, democracy and the rule of law.

While the foundations remain firm, we are constantly rebuilding the treaty and the institutional system. Hence, the legitimate pursuit of optimum solutions may at times conceal the obvious fact that, nevertheless, deserves to be highlighted: the Strasbourg system is based on universally endorsed values that unite the
The ECtHR: Agenda for the 21st century

European continent. The construction of a system of human rights protection – and indeed your presence at this seminar – constitute an affirmation of these values.

A second reflection is linked to the following question: how best to adapt the human rights protection system to the challenges of the 21st century while retaining its effectiveness? The question refers not so much to specific solutions as to our axiological approach. We should also be mindful of the methodology and legal awareness that accompanies changes in the Strasbourg system.

Law historians are still impressed today by the way Roman law evolved in its time. One reason was that the ancient Romans were able to accurately identify its development tendencies and to guide their course. As a result, Roman law – alongside Greek philosophy and Christian tradition – became the cornerstone of European civilisation.

It would be no exaggeration to assert that as regards the unification of our continent, the role of contemporary European law is as profound as that of Roman law thousands of years ago. How, then, should we guide its development? It may be assumed that the key to the problem lies not so much in upgrading the system itself as in the mechanism of introducing the changes.

The introduction of changes in treaty law is usually a time-consuming and painstaking process, though its ultimate effect may be distant from what was originally intended. Meanwhile, prudent shaping of the normative foundations could open the way for a more efficient and speedy reconstruction of the system. That goal would be attainable if certain systemic changes could be introduced by way of unanimous decisions of the Committee of Ministers of the Council of Europe. I will not dwell on this issue here since you are likely to consider it in your papers and debates.

I do wish to underline, however, that further reformist moves appear unavoidable. We have been able to identify some of the threats to the system – as eloquently demonstrated by the excellent report by Lord Woolf late last year, or the preliminary report by the Group of Wise Persons submitted a month ago. The authors of these documents deserve appreciation for their work in identifying the problems and their potential solutions. Still, we are not in a position today to elaborate on all the possible threats. For that reason I wish to stress the significance of a suitable mechanism for adapting the Strasbourg system to the threats likely to confront it in the decades to come.

My third observation, concerning a long-term vision of human rights protection in the process of European integration also refers to the future of the system. And so, we must not forget that the European legal space in senso largo is being co-shaped by two major international tribunals – the European Court of Human Rights in Strasbourg and the Court of Justice of the European Communities in Luxembourg. Efforts have been under way for years to ensure that the protection of human rights in Europe is not developed separately at the Council of Europe and the European Union. Shortly, after Protocol No.14 to the European Convention comes into force, the European Union will receive a practically explicit invitation to become bound by the Convention. I hope that Union member states will find a way of availing themselves of that invitation as soon as possible and of taking bold decisions in this regard.

I just referred to the co-creation of the European legal space in senso largo. It is not completely true, however, that the space is being filled exclusively by European tribunals of an international character. I am certain that the seminar will offer an opportunity for reflection on ways of extending the contribution of national courts to European jurisprudence. National courts have a pivotal role to play in the development of human rights protection, so any vision of this system in the 21st century should highlight the functions and responsibilities of national courts. Let us remember that national courts are not only courts of community law – but also of European human rights law.

Therefore, we should ensure that the Strasbourg system is in fact primarily based on national courts. It should be clearly emphasised that national jurisdiction is always viewed as a forum where most human rights problems or disputes can be resolved.
This assumption would not only fulfil the postulate of subsidiarity of every system of human rights protection, but would also offer hope that the Strasbourg Court will occupy itself with cases of supreme importance for the building of European identity. The present situation does not fully correspond to that postulate, since the use of international institutions for dealing with issues of secondary importance only undermines their potential.

For this reason, the introduction in Protocol No. 14 of the criterion of “significant disadvantage” as a requirement for the admissibility of an individual application to the Strasbourg Court is a step in the right direction. Over the next few years we will closely follow the Court’s interpretation of this concept. Let us note that it is not the point here to marginalise any category of cases, but rather to send a firm reminder that the role of the European Court of Human Rights can in many cases be played by national courts.

I am confident that in the course of this seminar you will hear many outstanding contributions and will have opportunity to discuss the future of the European Court of Human Rights and the entire Strasbourg system. In this context, let me repeat my satisfaction that the seminar will focus on issues highlighted in the Warsaw Declaration and Action Plan adopted last May at the Third Summit of the Council of Europe.
Poles in search of true justice

Mr Jakub Wołąsiewicz

Plenipotentiary of the Minister of Foreign Affairs for Proceedings before the European Court of Human Rights

Excellency, Esteemed Guests, Ladies and Gentlemen,

I wish to join in the words of greeting addressed to the seminar participants by Minister Stanislaw Komorowski. I believe we have an excellent opportunity to elaborate a vision of the European system of human rights protection in the 21st century. We are delighted by the presence of distinguished experts in this field, representing member states of the Council of Europe, as well as national and international courts, academic institutions and the legal profession.

As government agent in the proceedings before the European Court of Human Rights, I have direct experience of the various practical aspects of the operation of the Strasbourg system, concerning both the applications procedure and the execution of Court judgments. A presentation of the problems encountered in practice by a government agent would take up more time than the 15 minutes I have been allocated. For this reason I will not review the latest rulings in cases against Poland, nor the dilemmas that I am occasionally forced to resolve. Instead, I would like to share some observations on the Polish view of the postulate for streamlining Strasbourg jurisprudence.

First of all, let me note that despite the unflagging popularity of the Strasbourg mechanism among Polish citizens, in 2005 the European Court of Human Rights received about a thousand applications less from Poland than the year before – a drop of almost 20%. Though we are still among the states with the highest number of complaints lodged against them, the downward trend gives grounds for moderate optimism.

The fall in the number of Polish complaints is the effect of intentional, long-term endeavours to upgrade Polish jurisprudence, and also – prominently – of several well-designed legislative initiatives, including the new Bug River law and the law that introduced into the Polish legal system an effective remedy against excessively protracted proceedings.

Naturally, this does not mean that the workload of the Polish government agent has been reduced. On the contrary, the number of cases communicated to the Polish Government in 2005 was the highest ever, approaching 200. During the same period the Court issued 50 judgments and 125 decisions in Polish cases, while 8 cases ended in friendly settlement. I cannot fail to mention at this point the finalisation of an amicable solution in the case of Broniowski v. Poland, which – in view of the pilot judgment issued by the Court in 2004 – constituted one of the greatest challenges to the Polish legal order.

Allow me to dwell a little longer on the Broniowski cases – in order to draw conclusions from the way agreement was reached between the applicant and the government side. And so, both the size of the individual compensation for Mr Broniowski and the attempt to define a systemic model of Bug River compensation for thousands of persons in a similar legal situation, were the subject of negotiations, with the participation of representatives of the Court’s Registry.

The attainment of a friendly settlement in the pilot case resolved the individual problem of Mr Broniowski, but did not result in the transfer of the other Bug River complaints to the national system. Clearly, the pilot cases need a procedure for achieving legal peace.
Such legal peace would have as its objective the negotiation of terms between the Court and the government for dismissing clone cases and referring them for resolution to national courts. Thus, we are talking about a new negotiating procedure between the government and the Court Registry. Let me stress: between the government and the Registry – and not between the government and the applicant. The participants in such negotiations could also include the Council of Europe Commissioner for Human Rights, representing the interests of the applicants in clone cases, and a representative of the Committee of Ministers, which would subsequently act as guarantor of the correct fulfilment of the terms of legal peace. The negotiations would result in the elaboration of an agreement with the government on a general remedy to be introduced into internal law to prevent further violations. Such a remedy should also establish a path for settling clone cases, the latter being conditionally struck from the Court’s roster of cases. The government would present a timetable for implementing the remedy. If the government failed to implement its commitments, the Court would be able to withdraw from the legal peace and issue judgments in the clone cases as in the pilot case.

Meanwhile, the early response mechanism would have as its primary objective an expeditious resolution of the conflict before it is referred to the Court. Assuming a minimum of good will on the part of the applicants, it would be possible in numerous cases to attain agreement or compromise. The immediate reference of a submitted complaint to mediation or conciliation, with the involvement of specialised mediators, could lead to a breakthrough in the number and weight of cases handled by the Court.

Let me add here that the weight of most cases currently before the Court is probably lower than was originally anticipated. I realise the significance of problems connected with protracted court proceedings or the duration of detention on remand, but surely – with all due respect – it is possible to identify many other, more important problems that have fundamental impact on the development of human rights and the rule of law in Europe. It is true that the Court cannot disregard any applicant. However, its primary mission as guardian of the rule of law consists in resolving issues that determine the foundations of the European identity in the sphere of human rights.

Considering the benefits accruing from the friendly settlements already achieved between the government side and the applicants, perhaps in the future the Court should also resort more broadly to alternative methods of settlement, thus avoiding the need for full engagement of the Court.

Drawing on Polish experience, I would venture the prediction that the number of Polish cases at the Court would be dramatically reduced if we could introduce a kind of “early response” mechanism to the submission of Strasbourg complaints. At present, the Registry and the Court itself can react immediately only in a limited number of cases, e.g. when a delay would result in irreparable consequences or damage to the applicant, or when the applicant is elderly. On the other hand, it is no secret that the so-called fast-track procedure is applied rarely and cannot serve as the basic model.

Ladies and Gentlemen,

Alternative methods of resolving disputes that concern the European Convention of Human Rights have been taken up by the Group of Wise Persons, who, however, have not yet submitted any concrete proposals on the subject. On the other hand, Lord Woolf’s report devotes considerable space to friendly settlements, linking them to the concept of establishing satellite offices of the Registry in certain State Parties to the Convention, including Poland.

The establishment of satellite offices strictly as envisioned by Lord Woolf would encounter considerable organisational and financial obstacles. Still, the concept should not be refuted out of hand. It would be desirable to work out some form of presence of Registry representatives in the countries with the highest number of applications. Their presence would enhance alternative methods of
settlement and would stimulate the collaboration of national institutions to introduce the greatest number of applications into the national legal system.

I propose that immediately after an application is registered and initial assessment made of its admissibility, the application should be communicated to the government and the plaintiff, with proposal of its settlement through mediation. The objective would be to persuade the parties to resolve the problem and withdraw the application from the Court. Obviously, mediation is possible only when a case is still “fresh” and has not yet caused serious injury to the interests of the applicant, i.e. when the consequence are still reversible. At the same time, the parties should be advised by the mediator that if no agreement was reached, the case would be resolved by the Court, guided by its case-law and the degree of commitment of each party to solve the problem. Thus, if the government side was willing to solve the problem in line with the wishes of the plaintiff, and the plaintiff refused the offer – the Court would be able to dismiss the case because the plaintiff had declined the available extraordinary national remedy. If, on the other hand, the government refused to offer amelioration to the applicant, the Court could apply simplified, fast-track procedure to rule in favour of the applicant. These examples demonstrate the fundamental difference between the proposed new procedure and the present system of attaining an amicable settlement. Thus, the proposed procedure would have the goal of rectifying injured interests or rights of the plaintiff – and not repayment in the form of compensation.

Ladies and Gentlemen,

There is much interesting discussion ahead of us on the future of the system of the European Convention of Human Rights. Surely, no one is in doubt that the system will undergo transformations over the next several years. The organisers of this seminar hope to invigorate the debate on the directions of such changes. No one here needs to be reminded that our debates will concern the world’s most effective and developed system of human rights protection. I feel honoured to have the possibility of taking part in this discussion together with you.
May I first enter a disclaimer. The views which I shall express this morning are my own and should not be taken as representing those of the Court or its Registry unless otherwise indicated.

In 1997 I attended a conference in Potsdam which was intended to mark the forthcoming entry into force of Protocol No. 11. Prominent judges, academics and government officials from the community of specialists of the European Convention on Human Rights were gathered together like so many godparents at a baby's baptism, looking forward to the installation a year later of what was a new judicial body, the full-time single Court, the successor institution to the former Court and Commission of Human Rights. The assembled dignitaries were shocked when one of their number, Robert Badinter, former President of the French Conseil constitutionnel and Minister of Justice, called upon them to recognise that the baby was still-born and coined an expression that was to be heard frequently over the next few years. Work should begin, he said, on the "reform of the reform".

This was a deeply unpopular message for those who had only recently completed the lengthy and cumbersome process of negotiation of an international treaty. Discussions between partisans of a two-tier system and advocates of a single court had been vigorous, as I'm sure many of you here today will recall.

Those of you who are familiar with the Human Rights Building in Strasbourg which houses the Court today will be aware that it was designed for two institutions, which is why there are two of everything: two hearing rooms, two President's offices, two wings to accommodate the different secretariats. In fact Protocol No. 11 was opened for signature seven months before the building was occupied. In other words, when we moved into it, we already knew that it was no longer adapted to the needs of what was to become its occupying institution, the full-time single court.

I always see the building as symbolic of Protocol No. 11. The main lines of this reform had been discussed since the 1980s and did not take into account the doubling of the number of contracting states in the 1990s. With hindsight it is perfectly clear that a system which was designed for a relatively small number of states, mainly with long-established traditions of democracy and the rule of law would not be able to function in exactly the same way if the number of states was significantly increased and included countries emerging from decades of totalitarian government. All this is history; we do not need now to consider whether requiring all these new member states of the Council of Europe to ratify the Convention within a short period of time was either necessary or sensible. We may just observe in passing that, with the best will in the world, it was not materially possible for all of these states to make their systems Convention compliant within a matter of months or even years. In some cases it may take a generation.

Be that as it may, no one can really have been surprised when the volume of incoming cases began to rise dramatically. This was partly a matter of arithmetic: more contracting states = more applications. If you add to this the fact that particularly serious and widespread situations existed in certain states and that, even in the older states, the number of applications was rising as part of a more general awareness of the possibilities of litiga-
tion, particularly in the field of fundamental rights, then it was obvious that the Convention system was heading for trouble.

Of course we should not discount the progress brought about by Protocol No. 11, which undoubtedly strengthened the judicial character of the system by abolishing the adjudicative role of the Committee of Ministers and making acceptance of the right of individual petition obligatory for all contracting states. Individual citizens now, for the first time, had direct access to a fully judicial international body. Ironically these advances could only compound the Convention machinery’s problems. Within the space of a few years the size of the population who could apply to the Court had risen to 800 million.

Those last words suffice to summarise the Court’s difficulties. Direct access to a judicial procedure for 800 millions. That is at once the crowning achievement of the Convention and its millstone. The right of individual petition which lies at the heart of the system and around which the system has developed and evolved was the quantum leap effected by the fathers of the Convention, yet it had become to be also a threat to its continuing effectiveness. That paradox has provided the backdrop to all discussion on reform of the Convention system since 1998. How do you preserve that unique achievement and yet ensure that applicants and governments receive well-reasoned decisions within a reasonable time and that real problems of human rights protection are identified in a timely manner? Are these goals mutually exclusive?

It is often said in this context that the Court is the victim of its own success. Yet the system of human rights protection set up by the European Convention will only really have achieved its fundamental purpose when very few cases come to Strasbourg. We should never forget that the primary obligation incumbent on the contracting states under the Convention is to guarantee themselves the rights and freedoms set out therein. The Court’s role is, as is clear from Article 19 of the Convention, to ensure that they do so. Any discussion of the evolution of the Convention system must, it seems to me, be seen in the context of the underlying aim of that system, namely to maintain and strengthen human rights protection at national level, so that individuals can vindicate their Convention rights before the national courts, without engaging the complex and lengthy international process. The simple truth is that human rights protection at national level will always be more effective, when it functions properly, than international human rights protection.

But that is not to deny the importance of the right of individual petition which is the means by which defects in national human rights protection systems are discovered. Beyond that, most commentators agree that the Court’s function must extend further than a purely constitutional, prospective role to embrace elements of individual justice. I do not intend to reopen that whole discussion here this morning; let me just say that I do not believe that it is necessarily helpful in this context to refer to the procedure in the US Supreme Court.

But let me come back to the title of my intervention: institution in development.

From early 1999 the Court began to look critically at the working methods that it had inherited from its predecessor institutions. Conscious of the need to streamline where possible, it began a process of paring down the procedures to their bare essentials, particularly for the categories of routine cases. Gone, for instance, was the Commission’s warning letter setting out in detail the obstacles to admissibility, often the beginning of a lengthy correspondence with applicants whose complaints were entirely without merit. No longer would applicants whose cases were declared inadmissible by a committee receive a decision, but simply a letter informing them with the most summary of reasoning that their application failed to satisfy the admissibility conditions. An expedited procedure was also introduced for certain categories of admissible cases.

Then as now there were essentially three problems facing the Court, as many of you are aware:

- Firstly there is the mass of cases which are plainly inadmissible, the huge volume of unmeritorious cases, that is, cases which are so manifestly inadmissible as not to
require an adversarial procedure. We estimate that around 85-90% of the cases coming into the system will be declared inadmissible, the great majority of them at present under a summary procedure by a Committee of three judges. Since 1998 the Court has devoted a large part of its resources and its time and energy to these cases, with which it deals with considerable efficiency, but which contribute nothing to the underlying goal of improving human rights protection in the individual member states and generally throughout Europe. I should say incidentally that more effective domestic Convention implementation, however desirable and however effective it may be in reducing, in the longer term, well-founded applications, does not necessarily reduce manifestly inadmissible applications.

The second major difficulty facing the Court and the Convention systems is the phenomenon of what we call “repetitive cases”. These are cases which derive from situations of structural violation. Such situations in certain countries are capable of generating thousands, even tens of thousands of applications which would ultimately risk submerging the system. The best known example of this phenomenon is the length of civil proceedings in Italy, which has over the years generated well in excess of 10,000 applications. But similar situations with regard to the length of judicial proceedings exist in other countries and other categories of structural violation have emerged. For instance the non-execution of final judicial decisions is a chronic problem in certain countries. In others, questions have arisen about the legality of detention procedures, potentially affecting large numbers of individuals. Prison conditions may be another example. In any case what these situations have in common is a wide-scale breach of fundamental rights to which it is, I would say, almost materially impossible to bring an individual judicial response.

The third problem is quite simply a product of the first two. So much of the Court’s time is devoted to inadmissible cases and straightforward repetitive cases that there is a steady accumulation of substantial cases, the cases that really matter because they identify new areas of dysfunction in the national system of human rights protection, because they raise allegations of the most serious human rights breaches, because they make it possible for general human rights jurisprudence to evolve and progress. This is perhaps the most worrying aspect of the caseload situation and it is made worse by budgetary pressure exerted by the member governments of the Council of Europe who, perhaps understandably, demand increases in visible productivity, i.e. in the number of cases disposed of, with the inevitable result that the more complex cases, again the most important ones, are not dealt with or are not dealt with in good time, thereby not only breaching one of the Convention’s own requirements, that judicial proceedings be concluded within a reasonable time, but also frustrating one of the purposes of the Convention which is to diagnose at an early stage nascent malfunctioning in democratic society.

Of the 81,000 applications pending at the end of last year, over 20,000 had been identified as Chamber cases, that is cases which are not prima facie inadmissible and which may lead to a finding of violation. Even if half of those cases are routine repetitive cases, it is worth remembering that last year the Court delivered around 1,100 judgments. On that basis it could take the Court several years to deal with the substantial cases already pending.

In response to these problems, as the Court continued its internal process of reform, different initiatives were taken externally. The Ministerial Conference in Rome in 2000 to celebrate the 50th anniversary of the Convention led to the setting up of the Evaluation Group, which reported in 2001. As you know, the main proposals of this group were the setting-up of a filtering mechanism and the introduction of a “substantial issues clause”, in other words a provision that would have allowed the Court to decline to examine cases which did not raise a substantial issue under the Convention.

In the event neither of these recommendations was fully taken up by the Steering Com-
The ECtHR: Agenda for the 21st century

Committee for Human Rights in the drafting of Protocol No. 14. The idea of a separate filtering mechanism, which was supported by the Court, was discarded early on in the process, without however there having been a feasibility study as called for by the evaluation group. The substantial issues clause, which was admittedly controversial, was replaced by the significant disadvantage criterion, which I will come to shortly.

So, to Protocol No. 14. The Protocol’s response to each of the first two problems which I have mentioned, that is clearly inadmissible cases and repetitive cases, is similar; the idea is a streamlined procedure, using less judicial capacity for routine cases. Thus the Single Judge is empowered to declare applications inadmissible on the same basis as a three-judge Committee does today. The Single Judge is to be assisted by a non-judicial rapporteur, acknowledging expressly in the Convention for the first time the role played by the Registry in the preparation and adjudication of cases. We should not conceal the fact that this represents a lower level of judicial scrutiny. It is the inevitable consequence of the growth of the system far beyond its original conception and design. It is moreover worth recalling the type of cases we are talking about: these are cases which do nothing to enhance the protection of human rights or the strengthening of the rule of law and democracy; their examination and determination do not directly pursue the Court’s aim of ensuring that the Contracting Parties observe their engagements under the Convention. Yet we know that behind each application there lies a human story, often a dramatic one. We also know that the Convention and its enforcement mechanism have generated enormous expectations throughout the member states of the Council of Europe and that the frustration and lack of understanding of applicants whose cases fall outside the Court’s jurisdiction is a real problem, which increasingly in itself creates work for the Registry.

For repetitive, or what we sometimes call manifestly well-founded cases, a three-judge committee may now declare admissible and give judgment in cases where it can do so “on the basis of the Court’s well-established case-law” in the language of the Protocol. Just as we expect applicants to accept a lower level of judicial scrutiny where their complaints are plainly inadmissible, so governments are required to make some procedural sacrifices where the complaints are plainly well-founded. It is, if you like, the other side of the coin.

This new procedure assumes and requires a degree of good faith on both sides. The Court must not seek to use it for cases in respect of which there is a genuine doubt about whether they fall into the relevant category or about their admissibility. On the other hand, governments must also refrain from opposing the application of the new Article 28 § 1 (b) in cases where such opposition is not justified. Governments will not be entitled to veto its application, but I would say that the Court would be unlikely to override a justified challenge to its use. If the opposition is systematic, however, the hoped for effect will not be achieved.

We should be clear about what this provision means. We are saying essentially that governments will in effect not be contesting the finding of violation in a given category of cases. Once they have accepted that a case falls within that category and that there are no obstacles to admissibility, the complaint on the merits will not be challenged. Governments should also observe some restraint in advancing admissibility arguments. If admissibility is systematically challenged for the principle, we will not be making any savings of time and resources.

Of course there remains what is often the most time-consuming aspect of these cases, namely the determination of just satisfaction and here there may be room for new solutions, perhaps involving outside agencies, a special Claims Commission, an arbitration commission or a remedy at national level, transferring the task back to where it can be carried out most efficiently.

Let me say straight away that both these measures will increase the Court’s capacity to dispose of routine cases, whether they be admissible or inadmissible. Even before the entry into force of the Protocol, the Registry has adapted its working methods in the divisions dealing with applications from the highest case-count countries in line with the Protocol’s Single Judge Rapporteur mechanism and this simplified procedure is already
producing quite striking results in terms of productivity.

One of the ideas behind Protocol No. 14 was to separate the filtering of inadmissible cases from the processing of substantial cases. This is indeed one of the difficulties of the present system. Such separation would make it easier to achieve the right balance in the resources assigned to inadmissible cases and those allocated to meritorious cases. However, as we start to set up Rapporteur mechanisms in the Registry, it becomes evident that the problem that this element of Protocol No. 14 was designed to resolve only concerns a limited number of contracting states, the eight or nine which contribute nevertheless around 80% of the case-load and particularly large numbers of inadmissible cases. This state of affairs is reflected in the Registry’s makeup. For no less than 18 states we only have one permanent lawyer, which makes unfeasible the separation of filtering and the processing of substantial cases for these countries. It would be clearly contrary to the object and purpose of Protocol No. 14 to insist on such separation where it would be both inefficient and more expensive.

But the real question mark hanging over the Protocol is the third problem I have referred to, namely the accumulation of substantial cases. In other words, irrespective of what measures are devised to deal with inadmissible cases and repetitive cases, is the Convention machinery capable of dealing effectively with the volume of substantial and potentially well-founded cases which it currently receives? As I mentioned earlier, the Protocol introduces a new admissibility criterion, whose gestation and birth were extremely laborious. This is the possibility for the Court to declare inadmissible an application where the applicant has not suffered a significant disadvantage. I do not have to remind this audience that that criterion, which was derived from the practice of the German Federal Constitutional Court, was subsequently modified by the addition of two safeguards: that no application could be rejected on this ground firstly if respect for human rights warranted its examination on the merits and secondly if the complaint had not been duly considered by a domestic tribunal. Now this is clearly quite far removed from the Evaluation Group’s substantial issues clause or indeed the call by the majority of the Court for a general interest test at the time of the Protocol No. 14 drafting process. Preliminary work by the Court’s working methods Committee tends to suggest that the impact of this provision will be less than considerable, mainly because the majority of cases to which it might apply can, in the view of the Committee, be more easily dealt with under the existing admissibility criteria. That is perhaps to underestimate the capacity of such a provision to evolve jurisprudentially once it is actually available to the Court and we may yet be surprised by the way the Court develops this notion.

One measure in Protocol No. 14 is already proving effective. This is the joint procedure under Article 29 § 3 of the Convention. This actually codified a growing practice which enables the Court to deal with cases more rapidly and without the unnecessary duplication and delay which is inherent in the separate treatment of admissibility and the merits. There will be cases where this approach is not suitable, but the Court is applying this measure now whenever it can.

I take this opportunity to deliver a message to the host authorities of this conference, and here I can speak on the authority of the Court: we are ready for Protocol No. 14 and we are impatient to exploit the tools it gives us to the maximum, so we hope that the final ratification processes will be completed as rapidly as possible.

Nevertheless the conventional wisdom is that although Protocol No. 14 is necessary it will not be enough for the long-term survival of the system. No doubt it suffers, as Protocol No. 11 did before it, from the need to arrive at a compromise acceptable to all the negotiating parties.

The consequence of the prevailing view that Protocol No. 14 did not go far enough was the setting up of the Wise Persons group at the third Council of Europe summit in Warsaw last year. We are fortunate to have with us representatives of that very eminent panel’s members, so it will be for them to say more about their process. Their interim report was submitted to the Committee of Ministers last
month. I would just mention that while welcoming the general thrust of the report, in his address to the Ministers the President of the Court called for the Group to reach out further into the future, to look beyond the horizon. For my part, I would simply say that while a filtering mechanism is no doubt essential, it does not answer the underlying problem. I also believe that whatever solutions are now proposed they must be costed, because governments are willing only to a limited extent to accept increases to the Council of Europe budget. However strong the case may be for an effective European human rights protection system, and I believe it is compelling, that budgetary situation is unlikely to change in the foreseeable future.

In fact the Court is extremely good value for money; this year its budget is just over 46 million euros. This is in reality a very small amount for a Court whose jurisdiction extends from the Atlantic to the Pacific, an area with, as I have said, a population of over 800 million. It represents for instance, if my information is correct, roughly a quarter of the budget of the Court of Justice of the European Communities, and the Strasbourg case-load is much higher. Given the importance of the Court’s role in the wider process of European integration and in the consolidation of democracy and the rule of law in central and eastern Europe and as one of the pillars of good governance and therefore of the future stability and prosperity of Europe as a whole, one might think that further investment would be warranted. In any case additional resources clearly will be necessary over the next few years. Whatever solutions are adopted, there will always be a link between volume of cases coming into the system and the number of staff required for the Registry. It would certainly be illusory to suggest that the present Registry of over 500 staff members is a temporary phenomenon.

In the meantime the Court has been developing its own responses, not just by anticipating Protocol No.14, but by showing that the living instrument characteristic of the Convention has a procedural as well as a substantive dimension. My colleague Renata Degener will speak this afternoon about the pilot judgment procedure so I do not need to go into details here. It is a clearly a development of enormous potential significance if governments are prepared to play their part. Here I can pay tribute to the open and constructive spirit with which the Polish authorities handled the first pilot judgment case, Broniowski.

But let me come back to Protocol No. 14. One of the guiding notions of the Convention is that of balance; balance between conflicting rights, balance between the individual interest and the general interest. If balance plays an important role in the substantive application of the Convention, it is also a crucial element in the operation of the supervisory mechanism. Here the balance is between national protection and international protection; both components must function effectively if the system is to work. In recent years that balance has been upset to the detriment of the international component. Far too many cases come to Strasbourg which should, in accordance with the principle of subsidiarity, have been decided by the domestic courts. This is not merely a question of the implementation of the Convention rights and freedoms in the domestic order; it is above all the establishment of appropriate and effective remedies. The Strasbourg Court cannot bear a disproportionate burden in enforcing the Convention; that burden has to be shared with the domestic authorities. I can only repeat that the underlying aim of the Convention is to create a situation in which the great majority of Convention complainants do not have to come to Strasbourg, because their complaint has been satisfactorily addressed at national level.

It seems to me that the basic philosophy of Protocol No.14 and the accompanying measures is to recover that balance, to restore the national component of Convention protection to its proper and I would say inevitable place in the system.

Ladies and Gentlemen, I do believe that the Convention system will have to evolve further. It may indeed be that this is a more or less continuous process of adaptation and adjustment. In any event it cannot be right that, as is the case today, very serious allegations of Convention violations wait for years before being determined by the Court. If the purpose of the
Convention was to be an early warning device, as originally envisaged, to prevent a sliding back into totalitarianism, that purpose is frustrated by too long a delay for the Court's decision, quite apart from the accruing prejudice to the aggrieved applicant and the postponement of timely general corrective measures.

In looking for future solutions I consider that applications must be seen not only in terms of the specific individual situation, but also in their wider context. The Convention's role is prospective as well as aimed at individual relief. As the President of the Court has on several occasions suggested, by concentrating too much on providing an individual response, the system may be prevented from affording redress to a much wider range of persons.

Ladies and Gentlemen, there is a great deal at stake. The European Convention on Human Rights and its enforcement mechanism remain a unique and precious model of international justice whose practical value in the Europe of the 21st century as a facilitator for the consolidation of democracy and the rule of law throughout the wider Europe and as a detector of root causes of existing and future potential for conflict is, I believe, critical. ★
First, may I say how honoured I am to address this august Seminar, and to be doing so in Warsaw. I visited for the first time last Autumn and spent an extremely informative day with Hanna Machinska, considering issues relating to the working of the European Court of Human Rights, and in particular, the highly interesting and effective pilot project in the Council of Europe Information Office here in Warsaw, to which I shall return a little later in my address to you.

In conducting the Review of the working methods of the European Court of Human Rights, our Terms of Reference, on the invitation of the Secretary General of the Council of Europe and the President, were:

“To consider what steps could be taken by the President, judges and staff of the Court to deal most effectively and efficiently with its current and projected caseload, and to make recommendations accordingly”.

I record now the thanks of Lord Woolf and myself to the judges, lawyers and staff of the Court, without whose open, willing and helpful contributions to our review, our task would have been made more difficult and certainly less enjoyable and constructive. It will be clear that our terms of reference allowed us only to make recommendations which did not require legislative change – any such proposals would be clearly for the Wise Persons Group. Accordingly, within those terms, we sought to provide a package of proposals which would facilitate the disposal of business by the Court – we could not provide the panacea. The purpose of our review was to suggest administrative steps which could be taken, without amendment of the Convention, to allow the Court to cope with its current and projected workload, pending more fundamental reform.

In the course of the Review, we applied a number of key principles:

- First, it was considered that it should be the responsibility of the individual applicant to submit a properly completed form of application, and to provide the Court with all the information necessary to process the application.
- Secondly, there should be greater information and education at the national level on the jurisdiction and purpose of the Court, and the Court’s admissibility criteria.
- Thirdly, there should be increased recourse to national ombudsmen and other methods of alternative dispute resolution.
- Fourthly, the Court’s priority should be to deal without delay with admissible cases that raise new or serious Convention issues. Inadmissible and repetitive cases should be handled in a way that has minimum impact on the Court’s valuable time and resources.
- Fifthly, and finally, the management and organisation of the Court’s Registry should ensure that the Court’s workload is processed as efficiently and effectively as possible.

It is clear from the agenda for this seminar that a number of our proposals are to be discussed. Time does not permit me to expand further upon the reasoning behind our pro-
posals; that can be obtained from a study of our Report. It must suffice at this stage for me to identify the main recommendations from our review.

1. The Court should redefine what constitutes an application to the Court. It should only deal with properly completed application forms which contain all the information required for the Court to process the application. Such a change would simplify the task of the Registry, which would not be required to register and store letters from potential applicants. There would also be a reduction of applications requiring consideration by the Court, and also make the processing of applications more simple.

A huge proportion of the Court's workload is made up of processing what are, at best, inadmissible cases. The provision within the Convention that every individual has the right to apply direct to the Court, and many people write to Strasbourg without any advice or assistance, nor knowledge of the conditions of admissibility, results in a very high proportion of inadmissible cases. We were informed that approximately 85% of cases arriving in Strasbourg were clearly inadmissible; 95% were eventually found to be inadmissible. Of the admissible cases, only a fraction raised new questions of human rights law; the remainder were “repeat” or “clone” cases. Consequently, we proposed that Rule 47(5) of the Rules of the Court be amended to provide that all applications should be made on the Court's standard form (rather than letters, over 10,450 of which, were “disposed of administratively”) and the date of the application to the Court should be the date of receipt, by the Court, of a properly completed application form. Time could be suspended, on receipt of the initial correspondence and pending the properly completed application form, by the Court, if it considered it proper to do so.

Such an approach would have a significant impact on the Court’s statistics of pending cases, would save Registry resources and make the processing of applications more effective. As I have said, a very large proportion of the applications received by the Court, will be clearly inadmissible, diverting attention away from more deserving cases. However, Article 35(4) of the Convention provides that even when applications do not meet the basic admissibility criteria, they must be dealt with and rejected by the Judges of the Court. Any change, for example, to permit rejection of such cases by the Court’s lawyers rather than Judges, would require amendment of the Convention and was outside the scope of our Review.

We proposed that clearly inadmissible cases should be dealt with separately from more complex Committee cases, and borderline admissible cases, and should be given the lowest priority when judicial capacity is stretched.

How to handle, or filter out, inadmissible cases, which make up 85% of applications? Much has already been done by the Court – warning letters telling would-be applicants that their case is likely to fail, have been discontinued; applications now receive the briefest possible explanation of why their application was rejected and Protocol No.14, allowing for one Judge rather than a Committee of three to reject inadmissible cases, all give real assistance to the processing of inadmissible cases. However, such measures do nothing to address the tsunami of cases coming to the Court. We took the view that the problem needed to be addressed at the source, deflecting, wherever possible, inadmissible cases away from the Court. In effect, a filtering system. A glance at the Court’s statistics shows that the majority of the Court’s workload comes from a minority of its member states. In October 2005 81% of the Court’s 82,100 pending cases came from just 10 of the 46 member states, and each of the high case count countries produce a very large proportion of inadmissible cases. Information and education would contribute. It was in this context that, on behalf of the review, I visited Warsaw last October to spend an extremely informative day with Ms Machinska, considering the value of the Warsaw Information Office Pilot Project. Those here may well be aware of how the Pilot Project operates but briefly, the objectives are to provide information to applicants on the requirements as to Convention admissibility, to make them aware of any domestic remedies available, and to point them towards extra judicial avenues of recourse where appropriate. It was clear to me
that there was a great demand for information which could contribute to a reduction of applications lodged in Strasbourg. The project had been endorsed by the External Auditor to the Secretary General and also at the Oslo Seminar in October 2004. We proposed that such satellite offices could be established in those countries generating high volumes of predominantly inadmissible applications. One should be in Warsaw, building upon the positive experience of the Information Office, and two or three others in suitable high case count countries. Each satellite would be staffed by registry lawyers, and would act as a compulsory first port of call for potential applicants; any application forms being sent directly to Strasbourg would be returned to the satellite office.

Shortly, the offices would work in three different ways:

(a) an intended application which appeared to be admissible, or raised an admissibility issue, could be registered on the Strasbourg system by the satellite lawyer and sent direct to the relevant division, with a short report, either in English or French, explaining why it was thought to be admissible, or why it raised an admissibility issue, so sparing Strasbourg lawyers the initial translation, processing and analysis work, and enabling the preparation of draft judgments more quickly.

(b) where a complaint was clearly inadmissible, satellite staff could provide information on the Court’s admissibility criteria, together with standard information on local provision, (and benefits) of domestic remedies and alternative dispute mechanisms. Such assistance could prevent a substantial number of people from submitting inadmissible applications.

(c) where an applicant with a clearly inadmissible case insisted on making an application to Strasbourg, the satellite lawyer could forward the application to Strasbourg, with a note in English or French, highlighting why the application was inadmissible. It could then be referred to a Committee of three Judges (or the single Judge under Protocol No.14) for formal rejection, sparing the Registry from processing clearly inadmissible cases.

Such satellite offices established in Poland, and two or three other high case count countries, could together account for over 30% of applications lodged at the Court.

There are many advantages of the satellite filter system, which I would be happy to outline if the Seminar wishes me to do so. A key advantage of the satellite offices is that they would be well placed to redirect potential applicants towards alternative remedies, for example, national ombudsmen. Importantly, greater use of the ombudsman could divert from the Court and the Registry a large number of complaints that should never have come to it in the first place. Many enquiries, inadmissible under the Convention, could still be considered by a national ombudsman. There is also real potential for the increased use of ombudsmen and alternative dispute resolution in admissible cases. We proposed, in line with satellite offices and the involvement of national ombudsmen, that the Council of Europe and the Court should compile and maintain a “handbook on Admissibility” for both the Court and the satellite offices, setting out standard information on the Court’s admissibility criteria, and also options within the Country through ombudsman or similar authorities. We also proposed that the Commissioner for Human Rights could play a role in selecting locations for satellite offices and monitoring and safeguarding the independence of the satellites.

A further proposal which we made was that the Court’s first priority should be the timely processing of admissible cases raising new or serious Convention issues. It is important that repetitive cases are dealt with as efficiently as possible. There is also scope, as I said earlier, for the increased use of alternative dispute resolution in appropriate admissible cases and we accordingly recommended that the Court should build on the success of the Broniowski pilot judgment, and that it maximise its Pilot Judgment Procedure; that the proposed Article 41 Unit in the Registry (which would produce guidelines on suitable amounts of compensation in certain cases) should be established as soon as possible; that the Court should publish guidelines as to the rates of compensation; that the Council of Europe and the Court should promote further use of alter-
native dispute resolution; and that the Court establish a specialist Friendly Settlement Unit in the Registry.

We took the view that a new approach to applications, combined with the filter system provided by satellite offices and alternative dispute resolution, would help to check the further growth of the backlog of cases at the Court. I have said that in October 2005 the Court had 82,100 applications pending. This is projected to grow by around 20% a year, exceeding a quarter of a million cases by 2010. However, the backlog itself is unlikely to be representative of the general caseload of the Court (whereby 95% of cases are eventually declared inadmissible) because the pressure upon the Court to increase efficiency and maximise its disposal rate has led to a focus on the more straightforward cases, Committee cases being taken on by the Registry lawyers rather than the more complex Chambers cases. It was estimated at the time of our review, that up to 40% of the cases contained within the backlog of 27,200 cases may have been Chamber rather than Committee cases; many of which raised serious human rights issues.

We endorsed the creation of a backlog secretariat as being key to tackling and bringing down the backlog. There would be strict prioritisation of cases. In Chamber cases, first priority should be given to cases which could provide pilot judgments, and those raising serious points of human rights law. We proposed that there should be a new Deputy Registrar post created, with responsibility for Management, and that a Vice-President of the Court should be tasked to supervise and oversee the work of the Court, ensuring consistency across sections.

We readily endorsed the efforts made to improve the management and efficiency of the Registry and were very impressed by the total and overall commitment of the Registry staff in facing an ever-growing problem. We proposed that the Court should continue its efforts to ensure coherence and consistency across divisions and to spread best practice; that the post of Deputy Registrar be divided into two – a “Judicial Deputy Registrar”, responsible for advising and assisting Judges and managing the processing and preparation of cases for adjudication, and a “Deputy Registrar for Management”, as a staff manager, focusing on recruitment and training, career development and general management of lawyers and staff. We also proposed that the Court should continue to develop its case weighting system, prioritising complex Chamber cases and potential pilot judgments; there should be a review of the target system and more detailed and specific targets should be developed; that working methods piloted by the Polish division (organising the lawyers into four teams – two teams of junior lawyers, led by non-judicial rapporteurs for Committee cases; one team for repetitive cases and one team for complex Chamber cases) be spread across all divisions of the Court; that a Central Training Unit be established and that the Court should continue to develop its excellent I.T. system, and consider developing electronic applications.

So far as the Judiciary of the Court is concerned, we proposed:

(a) A Supervising Vice-President, to oversee the work of the Court, and to ensure that it is dealt with consistently across sections.

(b) the Supervising Vice-President should ensure that there is a proper and transparent system in place for Judges taking leave. (Judges should be asked to dispose of bundles of inadmissible cases during vacation periods.)

(c) there should be formal induction programmes for Judges.

(d) where necessary, the Courts should provide intensive language training for new Judges.

Although not in the review document, at our meeting with the President of the Court when a copy of the Report was presented to him, I did make one final recommendation, that the Court should offer new Ambassadors to the Council of Europe (and their deputies) induction or information sessions on the purpose and remit of the Court, its working methods and the application process. In this way all government representatives would understand the way that the Court functions, and would be better able to contribute to discussions about the Court. They would also better understand the problems and budget needs of the Court.
Finally, although the implementation of the Court's judgments fell outside the control of the Court, and indeed outside the remit of our review, we drew attention to the critical importance of the implementation of the Court's judgments. If the Court’s long-term viability is to be ensured, we thought it essential that member states take appropriate measures to implement the Court’s judgments and prevent repeat violations. The increased use of pilot judgments adds to the importance of member states taking action to avoid repetitive cases from arising after a pilot judgment has been delivered.

As I said at the beginning of this address, the recommendations we have made, if adopted, will not solve the Court’s problems. Nor will they transform the situation overnight. But they would achieve two important goals. First, they would enable the Court to stem the flow pending a fundamental review of the Convention. Second, they would provide a test bed for one way of achieving a long-term solution, namely regional centres providing Courts of first instance and allowing the existing Court to play a different role whereby it ceases to be accessible as of right, but can instead control and select its own caseload.
WHAT CAN BE DONE BY NON-JUDICIAL INSTITUTIONS, SUCH AS OMBUDSMAN OFFICES AND SIMILAR BODIES, TO RELIEVE THE EXCESSIVE BURDEN OF THE ECTHR?

Mr Jacob Söderman

Former European Ombudsman 1995-2003, Member of the Group of Wise Persons

The Group of Wise persons set up by the Council of Europe has been given the task “to draw up a comprehensive strategy to secure the effectiveness of the ECHR control system in the longer term, taking into account the initial affects of Protocol No. 14 and the other decisions in May 2004” by the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005) in the Warsaw declaration.

The reason for the Summit’s concern was the enormous and growing workload of the European Court of Human Rights. The number of pending cases in October 2005 appears to have been 82,100 – and it is projected to rise to 250,000 by 2010, if nothing is done. It is disturbing to note that out of these cases only some 5-10% are in the end dealt with by the Court. Around 4% of the applications – around 2,000 – had been pending for more than 5 years before the Court.

It is obvious that something meaningful has to be done over a period of years to save the Court.

One reason for this situation is the fact that the Court, in the eyes of many Europeans, appears to be seen as the only true custodian of European human rights standards. Thus European citizens have eagerly turned to it with their grievances. One could say that the Court is a victim of its success.

A great number of the applications to the Court are inadmissible because of the fact that European citizens do not know what the mandate of the Court is. Furthermore many cases could be successfully dealt with in the member states.

So let us see what the Parliamentary ombudsmen and similar bodies could do to alleviate the Court from its workload of non-admissible cases.

Initially, I would like to state that:

Firstly, One should not speak so lightly about a Court for 800 million citizens or speak about an unlimited individual right to appeal. In fact the right to appeal is quite limited by the admissibility criteria in Article 35 of the Convention.

One important purpose of any information campaign on human rights issues should be to recall this fact and to give precise information about the Court’s possibilities to deal with a case.

Secondly, The Court is not the only institution in Europe dealing with human right issues. The frontline should be the judiciary and further the non-judicial remedies in the member states. The European Convention of Human Rights is introduced as a national law in most of the member states’ law systems.

The remedies in the member states could be made more effective and better known to
the citizens. Above all the national judiciary should know that they are a member of the same judicial system as the Court of Human Rights, which, through its jurisprudence on human rights issues, shows the way.

Still the national judiciary should be the frontline to uphold the rule of law and the respect for human rights.

Thirdly, Over the years the Council of Europe has established many institutions, committees and bodies to focus on and deal with special fields of human rights issues. Normally these bodies have proved to be committed to their task. With a better exchange of information and better co-ordination of their activities, they could do a lot more to put things right wherever human rights violations or abuses occur in Europe.

In this way they could lift part of the burden of applications, especially inadmissible ones.

Fourthly, Every European citizen should get their human rights at home, in their home village, in their own neighbourhood. They should – as a rule – not have to turn to Strasbourg or Geneva to get help. Sometimes they have to, but such an alternative as turning to a European Court should not appear to be offered as the first possible one.

The forthcoming attitude that the Court has followed – since the Commission of Human Rights was abolished – in their practice of registering citizen’s applications has unfortunately been giving an overly positive message to the European citizens about the mandate and competence of the Court.

An essential condition to achieve results in undoing the backlog is that the registration policy of the Court from the start will study the merits of the admissibility criteria in Article 35 of the Convention.

The citizen’s application to the Court should contain all the necessary information so the Court could promptly decide on the admissibility. An electronic application form on the website of the Court, which could not be submitted if all needed information is not filled in, would be most helpful.

A properly drafted application would secure the interest of the citizens and at the same time make its handling much more effective in the Court. It would also be an important tool to help all information points all over Europe that assist citizens who want to explore the possibilities of opening a Court case. Any information campaign should focus on the fact that the national remedies have to be exhausted before a case can successfully be presented to the Court.

Fifthly, I do believe that Protocol No. 14 is a useful tool and gives the Court a possibility to put many things right for its part, when it comes into force at the beginning of the year 2007.

After having studied the reports of the Court’s Committee of Working methods and Lord Woolf’s Review of the working methods of the Court (December 2005) and by getting to know the pragmatic and professional expertise in the Registry of the Court, I am convinced that real progress can be made. Still, it might not be enough.

So the question is: How could the Ombudsmen-Offices and similar bodies in the member states promote better handling of human rights issues on the regional, national or European level and thus alleviate the Court’s excessive burden of non-admissible applications?

An information campaign on human rights issues

An information campaign on human rights issues was already agreed upon by the Committee of Ministers, when adopting Protocol No. 14. Its message should focus on the most effective national remedies in human rights issues and how to use them. It should also give clear and understandable information on the mandate and procedure of the Court, including how to launch an application and the criteria of admissibility for such applications.

The information campaign must be supported by creating information points in the member states, where possible in co-operation with the Council of Europe information offices that exist in 18 member states: these informa-
tion points should use modern information technology.

The Offices of the Parliamentary Ombudsman, Petition— and Human Rights committees and similar bodies could also successfully serve as such information points as well as the offices of non-governmental organisations in the human rights field. Assistance in completing applications forms, as hard copies or electronic ones, to present cases before the Court, should be given.

It is necessary to activate non-judicial players within the ECHR control system.

There are Ombudsman institutions in 38 member states. Such institutions do not exist in Monaco, San Marino, Serbia-Montenegro, Turkey and Liechtenstein.

In Italy and Switzerland there are regional ombudsmen, but not a national Office.

In Germany there is a Petition committee in the Bundestag and similar committees in the Länder – parliaments, with nearly the same task as the Ombudsman institution. Furthermore there are at least three Ombudsmen at the Länder level in Germany.

Since 1985 the Council of Europe has invited all European ombudsmen and similar bodies to biannual round-table meetings to discuss human rights issues. These round-table meetings have, for some time, been organised by the European Commissioner of Human Rights.

All the member states should have an Ombudsman or similar body to deal with human rights

The Committee of Ministers has adopted two Recommendations (No. R (85) 13 and No. R (97)) concerning the need to establish an Ombudsman institution in member states. The latter also deals with Human Rights Commissions.

The Parliamentary Assembly has adopted Recommendation No. 1615/2003 stressing the importance of Ombudsman institutions to supervise human rights.

Furthermore many member states have created Human Rights Commissions, and some member states bodies, to provide mediation in civil or criminal matters or between the individual and the public administration.

The Committee of Ministers has also adopted recommendations concerning the need of mediation in the member states – R (98) 1, R (99) 19 and R (2001) 9 CM.

The problem is that the mandate for the Ombudsman offices and similar bodies does not always clearly contain human rights issues or at times this remedy is not known to the citizens.

Therefore member states should be encouraged by the Council of Europe to strongly recommend that there is at least one effective non-judicial remedy, such as an Ombudsman office in every member state, with a clear mandate to deal with human rights on citizens’ complaints or at their own initiative.

The Commissioner of Human rights could also encourage member states to take this step to promote human rights more effectively.

The Council of Europe has, over the years, set up different bodies to deal with human rights issues, such as:

- The Commissioner of Human Rights;
- The European Committee for the Prevention of Torture and Inhuman or Degrading treatment or Punishment (CPT);
- The European Commission against Racism and Intolerance (ECRI);
- The Advisory committee for the framework Convention of Protection of National minorities;
- The European Committee on Social Rights
- The Steering Committee for Human Rights;

and, important on the administrative level, the Human Rights Directorate.

If these institutions and bodies parties could be properly informed of different allegations of human rights violations that are exposed in decisions or even in repetitive decisions of the Court, or human rights abuse appearing in applications to the Court, and, above all, in those cases that may be found inadmissible, they could act more effectively to put things right.

The Commissioner of Human Rights, who has a broad mandate, might be the most suitable candidate to co-ordinate this activity within the Council of Europe.
What to do with all the inadmissible applications before the Court

Among the thousands and thousands applications that arrive to the Courts registry and are in the end found inadmissible, there are cases that contain alarming information and allegations of ongoing human rights abuse or violation. At the moment these applications are just registered and stored for a period of time, before being declared inadmissible as cases for the Court.

The European Commissioner of Human rights and the Registry of the Court, with the due consent of the Court, could agree on smooth and well structured co-operation where the Registry informs the Commissioner of inadmissible applications containing alarming information and allegations of human rights violations. This co-operation could also include the same information contained in a Court decision or especially in Court decisions on repetitive cases.

The Commissioner of Human Rights could then consider how to proceed to secure that proper action is taken by a competent body within the Council or by looking into the case himself.

In many cases the Commissioner himself could be the one to act on information in such reported possible cases of human rights abuse of violations, but his Office could also be entrusted to call upon a national ombudsman or similar body to – in accordance with its mandate and rules of procedure – and depending on the merits of the allegations, to investi- gate and report on the matter within its national remit. To inform a national ombudsman of a possible case of human rights violation does not necessarily need a change in the HRC statute; there should be an obligation to do so, should there not?

This activity would mean that the Commissioner should have to further develop the present co-operation between the national and regional ombudsmen and similar bodies to form an active ombudsman network for promotion of human rights.

This network could also be useful for distributing actual information on human rights. As the European Ombudsman office of the European Union, also situated in Strasbourg, has already established such a network among the Ombudsmen offices and similar bodies within the EU and the applicant countries as well as with the Ombudsman offices in Norway and Iceland – that is in all, with almost 90 Offices in 30 European countries – certainly close but flexible co-operation between the Commissioner of Council of European the EU ombudsman would be a fruitful and feasible route to proceed on.

The biannual round tables organised by the Commissioner of Human Rights could also form an arena, where these matters could be discussed regularly to achieve the best possible result for the co-operation with the European Ombudsmen Offices and similar bodies.

Should the Ombudsman have powers to open a case at the Court of Human rights?

From time to time it has been discussed whether a National Ombudsman should have powers to open a case before the Court of Human Rights. This has been proposed especially for cases of principal importance, as for example concerning alleged discrimination of ethnic minorities, where the victims themselves do not have the means to initiate a case and the state administration is reluctant to act in accordance with the Convention.

The Ombudsman of Argentina opened a case before Court of Human Rights of the American States quite successfully some years ago. It was a case concerning the omission by the state to pay undisputed pensions.

I believe that he took a proxy from some of the citizens in question and thus did not need to refer to any precise legal base in his statute to act on the matter.

I do think that the Ombudsman office or a similar body should assist citizens in properly filling in the application form and give advice on the mandate and the procedures of the Court.

However opening Court proceedings is quite another thing. First of all it is a cumber-
some and costly task to open and deal with Court cases. Furthermore it might lead to quite difficult tension between the Ombudsman office and the state authorities in question.

The Ombudsman office can always advise citizens on whom to turn to, for example a Human Rights Organisation, an NGO or a law office that is prepared to take cases of this type for a fixed price or for free.

One could also consider the possibility that the European Commissioner of Human Rights should have the right to open these kinds of cases of principal interest for the observance and respect of Convention the before the Court of Human Rights.

For the Court it would mean that it would have some well prepared cases each year, which could have a positive impact on the observance of the Convention in the member states. In the long run it would subsequently lead to fewer cases presented to the Court. This kind of procedure would also give the HRC or the Ombudsman offices in member states a much stronger position when encouraging member state authorities to follow the Convention.

But as I said, this alternative has only been discussed from time to time. The focus for now has been on the effective informing of and securing the European citizens effective ways of remedy in human rights issues in their member states and on the European level with the purpose to alleviate the Court of Human Rights of cases that could be solved promptly by other means.

The noble goal must be to give the Court of Human Rights a fair possibility to focus on the very core of its task: to uphold the respect for the European Convention of Human Rights with its important jurisprudence.
Please let me start by conveying to you the Commissioner’s regrets for not being able to participate in this meeting today in person. Indeed, conflicting commitments have prevented him from coming. I would also like to thank the organisers and Dr. Machinska in particular for the conception of this seminar. Its contribution is valuable in the context of the general reflection on the preservation of the Court’s success story.

The subject of my presentation is the role of the Commissioner in the procedure before the Court. This of course implies an examination of the manner in which the Commissioner will make third party interventions under the new Article 36 § 3 of the European Convention on Human Rights (“the Convention”) once Protocol No. 14 enters into force.

There is a preliminary question we can ask ourselves. Can we speak today only of a procedure before the Court? There is an important set of rules adopted to facilitate the application of Protocol No. 14. There are also the Warsaw Summit Declaration and its Action Plan and the reflections which followed. There are preliminary, additional, proposals of the Group of Wise Persons. There is the Declaration adopted on the occasion of the recent Ministerial Session with its own supporting documentation. If we look at the contents of all these documents, we will have to use the plural and speak of procedures under the European Convention on Human Rights. All of them have the aim of ensuring the long-term effectiveness of the Convention.

Many of the texts I have just mentioned refer to the role of the Commissioner for Human Rights. Until now the Commissioner has only officially reacted to one of them. That is the Interim Report of the Wise Persons issued a bit more than a month ago. The Chair of the Group of Wise Persons invited the Commissioner to reply in writing to the proposals which concerned the extension of his functions beyond Protocol No. 14. The Commissioner submitted his comments on 13 June 2006.


42. Declaration of the Committee of Ministers on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels adopted on 19 May 2006; Report by the Minister’s Deputies on the implementation of the reform measures adopted by the Committee of Ministers at its 114th Session (12 May 2004), 12 May 2006, CM (2006) 39 final; Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, 12 May 2006, CM (2006) 90.
The Commissioner’s reply allows us to examine possible avenues for his involvement in the procedures under the Convention. Therefore, the first part of my presentation will deal with the procedure under Article 36 § 3 of the Convention. In the second part, I will refer to possible avenues for his involvement in the process of safeguarding the long term effectiveness of the Conventions mechanism, beyond Protocol No. 14. The time frame which I am obliged to respect allows me just to sketch and does not permit a thorough analysis of all elements before us. But I hope that the discussion will offer us the possibility to go further.

I. The third party intervention of the Commissioner under Article 36 § 3 of the Convention

A. The genesis of Article 36 § 3

The negotiations which led to Article 36 § 3 had many features in common with the debate connected to the drafting of Resolution 99 (50) on the institution of the Commissioner for Human Rights. When the latter was drafted, the Commissioner was conceived by some of the main negotiators as a possible means to contribute to redress the Court’s workload. The negotiators faced then the dilemma to decide between a general human rights institution with no judicial role or an institution that could be empowered to deal with individual complaints and bring cases before the Court. The initial Finnish proposal and the PACE opinion of 1999 were clearly in favour of the latter option. The Commissioner would be enabled to deal exceptionally with individual cases provided that they were not already before the Court or likely to be the object of an application before it.

However Article 1 § 2 of the Resolution of 1999 took a different direction and opted for an explicit prohibition of taking up individual complaints. In spite of that, when negotiators started discussing the drafting of Protocol No. 14, the issue arose again. The Office of the Commissioner for Human Rights proposed the introduction of an Article 33bis related to inter state applications that would give the Commissioner the possibility to refer to the Court applications related to serious questions of a general nature against one or more High Contracting Parties. The idea was that the Commissioner would help the Court with respect to repetitive cases as he would represent the general interest. This was supported by the Parliamentary Assembly. In its Recommendation 1606 (2003) it invited the Committee of Ministers “to envisage an actio popularis and create the post of public prosecutor at the European Court of Human Rights who would have take the task of bringing actions concerning violations of human rights before the Court and entrust this task, if necessary, to the Council of Europe’s Commissioner for Human Rights, assigning him the necessary resources”.

This option has not prevailed. The drafters of the Protocol were afraid that the proposed solution would go against the institutional order by transforming the Commissioner into a prosecutor. Instead, the option of third party intervention was adopted. It was welcomed by the Court.

B. The current scope of Article 36 § 3

The current scope of Article 36 § 3 is rather limited. It provides for a mechanism to provide additional information on the application to the Court and, in exceptional cases, to assist the Court in the examination of the application. However, the Commissioner’s role is not limited to the examination of the application. In some cases, the Commissioner may take a more active role in the proceedings.


45. Parliamentary Assembly, Recommendation 1606 (2003), Areas where the European Convention on Human Rights cannot be implemented, point 10 § ii and iii.

B. Substantive and procedural issues

With the forthcoming entry into force of Protocol No. 14, Mr Thomas Hammarberg, the second holder of the post of Commissioner will be the first to implement this new role. The Commissioner will use his powers directly. The Commissioner is currently working on the determination of the criteria of his interventions, which he intends to make public. Before doing so, he intends to consult NGOs but also other privileged partners like ombudspersons and national human rights institutions on their views.

The criteria will be developed in the light of the purpose of third-party interventions by the Commissioner as it is contemplated in the Convention. Indeed, in the case of the Commissioner the aim is different than the aim of diplomatic protection offered under Article 36 § 1 to the High Contracting Party whose national is an applicant. It is also different than the aim of a proper administration of justice in accordance with Article 36 § 2.

The third-party intervention by the Commissioner is indeed distinct. It should be possible for him to intervene in a manner which is compatible with the explicit prohibition of any judicial role in accordance with Article 1 § 2 of his mandate. Let me explain this a bit better. The Commissioner was set up, in addition to the Council of Europe’s political and jurisdictional bodies, as an institution that would exercise a sort of proactive prevention and correction of general human rights breaches. Consequently any action by the Commissioner should always be limited to cases were systemic problems are at stake or where general measures should be contemplated by member states. Keeping this in mind, the third-party intervention of the Commissioner will have the added value of opening new possibilities of addressing patterns of human rights violations, including ongoing ones. His field experience in member states allows him to put into a wider perspective the Court’s judgment, which deals by definition with an individual case that concerns only one responding state.

The procedural modalities of the Commissioner’s participation in Court’s proceedings will be defined in the new rules of procedure before the Court which are being drafted at present by the Court’s Rules Committee. At the seminar which took place on the occasion of the hand-over from the first to the second Commissioner on 3 April 2006, Judge Peer Lorenzen said:

“The Court is currently reviewing its Rules and working methods in anticipation of the eagerly awaited entry into force of Protocol No. 14, so as to be fully operational in the new procedural context without delay. Regarding the Commissioner’s future role under Article 36 § 3, the Court will pay close attention to his views. Furthermore, it is ready to open its in house legal training programme to the Commissioner’s staff and to share its research and library resources with his office”.

The Commissioner will indeed need communication sharing with the Court in order to carry out his tasks.

II. Other possible avenues for involvement of the Commissioner in the procedures under the Convention

The comments of the Commissioner to the Wise Persons’ interim report deals with the concrete proposals made by the Group of Wise Persons regarding a possible extension of the Commissioner’s functions beyond Protocol No. 14 – in particular, co-operation with national human rights institutions and ombudsmen (covered by Mr Söderman) and decentralised offices. The group further envisaged a general co-ordinating role for the Commissioner. We might come back to these points during our discussion if you so wish. Let me draw your attention to some comments made by the Commissioner which could be relevant also for our discussions this afternoon and tomorrow morning. They relate to pilot judgments, to the execution of judgments in general and to the verification of compatibility of national legislation with the Convention standards.
A. Pilot judgments

In its Resolution (2004) 3, the Committee of Ministers requested that the Court identifies in its judgments the underlying systemic problems and makes these judgments known not only to the states concerned and the Committee of Ministers but also to the Parliamentary Assembly, the Secretary General and to the Commissioner.

The Commissioner could engage in a continuous dialogue with the member state(s) concerned, either specifically or in the course of his visits or of bilateral contacts or via his privileged relations with national ombudspersons and/or national human rights institutions. The idea is, basically, that the systemic problems unveiled by a pilot procedure or judgment should become a priority in the continuous dialogue between the Commissioner and the member state(s) in question. The Commissioner could, in particular, suggest or validate the means to redress the systemic defect. Of course, the Commissioner would report back to the Court and the Committee of Ministers on the results of this dialogue.

B. Execution of judgments

Moreover, the possible contribution by the Commissioner to the execution of pilot judgments would seem applicable to the execution of judgments in general. The Commissioner could be involved by providing information and offering his good offices to the Committee of Ministers in accordance with the Declaration of 19 May 2006, providing for a framework of institutional relations between both. This could be useful in order to prevent infringement proceedings.

C. Compatibility of national (draft) legislation with the standards laid down in the Convention

Verification of the compatibility of draft laws, existing laws and administrative practices with the standards laid down in the Convention is deemed to constitute one of the main remedies to the Court’s excessive workload. Established by the Committee of Ministers Recommendation (2004) 5, this objective was reiterated in the Declaration of 19 May 2006. The Commissioner has already carried out compatibility exercises via Recommendations and Opinions. Provided that relevant information is given to him by the Court and the Committee of Ministers, the Commissioner could enhance his activities and his direct involvement in this field, in close cooperation with national human rights institutions and ombudspersons (see also above).

Concluding remarks

This presentation could not be other than prospective. The Commissioner is ready to offer his good services if he is asked to. By no means does he intend to shake the institutional balance within the Organisation. He wants to build on the mediation role he is entrusted


48. Declaration of the Committee of Ministers on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels adopted on 19 May 2006, point X§c.


51. Points X§ f and g.

with. Of course, if he is asked to expand or intensify his activities, the necessary means will have to be granted to his Office.

This is what the Heads of State and Government stated last year in Warsaw:

“We undertake to strengthen the institution of the Council of Europe Commissioner for Human Rights, which has proven its effectiveness, by providing the necessary means for the Commissioner to fulfil his or her functions, particularly in the light of the entry into force of Protocol No. 14 to the European Convention on Human Rights.”
Let me start by extending my words of gratitude for the invitation to this seminar to Director Machinska, whose instrumental role in organising this meeting has been rightfully praised by Mr Liddell.

I have the pleasure of sharing with you a handful of reflections about the relationship between the Strasbourg Court and the Luxembourg Court, whose co-operation is fraught with difficulty and burdened with a backlog of problems. Their co-operation is likely to take on a new dimension thanks to the role in the Group of Wise Persons given to Mr Gil Carlos Rodríguez Iglésias, former President of the European Court of Justice in Luxembourg, elected Chairman of the Group on 18 October 2005. The issue at stake is most interesting, as demonstrated by the many meetings of the members of the Strasbourg Court and the Luxembourg Court. I had the honour of participating in one such meeting chaired by the President of the European Court of Human Rights, Judge R. Ryssdall. The meeting took place in Strasbourg shortly after the ECJ in Luxembourg published its Opinion 2/94 of 28 March 1996 concerning the European Community’s accession to the European Convention on Human Rights in the light of the provisions of the EC Treaty. I then criticised the view that the position of the ECJ was opportunistic. The lively debate that followed the ECJ decision is now being revived.

In fact, many debates do recur in the forum of the European system of human rights protection. One of them is focused on Protocol No. 11 which entered into force on 1 November 1998. The assessment of the Protocol is a very personal and painful issue for me as I had the honour to serve as Judge at the European Court of Human Rights as of 1992. For 6 years I was Judge on the so-called non-permanent Court. I need to explain that term. The European Court of Human Rights was never a non-permanent court. It was a permanent court which sat in sessions. Non-permanent courts are ad hoc courts of arbitration. The European Court of Human Rights was a permanent court where we served continuously, working 7 to 10 days a month in sessions for which we prepared reading documents at home. Sessions had very full agendas with a much bigger number of issues than is the case today. Thus I think that it is imprecise and untrue to say that the Court was a non-permanent court. Regrettably, this is not the only imprecise and untrue statement about the Strasbourg Court.

As a judge who saw the transition from the old system where the Commission and the Court co-existed to the new system with a single court, I cannot aspire to be objective. I believe that the transition was a mistake, and current practice confirms my assessment. As the drafting of Protocol No. 11 was nearing completion, the Protocol was heavily criticised. It was criticised again on the 50th anniversary of the European Convention on Human Rights in Rome, only 2 years after the Protocol came into force. The solutions adopted in Protocol No. 11 were criticised from the start, which is only natural given that the reform of the European judiciary is a difficult process, increasingly complex with the rising number of the member states, and one that necessitates a constant effort to reach a consensus with many different and difficult partners.
In my opinion, the reform of the European system of human rights protection could have been implemented following the principle of two instances, as was suggested by the experts and the governments of the Netherlands and Sweden. The proposal to make the Commission a court of first instance and the Court an appeal court competent in fundamental issues was unfortunately abandoned. The proposed solution would have solved the difficult issue of the participation of the Committee of Ministers, an executive body, in the process of jurisprudence, the only positive feature of Protocol No. 11.

The first issue I want to raise here is the change of the term of office of the judges. I realise that an attempt was made to rectify that mistake in Protocol No. 14 of 13 May 2004 which for the first time in the history of the international judiciary introduced the principle of the non-renewable term of office of the judge, a very important condition of the independence of judges. However, another change introduced by Protocol No. 11 concerning the expiration of the term on the age of 70 was left untouched. Naturally, rotation of officials is a common practice, for instance in the British system where even the best ambassador has to resign on reaching a given age. But is this a wise solution in the case of judges? I am asking this question as I have seen the departure of many great judges – and I use this term emphatically – of the European Court of Human Rights including Louis-Edmond Pettiti, the architect of bioethics, Carlo Russo, Nicolas Valticos, former Assistant Director-General of the International Labour Office who visited Lech Walesa in Poland during the martial law, Rudolf Bernhardt, the last President of the former Court of Human Rights. They all had to go due to the age limit which was introduced, excusez le mot, brutally. It must be stressed that the lex retro non agit principle was breached as they all had to go due to a regulation which took effect after they became judges. They were all outstanding figures of international law who devoted many, many years to the Court; some of them served for two terms of nine years each; and they had to leave the institution they were committed to. They left not so much with a sense of personal harm as a sense that harm was done to the status of a judge; and the status of the judge is crucial to the quality of the court. Obviously, without due respect for the status of the judge, the court cannot work well even with a perfect organisation.

I am very glad that the nine-year term of office of judges was reintroduced at the European Court of Human Rights, however the issue of the age limit remains open. With all respect for young legal professionals, I believe that to be authoritative, an international or a European judge must have enough expertise to match his or her position, and such expertise cannot be gained in 10 or 15 years. However, if the system introduced by Protocol No. 14 continues, a 62-year-old judge will not be allowed to remain in office till the end of the term as the nine-year-term would take him or her beyond the 70-year age limit. In addition, outstanding European Court of Human Rights judges who were the founders of the European system of human rights protection will turn 70 and have to leave.

In light of the foregoing, a fundamental question arises whether the age limit should not be abandoned. Other international courts, including my Court and the UN Hague Court, do not impose an age limit; I am not aware of any extreme cases where the lack of an age limit would adversely affect the quality of jurisprudence; quite to the contrary.

The next issue concerns the system of social security for judges. I have recently had the honour to represent the Court of Justice of the European Communities at the inauguration of a Strasbourg court year. At that time, President of the Court Luzius Wildhaber regretted that no progress was made to ensure decent conditions of work for judges. Indeed, no progress was marked in many different areas, starting with possibly the most banal issue: pension rights and social security. In the era of the so-called non-permanent Court, all benefit entitlements were refused to judges due to the fact that the judges worked with other institutions, such as universities and research centres, and only attended Court hearings. Now that the judges are not allowed to hold any other functions and are required to stay permanently in Strasbourg, the lack of social security and pension benefits for the judges is in stark conflict with the letter of the
law, that is the European Social Charter of the Council of Europe which is binding law for the organisation. When I served as Judge, we made an attempt to establish a committee of judges responsible for social issues. However, the Presidency of the Court believed that the first priority was to achieve adequate productivity (I dislike this term), and only then to tackle social issues. I take this position to imply a misunderstanding of the issue as one must not draw a line between such interconnected areas as the status of the judges and their productivity.

In this context, I will not go into detail about the excellent system of social security for the judges of the European Court of Justice in Luxembourg which aims to ensure the independence of the judges. You may be aware of recent issues that arose in connection with the Microsoft case pending before the Court of First Instance. Two former ECJ judges, Sir David Edward and Melchior Wathelet, and former Judge and President of the Court of First Instance José Luis Da Cruz Vilaça were advisors to Microsoft and thus worked for a party to the case, which triggered discussions and criticism at the Court. It was proposed to draft a code of conduct for the judges which would bind them both during and after their term of office. I oppose this proposal; I believe that the code of conduct could be limited to a single article providing that a judge, whether in service or retired, should act properly. In my opinion, every judge should know how to act and how not to act under any circumstances.

Another issue I want to raise is that of legal assistance to the judges. Protocol No. 14 to the European Convention on Human Rights contains a draft which actually implements the provisions of the Convention regarding référendaires. I am strongly critical about this part of the current Strasbourg system given the problems I encountered as Judge of the European Court of Human Rights. I worked as Judge Rapporteur in the so-called new Court in a very dramatic case of four persons sentenced to death in Ukraine. The sentence was passed before the adoption of a moratorium on the death penalty in Ukraine. After the Court’s fact-finding mission in Ukraine, we had to write judgments of great importance. A particular controversy was whether the case fell under Article 2 or Article 3 of the Convention, that is whether the treatment of prisoners on death row could be considered a threat to the life of a person. The Court designated a lawyer who was to draft the judgment, but time was running and the draft wasn’t ready. It turned out that the Secretary General of the Council of Europe had sent the lawyer on a mission to Chechnya without communicating with the President of the Court. I could not draft the judgment myself as I was sitting on several cases as Judge or Rapporteur. The drafting committee of judges, in turn, intervenes at a later stage once the Registry of the Court has drafted a judgment. I believe that it is unacceptable to have a system where the Registry reports to the Secretary General of the Council of Europe and consequently the mutual relations and the tensions between the Secretary General and the President of the Court affect the situation. For the sake of comparison, in the Luxembourg system my four référendaires and two secretaries report only to me. It would be impossible for a third party: the Secretary, the President, a judge, to instruct them to abandon a job and handle another issue. The lawyers are hired and paid by the European Union, but they work for me. I have the exclusive power to appoint and to dismiss them, which is a great incentive in their work. This ensures full independence of the judge’s staff from the Registry of the Court, not to mention the officials of other institutions, especially the executive.

To conclude, let me flag one other issue concerning Article 30 of the Convention whereby the relinquishment of jurisdiction in a case in favour of the Grand Chamber depends on the consent of the parties. Soon after the draft Article 30 was published, President of the Court Professor Rudolf Bernhardt, Director of the Max Planck Institute, whom many of you know, published an article very critical of

53. Article 30. Relinquishment of jurisdiction to the Grand Chamber: Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.
the draft. Under the old system, the Court could relinquish jurisdiction in favour of the Grand Chamber where the case raised a serious legal question, and had to relinquish if jurisdiction or its direction could change. In the current legal system, relinquishment depends on the consent of the state or the applicant. This deprives the Court of the autonomy in deciding the composition of judges who should sit in the case. When the controversial draft was debated, I was Chairman of the Regulatory Committee where we were trying to solve the issue. I then quoted Sabathai Rosenne, a great expert on the International Court of Justice, who said that the Rules were more relevant to the parties than the Statutes, as the Rules were used directly by the parties. We managed to introduce two provisions in the Rules. First, objection or lack of consent for relinquishment of jurisdiction in the case in favour of the Grand Chamber has to be duly reasoned. Second, the time given to file an objection was reasonably limited to one month. Since I left the Court in July 2002, there has not been a single case of a party objecting to relinquishment of jurisdiction in the case in favour of the Grand Chamber, but this does not alleviate the concerns of my former colleagues on the European Court of Human Rights about the implications of a potential objection.

At the Luxembourg Court, procedural issues, including the composition of the judges, are an exclusive responsibility of the réunion générale. One of the main issues discussed every Tuesday at the general session of the Court is the question of composition of the judges to sit in a given case, the need for an opinion of the Attorney General, and the option of the oral procedure. Where the parties ask for a hearing to be held, the Court in principle accepts their request. I believe that it is absolutely necessary to restore the autonomy of the Strasbourg Court in having each case examined by the relevant composition of judges.
First of all, I would like to thank the Information Office of the Council of Europe and the Polish Government for organising this event to let us have a discussion on a subject as important as the reform of the European Court of Human Rights. I doubt that there is a single person in this room who would not agree that a reform is necessary to relieve the Court of its backlog of pending cases, which creates an enormous burden, and to some extent does not allow the Court to devote enough time for further development of the Convention case-law that would go hand in hand with the most recent developments in the member states of the Council of Europe. I think you will all agree that neither individuals nor the governments benefit form this situation, as individuals often receive a very delayed reply to their complaints, while the governments are not being given an opportunity to hear the views of the Court soon after or even while their law and practice are developing.

Today, I have been given the honour to share my views on the admissibility criteria before lodging a complaint to the Court. From the very outset, I must say that this presentation reflects my personal views only and may not be in any way seen as reflecting the position of the Latvian Government. Secondly, I would like to apologise in advance to anyone who may see this presentation as being too critical. Certainly, this was not my intention.

In my presentation, I will try to answer the following questions:

- What can be done to streamline the application process to the Court? I will focus on two issues:
  - how to improve the quality of the applications, and
  - access to the Court in Strasbourg;
- What can be done by the Court itself to streamline its approach to inadmissible cases?

I have been asked by the organisers of this seminar to think of solutions that would not require any amendments to the Convention or the Rules of Court.

When preparing this presentation, I used the Report of the Lord Woolf Review of the Working Methods of the European Court of Human Rights,54 the follow-up to the Recommendations of Lord Woolf, an Interim report by the President of the Court; as well as the Interim report of the Group of Wise Persons to the Committee of Ministers,55 placing them in the context of my own experience gained while working for a national human rights institution (an Ombudsperson-type institution), as well as a government agent.

What can be done to streamline the application process to the Court?

To improve the quality of the applications

There have been some proposals to re-define what constitutes an application. Lord Woolf in his report proposes to go as far as amending Rule 47 of the Rules of Court by introducing a general requirement for all applications to be submitted on a standard application form. Lord Woolf also proposes to change the approach towards the date of the registration of the application from the one of the receipt of the first letter “setting out, even summarily, the object of the application” to the one of the receipt of the completed application form. In my view, such an amendment to the Rules may create a problem of access to the Court.

As rightly pointed out by Paul Mahoney, the former Registrar of the Court, since the expansion of the Council of Europe after 1990, the main task of the Council of Europe and its Court has changed from one of fine-tuning well-established and well-functioning democracies, to that of working to consolidate democracy and the rule of law in new and relative fragile democracies. In these circumstances, one has to face extremely weak knowledge of human rights not only among the general population, but also among the professionals, including lawyers. Therefore, frequently, individuals, especially those living in remote or rural areas, or being deprived of their liberty, do not have access to qualified (free) legal aid. Should the Court opt for introducing much stricter criteria for application, I am afraid the only purpose it will achieve is that of cutting off individuals form primarily those “new” and “fragile” democracies from having effective access to the European Court. Thus, I doubt that such an introduction would serve its purpose. Maybe in the future, when all member states achieve the same high level of human rights information and education.

At the same time, I fully share the concerns expressed about the extensive correspondence the Court’s staff has to deal with without having prospects of receiving admissible applications. The statistical data show that at least 30% of the persons applying to the Court have not pursued the matter. Thus, perhaps one could adopt a middle approach to the one proposed by Lord Woolf in his report, without necessarily amending the Rules. The Court could introduce stricter requirements to what constitutes “setting out, even summarily, the object of the application”. The Court might want to require that even a summary statement of the fact must be clear and comprehensive enough to raise concerns as to possible violation(s) of the Convention. Such an approach would also be consistent with the rules of judicial procedure in the member states, which set out a minimum requirement as to the content of the application to the national courts before they even start looking into it. I doubt whether the Court should open a provisional file when it receives an application, which doesn’t contain the basic information about who is complaining, against whom, about what and why (including the dates, the events and the list of decisions), as I personally see it as a waste of time and human resources of the Court. I think it would not be too much to expect from the potential applicants, as they are required to exhaust domestic remedies before applying to Strasbourg, meaning that before they decide to apply to the Court, normally, they should already have some experience in writing complaints and applications on the same subject to the domestic authorities.

A Handbook on admissibility

The Honourable Lord Woolf in his report comes up with an idea of drafting a Handbook on admissibility. I personally find this idea extremely valuable and interesting, and certainly deserving of further attention. Looking at it from the perspective of a lawyer who once had to write her first application to the Court, I believe it would be very valuable if such a Handbook is written taking into account the specifics of the member states. One could

57. For further details see Lord Woolf’s report, page 9.
think of splitting the book into two parts. The first one would describe in detail the procedure of submitting and examining applications in Strasbourg. The second part would provide some country-specific information. The Strasbourg-specific part would be similar for all member states and could include information on calculating the six months deadline; an explanation as to the necessary content of the application; an explanation of what constitutes an attachment to the application (e.g., whether one can submit a hand-written copy (drawing) of documents, whether photocopies are allowed, or a certified copy is necessary); which attachments are necessary (e.g., if one complains about alleged violations during criminal proceedings it does not automatically imply the submission of the whole criminal case file); explanations of the limits of the Court’s jurisdiction (territorial, temporal, “fourth instant court” issues); an explanation on the requirement of exhaustion of domestic remedies (including which remedies and why; what constitutes a remedy); the principles governing calculation of claims for just satisfaction; specifics of a friendly settlement procedure; and other technical procedural issues. This part, in particular, could contain an insight into the so-called Committee cases, which deal with inadmissible cases, as well as reference to interesting (in)admissibility decisions. The country-specific part could be drafted by the national lawyers having extensive experience in working with Strasbourg, meaning it would be specific for each member state. This part could provide an insight into specific national domestic remedies, including their evaluation by the Court (if it exists) of their effectiveness, reference to the Court’s case-law concerning just satisfaction, examples of friendly settlements with comments as to why they were or were not useful. I believe that this approach could “better connect” the European Court with the domestic systems of member states. The inclusion of the country-specific information would also naturally facilitate the translation of the Handbook into the national languages of the member states.

Improving access to the European Court

I believe an investment into building up the capacity (not only in terms of the case-law of the Convention, but also procedural matters before the Court, and the proper knowledge of the national law) of national lawyers and NGOs, encouraging them to represent individuals, may significantly contribute to the quality of the proceedings before the European Court (including decreasing the backlog of inadmissible cases, as well as increasing the quality of admissible cases). From my own experience, lawyers often do not use provisions of the Convention during domestic litigation. The first reference to the Convention provisions often appears as late as when applying to Strasbourg. I am convinced that such an approach does not benefit either the applicants, or the national authorities, or even the Court. Increase in the number of domestic human rights litigations, including timely referral to the national Constitutional Courts, may lead to the solution at the national level, or, as a minimum, a better quality applications to the Court in Strasbourg.

As to the proposal of having satellite offices, which would work “as regional versions of Registry”60 “Satellite offices would be staffed by registry lawyers, and would act as the compulsory first port of call for potential applicants; any application form sent direct to Strasbourg would be returned, immediately, to the satellite office”61 “Where an applicant with an inadmissible case nevertheless insists on making an application to Strasbourg, the satellite lawyer could forward the application form to Strasbourg along with a note (in either French or English) highlighting why the application was thought to be inadmissible. This application could then be referred to a Committee of judges (or the single judge under Protocol No. 14) for formal rejection”62

Although I consider this idea as having reasonable grounds, I doubt whether the Court will have financial resources in their own budget to install such offices (which will also imply administrative costs). In case it does, I am afraid such offices will provoke an increase in the number of submitted applications, since

the Court will become “closer” and “a more easily accessible” institution, first and foremost, in terms of postal expenses. On the other hand, if such satellite offices are not financed by and subordinated to the Court in Strasbourg, then the problem of independency (in case national authorities (co-)financing the office) and consistency would arise.

What I fail to understand is the proposal by Lord Woolf to involve national human rights institutions (Ombudsmen) in the process of dealing with inadmissible cases. If the case is clearly inadmissible in Strasbourg, what more might a national human rights institution say? At the same time, I believe that the strength of these institutions may significantly contribute to the decrease in the number of complaints to the Court. Thus, member states should be encouraged to promote the independence and effective operation of those institutions. However, after working for several years for such an institution, I must say that convincing a potential applicant that his case is not for Strasbourg Court to deal with is almost an impossible task. Even if an individual admits that there may be no prospects of success for his/her complaint in Strasbourg, most frequently, s/he would want to hear this conclusion from the Court itself, as for him/her the Court would be a measure of last resort.

At the same time, I think (again, from my own experience), that national human rights institution may assist individuals in submitting applications to Strasbourg, although I also understand that such a function requires individual and financial resources. Another thing national human rights institutions may do is themselves submit applications to Strasbourg, if they concern an important issue (say, conditions of detention in a place X). Many national human rights institutions conduct on-site visits (or examine a specific problem), following which they would normally turn to the responsible authorities with a request to remedy the situation (i.e. national human rights institutions would be using the system of available domestic remedies). If their recommendation has not been complied with (or, for example, it was not possible to resolve the issue at the Constitutional Court level following the institution’s application thereto), the institutions would lodge an application to Strasbourg. They may do so as representatives of the applicants, or at their own initiative. In any event, it would save the Court a lot of time, since it would be dealing with one (instead of hundreds) of ‘clone’ applications. This procedure could also be applied in cases of numerous applicants who, individually, have not “suffered a significant disadvantage,” while the situation concerned points out to deficiencies in national law or practice. Such cases would most probably be the cases where the Court would adopt a pilot judgment, remitting the issue of individual compensation to the domestic courts (the effectiveness may be supervised at the Committee of Ministers’ level).

Another problematic area with the quality of the applications and access to the Court, is access to legal aid within the Court. As far as I understand, the applicant would have a possibility to have access to the Court’s offered free legal aid program sometime after his/her application has been registered and communicated to the government. My understanding that it would be around the time the application has been declared admissible (in summary proceedings under Rule 54 – when the parties are being offered to decide on the possibility of a friendly settlement). I understand the financial implications of this procedure (i.e. there is no reason to invest into a clearly inadmissible application, although with the introduction of summary proceedings this boundary between the two stages of the proceedings seem to disappear). At the same time, I wonder, whether this indeed contributes to the speediness and effectiveness of the proceedings? In a couple of cases, either declared admissible or under summary proceedings, against Latvia a foreign lawyer has been assigned to the applicants. This immediately implies high travel costs, most probably a language issue, as well as a clear lack of knowledge of the national law in Latvia. Without prejudice to the competence of the given lawyer, I still have doubts as to the

63. Lord Woolf’s report, pages 30-34.
64. One also has to bear in mind the high level of distrust to the national authorities among the population in “new” democracies.
quality and effectiveness of such representation. This makes me come back to the issue raised above – namely, the important role of the national lawyers/NGOs/NHRI, as they may come into play at a much earlier stage in the proceedings and will certainly be cheaper. Perhaps, one could think of ways to streamline the free legal aid scheme of the Court so that it would allow more national lawyers/NGOs to benefit from the scheme (one of the underlying problems may be that national lawyers are simply unaware of the Court’s free legal aid scheme).

What can be done by the Court itself in streamlining its approach to inadmissible cases?

Application of Article 34 of the Convention, as well as Rule 43 (Striking out and restoration to the list) and Article 37 of the Convention. The Court has stressed a number of times, that it is not a compensation Court. At the same time, the Court is sometimes very sensitive on the issue of “victim”, when during the course of the proceeding in Strasbourg the national authorities do not offer compensation, but, as far as possible, restitution of rights. The Court takes its own, the applicant’s and the government’s time (sometimes years after the offer has been made) to pronounce on the issue of a violation and perhaps offer compensation. My first question would be, how does such an approach contribute to decreasing the length of proceedings before the Court? My second question would be, whether the Court in such a situation takes into account the procedure for the execution of judgments (the principle that individual measures are decided upon and taken by the state, as well as the length of the supervision of execution procedure). My third question would be, does the Court value the individual measures proposed by the state versus compensation offered by the Court (namely, what is more important for an individual in the given case – to have individual situation resolved as quickly as possible, or to have compensation)? Does the Court take into account that it may not pronounce on the specific measures the state should take in execution of the judgment? Does it calculate the compensation for the “suffering” caused by the national authorities, or also for the length of proceedings before the Court (and why should the respondent state be paying for that)?

Both Rule 43 and Article 37 imply that the Court may strike out the application at any stage of the proceedings. Thus, it is questionable whether the Court should reject such requests as being submitted out of time-limit or too late, as it is impossible to ascertain in advance when such situation may arise.

I thus wonder, whether the Court is not being too formalistic in its approach towards this issue, thus not helping to relieve its own burden and the one of the Committee of Ministers.

I wonder if the Court could not streamline the system by joining cases. Up until this moment, the cases were joined in proceedings against the same state. What would be the Court’s opinion to join proceedings in very similar issues against several states, especially if the Court is about to adopt an inadmissibility decision, or a judgment concerning a friendly settlement? Perhaps, one could explore further the idea of joint final resolutions about to be (or already?) introduced at the Committee of Ministers level?

These are just some proposals, which my colleagues may or may not agree with. However, I believe that such discussions as the one we are having today will help generate ideas that the Court and the governments may use to improve the human rights protection system and the work of the Court.
The ECtHR: Agenda for the 21st century

RULES OF COMPENSATION IN FRIENDLY SETTLEMENTS IN REPETITIVE CASES (FRIENDLY SETTLEMENT CODE)

Ms Beatrice Ramascanu

Romanian Government agent before the European Court of Human Rights

The first question that pops to mind is why this topic. The Romanian experience in the past four years shows that repetitive cases form the majority of the Court’s docket (raising issues related to property rights and non enforcement of judgments). Facing this issue, the Romanian government believes that reaching friendly settlements in repetitive cases is the best solution for all the parties involved. Thus, governments avoid the embarrassing situation of being held responsible for violations of one or more human rights guaranteed by the Convention, having a negative impact at both the national and international levels.

On the other hand, the applicants benefit from a speedier trial in Strasbourg, sooner receiving the compensation decided on at the end of the proceedings in which they were involved. At this point, it is to be mentioned that the friendly settlement procedure reduces by 1 to 2 years the time necessary to resolve a complaint by the Court. This element is usually very important for the applicants, most of whom have already had to bear an excessive burden as to the length of proceedings only to face another set of lengthy proceedings in Strasbourg. Also, having a word to say in this process could represent an important incentive for the applicants to engage in the friendly settlement process.

In what concerns the Court’s interest in promoting this way of solving repetitive cases, I will emphasise the aspects underlined by Lord Woolf’s Review of the Working Methods of the ECHR:

36. Solving repetitive cases by friendly settlements that observe the principles established in the pilot judgments will save the Court from considering all the cases that raise the same issues;
37. thus the Court’s docket could be substantially reduced;
38. the time thus saved could be used by the Court to focus upon cases that raise important issues in the interpretation of the Convention and may lead of pilot judgments;

The European human rights mechanism will thus become more effective and efficient.

The building of an establishment requires a set of principles which form its foundation and at the same time represent its beacon.

Having this necessity in mind, it is of a great importance to set certain principles:

1. Transparency, encourages dialogue between the government’s agents and the applicants, some of them being reluctant to negotiate with the government which forced them to address the Court in the first place.

Having a friendly settlement code in writing could help the applicant better understand that the Court itself favours friendly settlements of repetitive cases. Thus the confidence of the applicants in the friendly settlement procedure increases, having as a consequence the raising of the cases thus solved and diminishing the time of negotiation.

Our experience shows that two categories of applicants could particularly benefit from this publicly available code, namely applicants who represent themselves and applicants who are represented by lawyers not entirely familiar with the jurisprudence of the Court. I will give...
you an anecdotal example from one of the Romanian cases in which the applicant’s lawyer proposed the amount of 3 million euros as non-pecuniary damage for the alleged violation of the right to a fair trial triggered by the domestic court’s failure to give a proper reasoning for its decision.

2. Celerity: The key of speedy proceedings is a well-established set of procedural rules. Thus a code in writing, that is available for the parties to study and become familiarised with prior to the beginning of the negotiation process could contribute to speeding up the proceedings. When sitting down to the negotiation table the parties already know what to expect within reasonable limits.

3. Accessibility: Given the limited information they now have access to, which is provided exclusively by Articles 38 and 39 of the Convention and Rule 62 of the Rules of Court, the applicants are not in a position to assess the benefits of the friendly settlement procedure. A more detailed code will help them realise that this procedure, which is also favoured by the Court, could represent the best solution in their case.

I consider that the accessibility of this code would be further enhanced by making it available on the Internet in the official language/languages of each High Contracting Party.

4. Flexibility: It is a necessary that such a code should comprise general rules applicable to all applicants and member states to the same degree.

However, one cannot overlook the problem, highlighted by Lord Woolf, of the comparative value of money in Council of Europe member states (25 euros go much further in Moldova that they do in Switzerland), which has to be taken into account.

Moreover, the Court itself, in the Scordino v. Italy judgment of 29 March 2006, paragraph 206, referred to the standard of living in the country concerned, which could be taken into account in negotiating the compensation amount.

With a view to achieving these principles, several steps could be taken, in my opinion:

A. The establishment of a working group, which will bring together government agents, representatives of the NGOs involved at the national level in bringing cases before the Court (such as the Helsinki Committee in Romania) and, of course, Court experts.

B. To have a greater impact, the code should be included, as an appendix, in the Rules of the Court.

C. Apart from drafting the code, a specialist friendly settlement unit, as suggested by Lord Woolf, could be established. The main functions of this unit would be:

1) To provide support to Registry lawyers in appropriate cases when pursuing friendly settlement proposals;

2) To scrutinise cases proactively with a view to identifying a greater number of cases suitable for friendly settlement proceedings;

3) To provide a central point of contact, advice and information for applicants and their advisers (whether lawyers or NGOs) concerning friendly settlements;

4) To liaise with satellite offices, where they may exist under our proposals, with a view to promoting and bringing about friendly settlements;

5) To maintain lists of accredited media tors in the various states who specialise in the handling of human rights issues.

As to the rules, we suggest that the following elements should be taken into account:

– The negotiations with a view of assessing the terms of the friendly settlement should have as a starting point the Court’s findings in the pilot judgment;

– In view of the flexibility principle, the parties are free to opt for the compensation means that better suit them. For example, the declaration of the friendly settlement, even though adopted in a repetitive case, may comprise general measures if the parties so wish. Likewise, with regard to individual measures, one should not limit oneself to compensation in money. Other solutions could be envisaged – the reopening of the proceedings, for example.

– As to procedural rules, we suggest that the provisions of Rule 62 paragraph 1 of the Rules of Court, dealing with friendly settlement procedure, should be further ex-
tended in its relevant part, which reads as follows:

"the Chamber shall take any steps that appear appropriate to facilitate such settlement."

Thus, we strongly encourage, apart from the written procedure, the development of a direct oral dialogue mechanism, in which the Registry plays the role of a mediator. Thus, given the nature of the cases we deal with, namely clone or repetitive cases, the parties involved in the friendly settlement procedure may invite the representatives of the Court to put themselves at the parties’ disposal, including by travelling to the member countries. Taking advantage of this possibility, several friendly settlements could be concluded at the same time.

– This direct dialogue could facilitate a better understanding by the parties of all the aspects to be discussed, enabling the Registry to mediate more effectively than in written proceedings.

– We welcome Lord Woolf’s recommendation concerning the possibility to strike out a case, under Article 37(1)(c) (Striking Out Applications), on the grounds that the applicant has unreasonably refused to agree to what the Court considers to be a satisfactory friendly settlement offer. For example in the case of Van Houten v. The Netherlands of 29 September 2005, the Court noted that:

31. On 7 July 2005 the government submitted a written statement in the following terms:

"... Direct contacts between the parties in the past weeks with a view to securing a friendly settlement of the matter have remained unsuccessful. That being the case, the government hereby wishes to express – by way of unilateral declaration – its acknowledgement of the unreasonable duration of the domestic proceedings in which the applicant was involved. Consequently, the government is prepared to accept the applicant’s claims for immaterial damage [sic] to a maximum of EUR 5,000, which it considers to be reasonable in the light of the Court’s case-law. The government is furthermore prepared to accept the costs of proceedings as requested by the applicant, i.e. to the amount of EUR 1,000.

The government would suggest that the above information might be accepted by the Court as ‘any other reason’ justifying the striking out of the case of the Court’s list of cases, as referred to in Article 37 § 1 (c) of the Convention. ..."

The Court further noted:

32. Article 37 of the Convention provides that the Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

“for any other reason established by the Court, it is no longer justified to continue the examination of the application.”

Article 37 § 1 in fine includes the following proviso:

“However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.”

33. In deciding whether or not it should strike the present case out of its list, the Court will have regard to the criteria emerging from its case-law (see Tahsin Acar v. Turkey [GC], No. 26307/95, §§ 75-77, ECHR 2003-VI; and also Haran v. Turkey, No. 25754/94, judgment of 26 March 2002, Akman v. Turkey (striking out), No. 37453/97, ECHR 2001-VI, and Meriakri v. Moldova (striking out), No. 53487/99, 1 March 2005).

34. The government’s declaration contains an acknowledgment that the length of the domestic proceedings in the applicant’s case has gone beyond what can still be considered “reasonable”. The Court has specified in a large number of judgments and decisions the nature and extent of the obligations which arise for the respondent state as regards the determination of “civil rights and obligations” within a “reasonable time”; it finds the government’s admission
to be in keeping with the applicable jurisprudential standards.

35. The Court understands the government’s acceptance of the applicant’s claims in respect to non-pecuniary damage up to a maximum of EUR 5,000, and in respect to costs and expenses in the amount claimed (EUR 1,000), as an undertaking to pay those sums to the applicant in the event of the Court’s striking the case out of its list. For its part, the Court considers EUR 5,000 in respect to non-pecuniary damage to be an acceptable sum in this case.

36. Accordingly, the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)).

37. Given the rather unusual course taken by the domestic proceedings in the case, the reorganisation of the social security implementing system introduced in 1997 (see paragraph 20 above) which makes the recurrence of similar cases unlikely, and above all the clear and very extensive existing case-law on the Convention issue concerned, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the application (Article 37 § 1 in fine).

38. In accordance with Rule 43 § 3 of the Rules of Court, the present judgment will be forwarded to the Committee of Ministers to allow the latter to supervise the execution of the government’s undertakings. In the event that the government fails to pay the sums set out in paragraph 35 above – namely EUR 5,000 in respect of non-pecuniary damage and EUR 1,000 in respect of costs and expenses – within three months of the date of delivery of the present judgment, simple interest will be payable at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

In conclusion, having in mind the common benefit of friendly settlement proceedings, we firmly support the drafting of the friendly settlement code, especially since Romania is currently the second main “client” of the Court, generating repetitive cases concerning, in particular, property rights and Article 6 rights, which can be easily settled in a friendly manner.

Obviously, since repetitive cases are of general concern for all member states, I trust that you agree with me that the sooner the code will be adopted the better.
Education in human rights as an important element of reform of the European human rights protection system

Mr Tomasz Wardyński

Wardyński & Partners law firm

I.

The Report of Lord Woolf indicates that the number of applications registered in Strasbourg in 1981 was 404. By 1997 this had risen to 4,750. Last year, the number of new cases lodged with the court was 44,100. In 2004 applications were lodged at a rate of nearly 1,000 per month, whereas the backlog of cases is projected to rise to 250,000 by 2010.

This unprecedented increase is obviously due to the growing number of member states within the Council of Europe and, therefore, to the increasing number of entitled potential applicants. One must note, however, that the increase of cases in proportion to the number of potential applicants represents a magnitude of geometrical progression versus an arithmetical one.

Two conclusions can be drawn from this comparison.

The first is that human rights are more frequently violated in states that became new members of the Council of Europe as a consequence of the downfall of the “iron curtain”.

The second is that knowledge of the system of protection offered under the European Convention is more solid in founding countries than in new member states and that applicants from the former do not solicit the Court with applications that are inadmissible.

In reality, the above two reasons relate to each other. Most applicants from new states treat the Court as a sort of fourth instance court complementing the national administration of justice system. Thus, they try to seek satisfaction of their claims. Also, the number of applications is high because the rule of law in new member countries suffers from inefficiency in the administration of justice as well as its “de-humanisation.” Consequently, the sense of justice amongst many citizens of these new member states is negative.

It is obvious that an important and efficient remedy for coping with these problems, in addition to technical improvement of the justice system, is education at all levels of the legal milieu. The education of judges, prosecutors and lawyers in private practice is essential. This means education related not only to the teaching and learning of the system of human rights protection, but also related to ethics that relate much more to upbringing than to learning.

Those to be taught are lawyers who make the justice system work. Their knowledge, competence, and sensitivity determine the integrity of a justice system as a whole, secures proper existence of the rule of law and contributes to the respect of ordinary people for court judgments. An appropriate assessment by competent practicing lawyers as to whether a court decision or conducted procedures violate the Convention enables potential applicants to undertake an appropriate decision in relation to an application. If such a mechanism as that described above functions, the Court’s
role as an institution enforcing discipline upon Council of Europe member states in respecting human rights is properly fulfilled. Otherwise, societies of member states will expect the Court to act in lieu of their national justice system. This is wrong. Reform, no matter how brilliant, will not bring results if this turns out to be the case.

II.

Educating lawyers in upholding the rule of law and human rights standards must place emphasis on the notion of independence. Such independence has many dimensions. As an institution related to judges, prosecutors and lawyers, it must be secured and implemented by the state indifferently for each legal profession in order to prevent violence, intimidation, harassment or any other improper interference. Two essential elements must be fulfilled to enable a judge, prosecutor or lawyer to remain independent throughout his or her career. These are: civil courage and “intellectual independence.” They enable a lawyer to interpret laws in accordance with the needs of society to which such lawyer owes a duty. They help to maintain own judgment and impartiality despite potential pressure on the part of a political party, group of interest, or acquaintances. They constitute a n essential part of a lawyer’s personal and professional integrity.

III.

The notion of abuse is also important when educating lawyers in human rights because it is the duty of legal professions to prevent any abuse of power to the detriment of a free society.

The abuse of power can have many different forms and it is important that lawyers be aware of what these are. This is particularly important for judges since they may unintentionally or out of incompetence abuse powers vested in them. Negligence, intellectual sloppiness, inability to interpret laws in accordance with their function as well as their overly strict grammatical interpretation when a need exists to undertake commonsense judgments are all actions that may constitute an abuse of power having vital impact on the lives of individuals. Abuse of power also has a psychological dimension. As such, it has been carefully examined by psychologists, especially after World War II. There is great knowledge in this field that is particularly useful to lawyers. Yet, in most countries training in psychology is not part of legal training. Inter-human relations are the main level playing field on which the law operates. Psychological training is necessary for all legal professions. It enables identification of the abuse of power at an appropriate time, particularly among judges themselves, as well as vulnerability to this temptation. Such knowledge aids in respecting the rules of conduct, whereby such respect is vital for the protection of human rights.

Practising lawyers assisting individuals have a particular duty to prevent abuse of their privileged position. Professional privileges primarily exist to protect human rights and liberty. Abuse and violation of the rules of conduct compromise the legal profession as an institution and place the entire national and, ultimately, international system of human rights protection at risk. A legal profession that loses the confidence of the society that it is obligated to serve will no longer maintain its legitimacy. The state will step forward and take over regulation of the profession, which will inevitably destroy the fragile equilibrium necessary for the functioning of human rights protection. This sort of development would obviously have a spill-over effect and endanger protection systems in other countries. The above considerations indicate that educational efforts related to the field of ethics in the legal profession must be of a permanent nature. Laws of substance without appropriate professional conduct within the area of human rights cannot be applied effectively. ★

Proceedings
No serious debate on the protection of human rights, its model, effectiveness, and existing and desired mechanisms can be conducted with the omission of non-governmental organisations and the role they play. Such organisations are indeed the source of all the power of all the human rights protection systems, regardless of whether national, international, universal or regional.

For the purpose of today’s discussion, as well as the broad debate taking place in Europe about the future of the protection of fundamental rights, I would like to concentrate on the current and the desired roles of these organisations – international and local – in the broadly understood system of protection based on the European Convention of Human Rights. My opinions result not so much from my presently held position as president of an important non-governmental organisation but more from thoughts and experiences of a person who has for many years been in different ways connected with the Strasbourg system – a former member of the European Commission of Human Rights, Kosovo ombudsman, for whom the European Convention was the basic instrument and a point of reference, a promoter of the Convention in Poland for many years, as well as an inspirer in legal circles, particularly that of attorneys.

Discussions on the role of NGOs are often greatly dedicated – and rightly so – to the issue of applications lodged before the European Court of Human Rights and the procedure of considering them. However, I would like to first of all focus on the role of non-governmental organisations in the protection of human rights within the states of the Convention, in which for reasons of the subsidiarity nature of the Strasbourg system, there must be appropriate and effective mechanisms of protecting the rights of an individual.

Human rights NGOs have much room for manoeuvre in this respect: promoting and explaining the Convention, providing training, organising thematic conferences, seminars, preparing manuals and other publications – all in all, broadly understood educational activities, a process of teaching the society and its different circles about the rights and instruments of their protection, both in the country, as well as pursuant to international conventions.

Another important area is professional counselling, owing to which non-governmental organisations can significantly help improve the application of domestic legal remedies, leading to the reduction of applications lodged with the Court. This can be done by providing wise advice to people who feel aggrieved, informing them about the conditions of admissibility of cases and the scope of rights and freedoms protected by the Convention, and showing them arguments against lodging the application. It is particularly in this sphere that well prepared local organisations can be a valuable strategic partner to the Council of Europe. They will be able to play this role, however, on the condition that they have sufficient funds. Allow me here to appeal to the stakeholders to consider the
Many important problems, sometimes of a systemic nature, are considered before the Court of Human Rights despite the fact that they would never have had to get there if they had been taken care of by national courts or considered in a public or parliamentary debate. It is the duty of NGOs to intervene and blow the whistle on time, as well as to create a social force so as to solve the problems revealed and develop appropriate protection mechanisms. This can be done by supporting the aggrieved in using existing domestic protection remedies in cases which refer to publicly important issues, also systemic ones, related to the freedoms and rights of individuals. Such aid would entail assistance in submitting and supporting cases before courts, constitutional tribunals included. The Helsinki Foundation often makes use of a possibility, available in the Polish legal system, of participating in proceedings before common and administrative courts, when such cases are considered, as the so-called social party. The argument put forward in such cases is based on the standards of human rights and fundamental freedoms. The objective here is to prevent violations from happening or to assist the state in remediating the violations committed, as well as finding a proper solution without the need to resort to lodging an application before the European Court of Human Rights, as this should indeed be the last resort.

However, the situation often calls for this resort. Effective use of this possibility requires specialised legal expertise and experience in this field. And this is exactly the type of assistance that NGOs should, to the best of their ability, provide to the aggrieved. They can take a stand before the Court directly, representing the aggrieved, or provide support by many different means not being directly involved in the case.

Experience indicates that the involvement of NGOs is of paramount importance, particularly in cases of serious and large-scale violations. A good example here is applications against Turkey which referred to a situation from some time ago in the south-eastern part of the country. The fact that the application was lodged and a breakthrough achieved was possible owing to the initiative and co-operation of non-governmental organisations: the Human Rights Association in Dyarbakir and the Kurdish Human Rights Project with a seat at the University of Essex. The cases were first prepared mainly by experienced British solicitors, whose place was gradually taken over by Kurdish lawyers trained by their British colleagues, despite the repressions they had met with.

Presently, similar assistance is provided to victims of human rights violations in Chechnya by the Stichting Russian Justice Initiative – an organisation with roots in the Helsinki movement, located in the Netherlands, and the Chechnya Justice Project within the Stichting Russian Justice Initiative, which clearly refers to the experiences of the Kurdish programme from Essex. The victims represented by the foundation lodged approximately 200 applications with the Court by the end of 2005. Half of these cases are Chechen applications against Russia. The Chechen victims are also helped by the European Human Rights Advocacy Centre (EHRAC) functioning at one of the London universities, co-operating with Russian human rights organisations, in particular the Memorial.

It would be difficult to imagine the severely aggrieved and intimidated inhabitants of villages and little towns by the Iraqi border or in Chechnya, often refugees, to be able to independently and without any assistance lodge an application with the Court in Strasbourg, pressing charges of mass repressions imposed by authorities.

The reason for the NGOs participation before the Court and their help for the aggrieved is not just remediying a single damage. Of course this reason is also very important, yet there is another one which needs to be born in mind by NGOs, namely the critical assessment of the law and practices of state authorities in areas which are important from the perspective of human rights and the guarantee of their protection. The application is often the last stage of previously undertaken efforts in terms of nationally available procedures. The dispute about the limits of protec-
tion pending in a given state is thus transferred to the Court in Strasbourg.

Non-governmental organisations can participate in proceedings before the Court, submitting an intervention as a third party. Starting with the case of *Malone v. the United Kingdom* in the early 1980s, NGOs, when acting in this manner, began to have a great impact on the Court’s decisions and, as a result, on the Convention’s standards. It would take a long time to list all the great judgments of the Court where the substantive contribution (often expressly underlined in the justification of the decision) of NGOs presenting an *amicus curiae* brief has been unquestionable. Such successes have been achieved by such organisations as Interights, Amnesty International, Liberty, Human Rights Watch, Justice, the AIRE Centre (Advise on Individual Rights in Europe), International Commission of Jurists (ICJ), European Roma Rights Center (ERRC). In some cases important roles were played by specialised organisations, such as “The Voluntary Euthanasia Society” or “The Family Planning Association”.

It has often been so that in cases which bore difficult problems in terms of the interpretation of the Convention, as well as those which raised new important questions, a number of NGOs were involved – just to mention the pending case of *Ramza v. Holland* pertaining to a very delicate problem of the admissibility of breaking the rule of unconditional protection pursuant to Article 3 of the Convention in cases of expulsions for reason of state security where, apart from the governments interested, there are as many as seven NGOs participating as third parties.

When in this role, non-governmental organisations should not be engaged in issues which are assigned to the parties in dispute, in particular in reference to the facts of the specific case. Instead, the point of interest for NGOs should be e.g. a comparative analysis of legal systems, an analysis of the issue in question in light of international or community law, a review of conclusions from other international documents and protection systems, as well as of the body of valuable rulings of the different systems of state law and application of own experience and knowledge. In cases related to expulsions or extraditions in conditions threatening to violate provisions of the Convention, the reports which are of particular value are those on the state of human rights in the country where the applicant is sent.

More and more active in functioning as third parties in the Strasbourg procedures are NGOs from this part of Europe, although to my mind they are still not active enough. The Helsinki Foundation of Human Rights has within a short period of time presented, as part of its precedent cases programme, *amicus curiae* briefs in five cases, not only against Poland but also against Austria (the case of *Reinprecht* on prolongation of detention on remand without public hearing) and Slovakia (the case of *Turek* regarding the lack of guarantees required in the process of vetting). The cases against Poland refer to the lack of an appeals measure against a physician’s decision on refusing to perform an abortion, the system of providing legal assistance *ex officio*, as well as access limitations to the highest court instance (*cour de cassation*).

In light of current experience and needs, the President of the Court should make broad use of the possibility of NGOs participating in the Strasbourg procedure, assuming and following the rule that applications for intervention are always accepted unless there are serious grounds for a different decision.

For an NGO to consider the possibility of participating in proceedings as a third party it is necessary to ensure appropriately speedy access to information about new cases pending. The above stems from the condition stipulated in the Rules of the Court that the application to participate in such a role cannot be submitted later than 12 weeks from the moment of communicating the complaint to the government. However, how is an NGO to learn of this fact, particularly if it is not representing the applicant but is only ready to consider the possibility of its involvement in the case, acting in the general interest? Hence the repeatedly made postulate to make information on complaints which are communicated to the government immediately available online.

Pursuant to the Rules of the Court presently in force, applications for intervention
must be submitted before the decision on admissibility is made. Therefore, it is possible that a case, in which such an application has been filed, will never be considered on its merits for reason of inadmissibility. Suggestions made by some of the Court’s sections proposing to submit the application again once the decision on admissibility is taken cannot be seen as solution to the problem, if only due to the fact that more and more often the Court links the admissibility issue with the merits of the case. In such a situation, there is no separate stage of proceedings “after the application had been deemed admissible”.

Once Protocol No. 14 entered into force, which extends the remit of competencies of the human rights commissioner allowing him/her to more extensively get involved in cases pending before the court, the issue of the commissioner’s proper co-operation with NGOs has cropped up. It will become necessary to develop, even if informally, a set of rules of this co-operation, so that the new mechanism is used in the best way possible from the perspective of the interest of human rights.

Non-governmental organisations can and should play an important role also in the procedure of the so-called pilot cases. I share the view that applying this procedure to a specific case can constitute a significant part of the amicus curiae brief.

Another vital role of NGOs is related to the execution stage, which is of key significance in the mechanism of controlling the observance of the Convention. It should be expected that NGOs will be able to participate in one form or another in this stage of the procedure, if only pursuant to Protocol No. 14 Article 46 paragraph 4-5 of the Convention, when the state refuses to abide by the final decision of the Court. Apart from this procedure, non-governmental organisations have the duty to undertake different efforts in the country so that the judgments in which a violation of the Convention by the state has been established, are executed by this state.

It is quite impossible to dwell on any detailed considerations and proposals in such a short presentation. However, it is vital that the role and possible contribution of NGOs in the success of the human rights protection mechanism based on the Convention are appropriately understood, considered, and appreciated in the currently pending debate.
I wish to share with you a few observations concerning the potential for boosting the effectiveness of the European Court of Human Rights. My reflections are based on experience gained during several years of work at the office of the national agent. As we examine ways of improving the efficiency of the Court, we should keep in mind that the more applications are submitted to the Court – the greater the number of cases on which governments have to elaborate their position. And so, putting aside the whole problem of clearly inadmissible cases, which are handled by Committees of three judges – and which at no stage of the proceedings are considered by governments – I wish to focus on ways of raising the Court's effectiveness with regard to cases already communicated to governments. I feel debate on this issue could obviously profit from the experience of national agents, since the streamlining of cooperation between the Court and governments would be likely to reduce the backlog of pending cases.

It would be worthwhile to consider the possibility of the Court issuing its decisions on the admissibility of applications after the submission of preliminary objections by the government. Such a system is in use at the Human Rights Committee. Procedures would be significantly simplified if the government was allowed to present its preliminary objections on obvious points and those that served as the basis for the Court’s decision on admissibility, without the need for observations on the merit of the case (and other points relating to admissibility). Meanwhile, situations arise today in which the government – despite raising the objection that, for example, an application has been submitted after expiry of the six month deadline – fails to obtain the Court's ruling on admissibility and is obligated to prepare time-consuming observations on the merits of the case. And it is that position on merits which is then analysed by the Court.

In order to determine whether an application has been submitted within the prescribed six-month period, it would be desirable to introduce uniform rules for the submission of applications, as rightly recommended in Lord Woolf’s report. It is also essential for the Court to establish what should be considered the date of application submission: the date on the communication from the applicant, the date of its posting, or the date of its receipt by the Court? The present practice of the Court in this regard is inconsistent, which makes it more difficult to determine whether the applicant has met the statutory deadline. Perhaps the simplest solution would be to adopt the principle, followed in many countries with the date of the postmark treated as the date of submission.

Another important question in the cooperation between governments and the Court concerns the granting of priority status to certain applications – as postulated today by Mr McKenzie. I would like to supplement his observations with the government’s experience. A certain selection of cases with a view to the problems contained therein would be desirable since it would allow governments to apply compensation and amelioration mecha-
nisms more rapidly in the event of a violation being ascertained by the Court. The fact that after a long delay in passing judgment, the Court may ascertain the existence of a systemic violation in a given case can pose enormous problems for the respondent state. As an example I could cite the case of Hutteng-Czapska v. Poland. It is one of the cases recognised by the Court as a pilot case. Without touching in any way on the substance of the judgment, I would like to point out that the applicant lodged her application with the Court in 1994.

A chamber judgment was issued in 2005 and it wasn’t until this year that the Grand Chamber passed its judgment. In it the Court ascertained a violation of Article 1 Protocol No. 1 to the Convention, due to the existence of systemic regulations concerning real estate owners. The Court found that the violation occurred in 1994 and lasted since then. An earlier ruling by the Court would have permitted the state to implement new regulations sooner, thus ending the state of continuous violation. As the Court itself declared in the above judgment the designation of a case as a pilot case has the goal of facilitating the fastest possible removal of a “dysfunction” determined by the Court, which violates the protection of conventional rights in the legal order of the state. By passing judgment 12 years after the application was lodged, the Court put the government in a highly disadvantageous situation, as indicated by press reports of class-action lawsuits, in which apartment house owners intend to sue for damages for the entire period that the unfavourable regulations were in force.

In conclusion, I would like to address another problem, also raised today. What I mean is the need for elaborating a document containing guidelines to be used by the Court in awarding compensation. In his address, Mr Wolasiewicz mentioned that one way of reducing the Court’s excessive workload could consist of a system of early response to problems being submitted to Strasbourg. Under it, friendly settlements would be reached and domestic remedies proposed even before the case became the object of the Court’s consideration. On my part, I would like to underline that a clear indication of the amounts likely to be awarded by the Court would stimulate the attainment of friendly settlements at all stages of proceedings. It so happens that applicants often reject reasonable offers by the government in the hope of being awarded much higher compensation by the Court. However, that usually does not happen and the proceedings drag on.

In the face of such attitudes by some applicants, it would be desirable to invoke more frequently the fast-track procedure already used by the Court on several occasions. In the light of its case-law, the Court admits the possibility of an application being struck out on the basis of Article 37 § 1 (c) of the Convention following a unilateral declaration by the government, even if the applicant wants to press on with the case. Naturally, the Court requires that certain conditions be met if an application is to be struck off the roster. These include the absence of controversy as to the circumstances of the case, acceptance by the government of responsibility for the violation and offer by the government of fair compensation to the plaintiff. The plenipotentiary of the Polish Government now hopes that the Court will be receptive to his recent proposals concerning the fast-track procedure. Wider application of this model – especially in clone cases – would be likely to substantially reduce the number of pending cases.

I wish to assure that the Polish Plenipotentiary is committed to cooperating with the Court in this regard. ★
Execution of judgments – problem of effectiveness monitoring of execution of the ECHR judgments

Mr Jan Sobczak

Director General of Human Rights, Council of Europe

For over 50 years since its adoption, the European Convention of Human Rights has proved its enduring relevance for democratic stability, European co-operation and unification. However, if the European Convention system is to be able to meet its expectations it must remain efficient – that means, the promises it contains about the protection of human rights have to correspond to reality.

It is undeniable that the success of the European Convention of Human Rights system depends much on the authority of the judgments of the European Court of Human Rights.

Two features, both regulated by Article 46 of the Convention, are obvious: the states’ undertaking to abide by any judgments in a case to which they are parties and the unique mechanism for their execution control.

While the knowledge of the European Convention and the European Court is widespread, the execution of the European Court’s judgments is an aspect which seems to be less well known. In fact, the delivery of a judgment by the European Court ends the judicial proceedings but, at the same time, initiates the execution proceedings.

Each and every judgment finding a violation is transmitted to the Committee of Ministers of the Council of Europe which supervises its execution. In this way the governments of the member states, acting within the Committee of Ministers, bear collective responsibility in controlling and, indeed, ensuring execution. What is even more important, the Committee of Ministers will continue to control until each and every judgment has been fully executed.

The aim of this intervention is to briefly present the main characteristics of the present execution process and the efforts carried out to improve it in order to meet the challenge of the rapidly increasing judgments rendered by the European Court.

I. Meaning of the notion of “execution” of the judgments

Under Article 46 § 1 of the Convention, member states “undertake to abide by final judgment of the Court in any case to which they are parties”. This undertaking may entail several obligations of a different nature for the respondent state.

Some of them concern the need to ensure that the applicant receives, as far as possible, the restitutio in integrum. This obligation has two aspects: firstly, the states have to pay any compensation (just satisfaction) which the European Court may award the applicant...
Proceedings

under Article 41 of the Convention and which covers, as appropriate, pecuniary and non-pecuniary damage and/or costs and expenses; and secondly, the respondent state must adopt, depending on the circumstances of every case, specific additional individual measures in favour of the applicant to effectively put an end to the violations found and, as far as possible, erase their consequences.

Other obligations relate to the states' commitments to not continue with practices found to have been in violation of the Convention. The state must thus take general measures in order to prevent new similar violations in those cases where the shortcomings found by the European Court were caused by some structural problems of the domestic legal system.

In this context, it is important to underline that the obligation under Article 46 is an obligation of result or, to put in other terms, that the Convention system is based on the principle of subsidiarity. That means that member states usually have the freedom to choose the individual and general measures. This freedom goes, however, hand in hand with the monitoring by the Committee of Ministers to ensure that the measures taken are appropriate and respect the conclusions of the European Court in its judgments.

Payment of just satisfaction and individual measures

The payment of just satisfaction is an obligation usually defined in the judgment and the Committee of Ministers supervises its fulfilment until it is informed by the respondent government that the payment has been properly made.

In spite of the apparent clear obligation which states have as regards payment, quite complex problems can arise in practice in this respect. Those may include:

– problems of late payments caused by the fact that the applicants refuse to receive the sums afforded by the European Court or cannot be located by the authorities;
– problems resulting from fluctuation of the exchange rate between the euro and the national currency of the respondent state, in the period between the moment when the payment was approved by the domestic authorities and the moment when the applicant actually received the money;
– on some occasions the Committee was also confronted with the initial refusal to pay the sums afforded by the European Court as just satisfaction (e.g., Loizidou v. Turkey case), etc.

However, the payment of just satisfaction does not always adequately remedy the violation suffered by the applicant. Therefore, the execution of the judgment may also require the adoption by the respondent state of individual measures. Among such measures we can find:

– the reopening or re-examination of unfair proceedings,
– the acceleration of excessively long court proceedings,
– the revocation of a deportation order issued despite the risk of inhumane treatment in the country of destination or in violation of the applicant's right to respect for his or her family life, etc.

In this context it is worth recalling the Recommendation (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted by the Committee of Ministers on 19 January 2000. This Recommendation has been very successful in ensuring that in the overwhelming majority of the member states, adequate possibilities of reopening exist in criminal cases. Half of the member states have also adopted provisions for reopening of civil cases. The major problem here is, of course, the protection of good faith of third parties.

General measures

Coming to general measures, it must be stressed that it is not always clear from the European Court's judgment what kind of general measure would be the most appropriate to ensure that similar violations will not occur again in the future. Therefore, this forms the object of an evaluation which is conducted by the respondent state together with the
Committee of Ministers, in order to assess whether, in view of the particular features of the case and of the domestic legal system, a change of practice can be enough or more extensive legislative measures are needed. This is a very important exercise as its outcome will have a great impact on clone cases: if carried out well, there will be no such cases, if carried out badly, the violations are likely to continue and will overburden the European Court and the Committee of Ministers.

In those cases where the violation of the Convention was the result of domestic legislation or of the lack of such legislation, it falls to the state concerned to amend the existing legislation or introduce new, appropriate legislation in order to comply with the European Court’s judgment.

However, the majority of violations are not due to any clear incompatibility between domestic legislation and the Convention, but to the way in which the domestic judicial practice interprets and applies the domestic law. In such cases the best solution is to change the domestic court’s practice in order to conform with the standards established by the European Court’s judgment. Only if such a change does not occur, will the execution responsibility fall on Parliament, which has then to enact the necessary legislation.

II. Procedural mechanisms of the Committee of Ministers to ensure the execution of judgments

According to the wording of Article 46 § 2 of the Convention, “the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution”. This provision, however, does not contain any information on the procedural aspects of the supervision. Therefore, the methodology of dealing with the European Court’s judgments had to be developed by the Committee of Ministers itself – not an easy task, as the Committee of Ministers is a political organ of the Council of Europe, encompassing the government representatives of all its member states. Not surprisingly, the Committee of Ministers has delegated much of this task to the Steering Committee on Human Rights. The outcome is reflected, on the one hand, in the Committee’s Rules and, on the other, in its working methods.

Once the Committee of Ministers receives the judgment, it invites the respondent state to provide information on the steps taken to pay the amounts awarded by the European Court in respect of just satisfaction and, where appropriate, on the individual and general measures taken to abide by the judgment. The information provided by respondent states with respect to the execution of judgments is today examined primarily during special Committee of Ministers meetings, which take place six times a year.

A word must be also said about the Department for the Execution of the Judgments of the European Court, which is part of the Directorate General of Human Rights of the Council of
Europe. The Department assists the Committee in exercising its responsibility under Article 46 of the Convention, notably by providing an assessment of the measures envisaged by the respondent state and, if difficulties are encountered in executing the judgment, by examining possible solutions.

Furthermore, according to the new working methods adopted by the Committee, after the judgment is transmitted to the Committee of Ministers, the Department normally engages in an initial phase of bilateral contacts with the respondent state in view of establishing a “plan of action” for the adoption of the necessary individual and general measures. Such a plan should be submitted to the Committee of Ministers by those states at the latest six months after the judgment has become final.

After the expiry of this time-limit, or when divergent approaches exist between the Department and the interested state as to the execution of the judgment, a debate is organised within the Committee of Ministers in view of settling the respective issues. Nevertheless, it is possible for the Committee to proceed to the debate of a specific case before the expiry of this initial phase in some specific instances, such as when urgent individual measures need to be adopted by the respondent state or where important systemic problems need to be addressed.

If the respondent state does not adopt the required measures, or if there is an excessive delay in this respect, the Committee may apply political pressure. Such pressure may take different forms, most commonly peer pressure at meetings or formal letters and resolutions to domestic authorities conveying the Committee of Ministers’ concerns, recommendations or advice. On some occasions the Committee has even been compelled to adopt Interim Resolutions publicly deploring the failure on the part of the state to meet its Convention, and indeed even Council of Europe, obligations. So far, these measures have always proven effective in the end, so that the Committee of Ministers has not had to address the difficult question of additional sanctions.

Once the Committee is satisfied that all the necessary measures have been adopted, it closes the examination of the case through the adoption of a Final Resolution.

III. Challenges to the execution system

It may be a paradox, but, as in the case of the European Court, the main challenge to the execution of judgments results from the success of the European Convention of Human Rights.

It is true that the increasing popularity of the Strasbourg Court led to increased numbers of applications. However, even if we assume that the majority of the cases brought before the European Court are inadmissible, those remaining, in which the European Court found a violation of the Convention, still present a great number which must later be executed.

It has been already mentioned that the execution of each case is supervised by the Committee of Ministers until its full execution which means that each case may be examined several times a year. Therefore, the number of cases pending before the Committee of Ministers is even higher than the number of new cases transmitted to it. Moreover, bearing in mind that very often there are delays in the execution or in providing information by the states, the number of case examined during one meeting is constantly increasing. Thus, when in 2000 the Committee of Ministers examined around 968 cases during its one meeting, this number reached around 3 375 cases per meeting in 2005.

These figures reflect a big problem for the European Convention system, already mentioned yesterday in the context of the Broniowski case – the problem of so-called clone or
repetitive cases. To give one example: out of 4,322 cases pending before the Committee of Ministers in 2005, 2,183 (more than half) concerned Italian length of proceedings cases. Indeed, the Broniowski case provided a spectre of 80,000 clone cases.

Different solutions to clone cases have been adopted by the Committee of Ministers and include, for example:

- grouping of cases to highlight their common systemic problem and facilitate their examination;
- improving the identification of problems in the implementation of the necessary reforms meriting collective attention;
- developing responses to delay and negligence in adopting the reforms;
- the Committee of Ministers also tries today to address systematically the question of effective remedies in all systemic cases – whether or not a violation of Article 13 of the Convention has been found.

The present efforts have received expression in the new Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted on 10 May 2006 and in the so-called “new working methods” of the Committee of Ministers.

Thus, the Rules explicitly provide, among others, that the Committee of Ministers shall give priority to supervision of the judgments in which a systemic problem was identified by the European Court. They also set specific control intervals for the examination of the adoption of individual and general measures by the respondent states. It is also worth mentioning a new tool to exercise pressure on states which refuse to abide by a final judgment, namely the Committee of Ministers’ entitlement to initiate any infringement proceedings against those states (introduced by the Protocol No. 14 to the European Convention).

New working methods for supervision of the execution of the Court’s judgments (Human Rights meetings), introduced in April 2004, also reflect the necessity to examine the execution of the increasing number of cases. Thus, in particular, they give guidance to the Chair of the Committee of Ministers, how to use the scarce time of the Human Rights meeting in the most efficient way. They also introduce the above-mentioned initial phase in the execution of the judgments and stress the need to give the execution control a “more robust” form if full execution has not been achieved one year after the judgments have become final. Since the execution of judgments is a dynamic process, the Committee of Ministers’ work in adopting its working methods to changing circumstances is a constant challenge and reflections on further improvements are presently being carried out.

Conclusions

As was mentioned at the beginning of this intervention, the success of the European Convention on Human Rights and its protection system results, in a great part, from a unique execution system of binding judgments supervised commonly by states present in the Committee of Ministers.

Therefore, in order to prevent the Convention from becoming a victim of its own success and to preserve its pertinence in the 21st century, it is not enough to reform the European Court. Many other measures are required, both at the national and the Council of Europe level. Thus, it is notably necessary to make the execution process more efficient. As I have just mentioned, the reflection is ongoing and this seminar is an important contribution to this reflection.

The Norwegian Ministry of Foreign Affairs has taken a number of important initiatives in the past, in particular as a follow-up to the Oslo Seminar, so I am very much looking forward to hearing what my Norwegian colleague will say on this matter.
First, I want to thank the organisers of this Seminar for giving me this opportunity to draw a line back to the seminar held in Oslo in October 2004 on “Reform of the European human rights system”.

The seminar in Oslo took place just a few months after the Committee of Ministers had adopted what was meant, at the time, to be a comprehensive package of reform measures to guarantee the long-term effectiveness of the European Court of Human Rights.

The reform package, which was adopted in May 2004 and reaffirmed at the Warsaw Summit a year later, is comprised of the following five key elements:

1. Protocol No. 14 to the European Convention on Human Rights, which amends the control system of the Convention, and will increase the case-processing capacity of the Court;
2. a commitment to provide the Court and its registry with the necessary resources;
3. five recommendations to member states on measures to improve implementation of the Convention at the national level;
4. a resolution inviting the Court to identify underlying systemic problems in its judgments; and
5. a commitment to improve and accelerate the execution of the Court’s judgments.

The main purpose of the Oslo seminar was to identify practical measures to ensure that the reform package was effectively implemented. On the basis of the findings of the participants, the Norwegian Chair drew up a list of 32 conclusions, which relate to all the key elements of the reform package. The conclusions are addressed to the various players which are involved in the human rights protection system, the Court, the Committee of Ministers, the Commissioner for Human Rights, other bodies of the Council of Europe, member states and the civil society.

A publication on the proceedings of the seminar is available to you in this room.

In this presentation, I will focus on the implementation of those of the conclusions which relate to the execution of judgments.

It is evident that effective execution is an essential condition for a well-functioning European human rights protection system. If judgments are not executed, the system does not work. And if judgments which reveal underlying systemic or structural problems, are not executed swiftly and fully, the Court risks being overburdened with repetitive cases. The fact that a very large proportion of the judgments delivered by the Court are of a repetitive nature clearly shows that the execution side of the human rights protection system still needs to be improved.

In the Declaration adopted in May 2004 as part of the reform package, the Committee of Ministers asked their Deputies to take specific and effective measures to improve and accelerate the execution of the Court’s judgments, notably those revealing an underlying systemic problem. The Warsaw Summit Action Plan repeated this and also underlined the primary responsibility of the state directly concerned by a judgment.

Many of the Oslo conclusions have a bearing on this particular part of the reform package.

First, I will mention three of the more general conclusions, which are relevant with
regard to execution, but also have a wider scope:

- Oslo conclusion No. 9, which reads as follows, reflects a forceful point made by the Court:

  “The balance must be restored between the national and international levels of human rights protection. The Court in Strasbourg is at present bearing a disproportionate part of the burden. Governments must assume to the full their responsibilities under the Convention, both when taking national measures and as members of the Committee of Ministers.”

As far as execution is concerned, the governments are responsible under Article 46 of the Convention to abide by the final judgments of the Court in cases to which they are parties and – as members of the Committee of Ministers – they are collectively responsible for supervising the execution of all the Court’s judgments. The balance has clearly not been restored yet.

- Another more general conclusion of the seminar, No. 1, calls on member states to ratify Protocol No. 14 as soon as possible. In addition to enhancing the case-processing capacity of the Court, the Protocol includes some measures which pertain to the execution of judgments. Firstly, it provides the Committee of Ministers with two new tools which it can make use of, in order to facilitate execution. If the Committee considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it will be able to refer the matter back to the Court for a ruling on the question of interpretation. And if a state refuses to abide by a final judgment of the Court in a case to which it is party, the Committee of Ministers can refer to the Court the question whether the state has failed to fulfil its obligation. The Protocol also implies that when the Court adopts a decision striking a case out of its list because a friendly settlement has been reached, the Committee of Ministers shall supervise the execution of the terms of the friendly settlement. As was mentioned yesterday, the Protocol has not yet entered into force, despite the fact that the Committee of Ministers set a two-year target for entry into force in its May 2004 Declaration. Hopefully, the four remaining states will ratify it in the near future.

- The last of the more general conclusions that I will mention is No. 5, which states that:

  “(p)articular interest attaches to pilot judgments, which seems to be the most effective way of dealing with certain structural situations.”

Yesterday, Ms Degener and several other speakers spoke about the Court’s pilot judgment procedure. Both Lord Woolf and his team and the Group of Wise Persons have encouraged the Court to make maximum use of it. From the execution perspective, I would just like to point out that the pilot judgment procedure implies that the Court has taken on some of the supervisory functions of the Committee of Ministers. This may very well contribute to more effective execution, but it also raises certain questions of coordination which should be discussed by the Court and the Committee of Ministers.

Now I will turn to those of the Oslo conclusions which specifically concern measures to improve and accelerate execution.

Some of these more specific conclusions are reflected in the revised Rules of the Committee of Ministers for the supervision of the execution of judgments, which were adopted on the 10 May this year. Some of the other conclusions are reflected in a list of practical suggestions to address situations of slow or negligent execution of judgments, which was forwarded by the Steering Committee for Human Rights – the CDDH – to the Ministers’ Deputies in April this year.

The following conclusions have been reflected in the newly adopted revised Rules of the Committee of Ministers:

- Conclusion No. 23, which says that:

  “(t)he Committee of Ministers should consider adopting an annual report on its activities with regard to supervision of the execution of the Court’s judgments, highlighting the most salient developments and problems, so as to enhance transparency and publicity.”
And conclusions Nos. 21 and 32, which recommend that the Committee of Ministers follow a fast track supervision procedure with regard to pilot judgments which affect a large number of individuals and also with regard to cases requiring urgent execution measures because of what is at stake for the individual applicant.

The following five conclusions are reflected, in one way or another, in the list of practical suggestions, which has recently been drawn up by the CDDH:

First, conclusion No. 19, which reads as follows:

“With regard to pilot judgments which reveal truly structural or endemic problems, the Committee of Ministers should demand that the respondent state rapidly produce a comprehensive plan of action with a time-table for solving the problem. The Department for the execution of judgments should offer assistance if needed. The plan of action should be made public. Thus, civil society could assist the Committee of Ministers in ensuring that the plan is implemented.”

In April 2004, just before the adoption of the reform package, the Committee of Ministers agreed on the so-called “new working methods” for the supervision of the execution of judgments. Two of the key elements in the new working methods are:

1) the requirement for the state concerned to present an action plan and a timetable for execution within six months, and
2) the setting up of a searchable global database on execution. The CDDH has strongly emphasised the need for both of these measures to be fully implemented by the Committee of Ministers.

The second conclusion which has been reflected in the list of practical suggestions, No. 20, states that:

“(f)ollowing a pilot judgment which reveals a truly structural or endemic problem, the respondent state should consider establishing a national task force between relevant ministries and authorities to prepare such a plan of action and ensure its sustained implementation.”

The third conclusion reflected in this list, No. 24, refers:

“to the possibility that, when a systemic problem has been identified raising particular valuation problems, the Committee of Ministers could (...) encourage the state concerned to set up a national claims commission.”

The forth conclusion, No. 29, urges:

“member states (...) to prepare themselves thoroughly in advance of Deputies’ meetings devoted to supervision of the execution of Court judgments, and to also involve ministries other than the Ministry for Foreign Affairs in those preparations.”

The CDDH has made several practical suggestions which would facilitate member states’ preparations for the so-called “Human Rights meetings”. Of particular importance is the setting up of the global database.

The fifth and last conclusion that I will mention in this particular context, No. 30, reads as follows:

“The need was stressed for the Committee of Ministers to mobilise also other Council of Europe bodies in order to help overcome, in appropriate cases, certain difficulties encountered in the execution of a judgment. For example, targeted expertise could be provided through the Venice Commission or the Directorate General of Human Rights; the Commissioner for Human Rights can in his own work act in complimentarity with ongoing Committee of Ministers’ supervision and thus produce useful synergies; the Parliamentary Assembly, the Secretary General and/or the Commissioner for Human Rights might be useful partners for approaching national parliaments if execution problems are linked to the legislative process.”

With regard to this conclusion, the CDDH has included several practical suggestions in its list. One concerns technical assistance. A second is to organise annual tripartite meetings between representatives of the Committee of Ministers, the Parliamentary Assembly and the Commissioner
The ECtHR: Agenda for the 21st century

A Work in progress

for Human Rights. And a third suggestion is to consider inviting, in appropriate cases, the Commissioner for Human Rights or the Parliamentary Assembly to address the Committee of Ministers. The aforementioned new Rule of the Committee of Ministers, regarding the adoption of an annual report on supervision of execution, as well as the searchable global database, should also contribute to enhanced interaction between the various bodies of the Council of Europe, resulting in more effective execution of judgments.

Before summing up, another two conclusions from the Oslo seminar should be mentioned.

- Conclusion No. 22 reads as follows:

  "In appropriate cases, and without detracting from the legal obligations incumbent on Respondent states under Article 46 of the Convention, assistance from the Council of Europe to help a state execute a pilot judgment could also include financial assistance; the possible role of the Council of Europe Development Bank was specifically mentioned."

In the Plan of Action adopted at the Warsaw Summit last year, the Council of Europe Development Bank was requested to facilitate the implementation of policies which aim at the consolidation of democracy, the promotion of the rule of law and respect for human rights. The Development Bank has started the process of readjusting its lending policy. However, Norway believes that additional grant funding may be needed for the most disadvantaged member states. At the Ministerial Meeting in May this year, the Norwegian Foreign Minister proposed that a voluntary trust fund be established to support national efforts in implementing the European Convention on Human Rights. The fund could be administered by the Council of Europe Development Bank, and thus supplement its own new lending policy. We are currently consulting with all interested parties, including the Secretariat of the Council of Europe, on further development of this proposal.

- The last conclusion that I will mention, No. 28, reads as follows:

  "In a case of a consistent failure of a respondent state to execute a judgment, the Committee of Ministers should consider, in addition to the possible institution of infringement proceedings as provided for in Protocol No. 14 (when the Protocol has entered into force), the possibility of excluding the member state concerned from assuming leading positions or certain functions in the Organisation, or, even, suspending the member state's voting rights in the Committee of Ministers. Reference was furthermore made to Article 8 of the Statute on expulsion of the state from the Council of Europe, as a last resort."

Hopefully, Protocol No. 14 will soon enter into force and enable the Committee of Ministers to institute infringement proceedings. However, the Committee of Ministers’ inability with regard to ensuring the immediate release of the two persons still imprisoned in contravention of the Court’s judgment in the Ilascu case, demonstrates that follow-up to this conclusion still needs further reflection.

To sum up, many of the Oslo conclusions which relate specifically to the execution of the judgments of the Court have been reflected, either in the recently adopted revised Rules of the Committee of Ministers or in the list of practical suggestions which was forwarded by the CDDH to the Ministers’ Deputies in April this year.

This is very encouraging. However, the follow-up mission has not been completed yet.

In May this year, in a new Declaration concerning implementation of the 2004 reform package, the Committee of Ministers has instructed their Deputies to intensify their action with regard to taking specific and effective measures to improve and accelerate the execution of the Court’s judgments, inter alia, by carrying forward the practical suggestions made by the CDDH.

Norway is prepared to contribute to intensified action in this field.

The new Declaration confirms that improved and accelerated execution of judg-
ments – as well as effective implementation of the other measures in the 2004 reform package – remains absolutely necessary in order to ensure the long-term effectiveness of the European human rights protection system. The proposals of Lord Woolf, the Group of Wise Persons and previous speakers at this seminar, supplement and go beyond these measures, but do not replace them.
1. Introduction

The present contribution is aimed at continuing the reflection on how to modify the method of reforming the European system for the protection of human rights. Recently, I have submitted elsewhere that any further reforms of the European system require, above all, a change of philosophy. It implies a need of departing from the presently prevailing philosophy of amending the European Convention on Human Rights and of arranging for its fundamental reorientation. The procedure of introducing consecutive piecemeal, and sometimes very detailed, amendments should be abandoned in favour of reforming the Convention’s procedure in a simplified way. Such a goal may be achieved by remodelling the treaty bases of the European human rights system, an option which is examined in the present contribution. In its original form, this concept has been outlined in my expert report drawn up for the Ministry of Foreign Affairs and designed for a Group of Wise Persons of the Council of Europe.

2. A Diagnosis of the Status of Legal Bases

It is a remarkably characteristic of modern international law to react excessively slowly and with delay to emerging needs and challenges. Although it is natural that the reactive conduct of human beings and states consists of taking subsequent corrective actions, it is discernible in the field of international law that the duration of reaction in response to emerging needs appears overly long. A classic example of this syndrome has been the development of treaties on international humanitarian law. As it has been accurately pointed out, since the adoption of the first Geneva
Convention in 1864 each subsequent instrument of humanitarian law has appeared "one war too late".\textsuperscript{70}

It is not surprising that the international society, which is far from being an international community, hardly draws appropriate conclusions from this generic malaise. It stems from a difficulty to agree upon further treaties in the diversified environment of nearly 200 states, a difficulty which is not a petty dilemma within regional organisations either. This has thus caused that the reaction to emerging needs is not only delayed but, what's worse, duplicates a model of limited, short-sighted and compromised reaction. We are therefore confronted with a lack of vision going further than the current needs, hence with an absence of medium and long-term perspectives. Such a trend is frequently accompanied by the trap of “detailism”, which has developed with regulations becoming unnecessarily more and more detailed. This contributes to a discernible regularity whereby the more detailed the formulations drawn up the quicker and more frequent adoption of amendments is required.

It is in this context one should likewise perceive the European Convention on Human Rights with all its peculiarity; and this is why the philosophy of its changing requires a fundamental reorientation. All previous procedural amendments of the Convention, be they major reforms or modest adjustments, came either too late or their remedial impact was exhausted very soon after their adoption. This has repeatedly made further changes necessary, thereby consuming a lot of time and effort of the Council of Europe bodies and member states. While the pattern of regular endeavours for improving the Convention system remains a constant task and concern, the very procedure for introducing all the indispensable changes does not need to be so cumbersome and long-lasting as it has presently been. One should be aware that further changes to the procedure of the European Convention on Human Rights will certainly be indispensable.

3. The Mode of Reforming the European Convention

Since the adoption of the European Convention in 1950 the mode of introducing amendments thereto has not been substantially modified. Sometimes adoption of indispensable changes required merely the appropriate amendments to the Rules of Court, the former Commission, or the Committee of Ministers.\textsuperscript{71} If the changes appeared insufficient due to detailed regulation of procedural issues by the Convention, the needs of procedural modifications or complementary provisions would consequently require changes of the Convention, thus initiating the complex procedures for diplomatic negotiation and ratification. Amendments to the Convention need the consent of all State Parties thereto, thus additionally prolonging the duration of introducing the appropriate improvements. Of the total eight protocols adopted to amend procedural provisions of the Convention five had a more detailed character (Nos. 2, 3, 5, 9 and 10) and three were more comprehensive (Nos. 8, 11 and 14).\textsuperscript{72}

It is surprising that the first group of protocols dealt predominantly with meticulous and technical issues, for which there should have been no space in international treaty and could instead appear in lower-ranking instruments. The second group of protocols continued, or even strengthened the tradition of detailed regulations, although they were designed for more complex reforms. Shortly after the entry into force of Protocols Nos. 8 and 11 it

\textsuperscript{70} It was the \textit{Convention for the Amelioration of Condition of the Wounded in Armies in the Field}. The successive conventions extended protection to wounded, sick and shipwrecked members of the armed forces at sea, prisoners of war, civilian populations and to the protection of victims of non-international armed conflicts and against certain weapons considered as causing superfluous injuries.

\textsuperscript{71} These changes were often subject of extensive discussions among the judges of the Court and brought about the adoption of proposals for numerous improvements of Rules of Court – see \textit{Three Years’ Work for the Future}. Final Report of the Working Party on Working Methods of the European Court of Human Rights, Strasbourg: Council of Europe, 2002, pp. 3-107.

\textsuperscript{72} For more on the issues which were subject to changes in the above-mentioned protocols see K. Drzewicki, \textit{Reforma...}, op. cit., pp. 7-8.
appeared that the reforms they envisaged were insufficient. The menace of the paralysis of the Court led to the initiation of further reform of the Convention’s procedure, which after a few years of work by experts and political organs of the Council of Europe brought about Protocol No. 14. It has not yet succeeded in entering into force since action has simultaneously been taken to implement a further reform of the European Court of Human Rights.

The Warsaw Declaration, adopted at the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 15-17 May 2005), reflects in paragraph 2 the states’ belief that it is essential to guarantee the effectiveness of human rights, and thus to implement in the short term the comprehensive set of measures adopted at the 114th Session of the Committee of Ministers, including the speedy ratification and entry into force of Protocol No. 14 to the Convention. Furthermore, it was decided to set up a “Group of wise persons to draw up a comprehensive strategy to secure the effectiveness of the system in the longer term, taking into account the initial effects of Protocol No. 14 and the other decisions taken in May 2004”.

4. Temporal Scope of the Amendment Procedure of the Convention

The most typical procedure for introducing amendments to the European Convention, from their initiation, through negotiations and adoption of a draft instrument, up to their entry into force, has usually taken 7-9 years. In case of Protocol No. 11 it took seven years, No. 8 – eight years, No. 5 – over seven years and Nos. 2 and 3 – over nine years. It should be observed that the periods from the official initiation of standard-setting (as a rule by virtue of decision by the Committee of Ministers) until opening a protocol for signature lasted usually between 2-3 years. The ratification process at domestic levels took usually from 4 to 5 years. An interesting observation may be noted regarding the increase of States Parties to the European Convention (from 23 in 1990 to 46 in 2005) not prolonging the duration of ratification process of the protocols.

Bearing in mind the Council of Europe’s “in-house” modus operandi for drawing up new legal treaty instruments, the period actually spent (2-3 years) can hardly be shortened in a substantial way. This period is made up of such actions and stages as initial decision to commence negotiations, issuing formal terms of reference for the appropriate body or bodies for their work and negotiations, actual work of expert and steering committees, consultations with the Court and Parliamentary Assembly, final adoption of draft by a steering committee, debate on the draft and report thereto by the Ministers’ Deputies (ambassadorial level) and by the Committee of Ministers, which is formally convened at a level of ministers of foreign affairs twice a year, and, since recently, once a year.

Consequently, at this stage it is extremely difficult to save time. This is not the case with the domestic phase of the process of introducing amendments. Ratification procedure occupies on average 4-5 years and in extreme cases much longer. It is mostly at this stage that improvements are possible and where the

73. Protocol No. 14 was adopted on 13 May 2004 and will come into force after ratification by all the 46 Parties to the Convention (at the end of October 2006 only ratification by Russia was missing). For more on the reform see R. Kowalska, “Reforma Europejskiego Trybunału Praw Człowieka” (Reform of the European Court of Human Rights), Biuletyn Biura Informacji Rady Europy 2004/1, pp. 5-23 and P. Lemmens, W. Vandenhole (eds.), Protocol No. 14 and the Reform of the European Court of Human Rights, Antwerp-Oxford 2005.

74. Similar provisions are envisaged by the Action Plan of the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 15-17 May 2005) in its Chapter I para. 1 – Ensuring the continued effectiveness of the European Convention on Human Rights.

75. K. Drzewicki, Reforma ..., op. cit., pp. 8-10.
76. These figures relate exclusively to amending protocols and not to additional protocols. Entry into force of the former requires ratification by all the States Parties to the Convention. Although Protocol No. 14 has not yet come into force, it nevertheless continues to confirm the pattern established by the previous protocols. The Protocol was initiated in 2000, open to signature on 13 May 2004 and there is a narrow chance that it will come into force in 2006. Thus the procedure is in its 6th year of duration.
greatest opportunities for temporal economisation can be sought. It seems feasible to render the procedure for revision of the Convention more flexible and shorter. One of the possible and feasible solutions could be the establishment of a three-level system of legal bases for the European Court of Human Rights. The idea of establishing such a system stems from the arrangements which define the status of other international bodies fulfilling judicial and monitoring functions.  

5. Prerequisites of the Three-level System for the Legal Bases

The system would consist of the following legal instruments:

1. European Convention on Human Rights, as a constitutional or organic type of instrument for the European human rights protection system, with all its substantive provisions, fundamental procedural rules and formal clauses. That is:
   - Preamble with Article 1;
   - Section I – "Rights and Freedoms";
   - Section III – “Miscellaneous provisions”; and
   - All additional protocols (Nos. 1, 4, 6, 7, 12 and 13).

2) Statute of the European Court of Human Rights, which would be adopted and amended by the Committee of Ministers of the Council of Europe; it would include the majority of detailed procedural provisions “transferred” from Section II of the Convention (“European Court of Human Rights”); the Statute would constitute a sort of implementing legislation, the adoption of which would be delegated to the Committee of Ministers under authorisation of the Convention.

3) Rules of the Court, which would be, as is now, adopted by the Court itself as an instrument regulating the internal organisation and functioning of the Court with the aim to implementing the provisions of the Convention and Statute.

This fundamental change of the legal bases for the European Court would need a political consensus of all States Parties to the European Convention. Such an essentially procedural and outwardly politically neutral arrangement nevertheless carries with it certain profound consequences which should be brought to the attention of the parties.

Firstly, the Convention would only provide for the most fundamental procedural provisions. Section II would be substantially shortened. Governmental experts would be asked to agree upon a list of provisions to be retained in the Convention and those to be transferred, or ‘devolved’ to the Statute of the Court. It follows from the earlier discussions in the Council of Europe that the identification of specific provisions of the Convention, which might be subject to devolution to the Statute, already caused considerable disputes. These are however problems that can be overcome in the course of work by experts.

Secondly, any agreed amendments to the Convention would obviously have to undergo a regular standard-setting procedure within the Council of Europe and subsequently a domestic ratification process in each member state. Thus, in spite of the present criticism against its lengthy duration, the ratification procedure would once again be indispensable. There is a
hope however that this could be the last protocol to the Convention amending its procedure.

Thirdly, the Statute would accommodate two sorts of provisions: one made up of the detailed procedural provisions “transferred” from of the Convention (e.g. particulars concerning election of judges, their terms of office, criteria for office, internal organisation of the Court and Registry, and other procedural arrangements) as well as those provisions whose rank would justify their “upgrading” from the level of Rules of Court to that of the Statute of the Court or the needs of integrating the established case-law. An example of the first situation can be revision of judgments (Rule 80 of the Court) due to the need of particular protection of res iudicata which prescribes to regard the arrangement for revision of judgments in an absolutely exceptional manner. The second type of such situations can be the provisions of Rules of the Court on interim measures (Article 39), the status of which was strengthened by the Court’s case-law thus justifying the need for introducing a relevant regulation to the Convention. There is no doubt that both provisions are definitely of “constitutional” character and as such they should not be placed below the level of the Convention.

Fourthly, in strictly legal terms, the Statute would become a binding resolution of the supreme governmental body of the international organisation. This method has increasingly been applied to amend numerous treaties, whose revision and ratification would be a long-lasting or even futile process due to protracted negotiations and other procedures as well as the multiplicity of participating states. International organisations resort to this method most frequently in organisational and procedural matters for the needs of flexible modification of the so-called implementing treaty provisions. The latest instance of the application of this method was resolution 60/251 of the UN General Assembly of 3 April 2006, whereby the former Commission on Human Rights was replaced by the Human Rights Council. Another example is a resolution of the UN Economic and Social Council regarding the reform of the supervisory mechanism of the International Covenant on Economic, Social and Cultural Rights and setting up to that end the committee of experts for the examination of state reports (Resolution 1985/17 of 28 May 1985). The adoption of the Statute and all subsequent amendments would require either consensus or qualified majority of the governments represented in the Council of Europe. Actually both thresholds may be envisaged in the Statute: consensus for the most essential provisions and qualified majority of votes for adoption of the other provisions of the Statute. The latter solution is so essential that the voting system, unlike ratification, allows for marginalisation of potential consequences of obstruction by one or a few governments.

6. Implications of the new system of legal bases

One of possible weaknesses of the proposed system of resolution-based amendments by the Committee of Ministers can be the perception of this method as a means of diminution of the role of parliamentary powers within the ratification process. This potential weakness may however be remedied by prior consultation by governments with the parliaments or their relevant committees. It is discernible in modern constitutional practice that ratification of international treaties is applicable to treaties of enormously diversified content; that is to treaties concerning, for instance, human rights and matters of technical nature.

80. Such effects were generated notably by the judgment of the European Court of Human Rights (Grand Chamber) in the case of Mamatkulov and Askarov v. Turkey, (Applications Nos. 46827/99 and 46951/99), 4.02.2005 r., paras. 92-129. For more on the reasons for upgrading these provisions to the Convention’s level see K. Drzewicki, Reforma..., op. cit, p. 12.

81. In a similar way, that is by means of a resolution of the Ministerial Conference in Turin in 1991 the mechanism of the adoption by the Governmental Committee of the conclusions of the Committee of Independent experts was abandoned for the period until entry into force (and this continues till now) of the relevant provision, which was introduced by the Protocol amending the European Social Charter of the Council of Europe.
The parliaments should therefore be made aware of the fact that fundamental substantive rules (catalogue of rights and freedoms) and procedural principles (right to individual application, judicial type of procedure, etc.) of the European Convention on Human Rights will remain intact while only rules of more technical procedural character are to be subject to amendments by way of resolutions of the Committee of Ministers. In order to mitigate fears of a reduced role of parliamentary bodies, regard should also be had to consultations with the Council of Europe's Parliamentary Assembly and its committees.

It should be emphasised that the most important and attractive innovation in the proposed rearrangement of legal bases is that instead of resorting to cumbersome and lengthy ratification procedures in order to adopt any further amending protocols, the Committee of Ministers could swiftly react to emerging needs and challenges of the Court by accepting appropriate resolution amending the Statute. It goes without saying that before their submission to the Committee of Ministers, draft amendments would first be negotiated by relevant committees of governmental experts (e.g. by DH-PR) and steering committees (notably by CDDH).\(^2\)

The essential feature of the new system of legal bases is that it would also allow the governments to maintain and strengthen their treaty-making power. The governments remain authorised in regard to instructing their experts for the needs of negotiations and their ministers for their final negotiations, assessment and adoption of amendments accepted by experts. In other words, the new system is not capable of imposing specific amendments upon the governments because they constitute the Committee of Ministers. Significantly, this system of amending the procedural rules may actually help the governments to restore to some extent the balance between the powers in international organisations. From the perspective of the concept of separation of powers, as applicable to international organisations, governments have their legitimate right of and duty to an adequate and prompt reaction to the demands or determinations of judicial bodies in organisational, budgetary, jurisprudential or other fields. The new arrangements are further supported by the remarkably valuable experience of the Committee of Ministers of the Council of Europe accumulated in the course of performing its supervision over the execution of the Court’s judgments (Article 46, paragraph 2 of the European Convention).\(^3\)

In conclusion one may submit that the traditional way of reacting to demands of the European Court of Human Rights through negotiation and ratification of amending protocols has become ineffective and notoriously delayed. This prompts a profound reflection on various proposals for possible changes. The above-submitted concept of establishing a three-level system of legal bases for the European Court can be one of such proposals. This would allow for such normative rearrangements that would release the Convention from the excess of detailed procedural provisions by their transfer to a Statute, placing this instrument within the competence of the Committee of Ministers and thus subject, once a need appears, to change by way of resolution. The exact separation of the procedural provisions between the Convention and Statute would not be, as indicated above, an easy task for experts, however it remains within the limits of feasibility.

All in all, one may hope that the proposed system of flexible legal bases could create an opportunity for the Council of Europe to depart from its original and still prevailing philosophy of change which are of a detailed and procedurally technical, and thus protracted character, towards a philosophy favouring flexible and effective adjustments of the procedure to the emerging needs of the Court and the whole system for human rights protection.

---


83. Actually the Committee holds regular meetings at which measures taken by governments for the execution of the Court’s judgments are extensively discussed. In the course of years the Committee gained enormous experience in performing this function, working out, among others, concepts of the applicability of individual and general measures for the execution of judgments.
7. Post-scriptum

The above proposals and arguments in their support were presented at the Warsaw Seminar European Court of Human Rights – Agenda for the 21st Century on 24 June 2006 and are based upon the main submissions of my expert report drawn up for the Ministry of Foreign Affairs and designed for the Group of Wise Persons of the Council of Europe. This expert report was submitted to the Polish member of the Group of Wise Persons – Ambassador Hanna Suchocka who, as it appeared, succeeded in promoting the proposal of three-level legal bases for the European Court of Human Rights. As may be seen in the Interim Report of 10 May 2006 this issue has been addressed in its Paragraphs 34–36.

In paragraph 34 the Group of Wise Persons has acknowledged that:

“consideration should be given to introducing greater flexibility into the judicial system of the Convention through an amendment thereto authorising the Committee of Ministers to carry out certain reforms relating to judicial organisation by way of unanimously adopted resolutions without an amendment to the Convention being necessary each time.”

Moreover, the Group has explained in paragraph 35 that:

“[This method has been used on numerous occasions in the European Communities. One notable example was the setting up of the Court of First Instance. The Treaty of Nice subsequently introduced the possibility for the Council to create ‘judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas.’ It was this means that was employed to set up the new European Union Civil Service Tribunal. In addition, under Article 245, 2nd paragraph, of the Treaty, the provisions of the Statute of the Court of Justice of the European Communities, with the exception of Title I, may also be amended by the Council acting unanimously.”

Summing up its conclusions, the Group of Wise Persons has considered in paragraph 36 that:

“such a method could prove effective in the long term as a tool for making the convention system more flexible and capable of adapting to new circumstances. The Group notes, however, that this flexibility could not apply to the substantive rights set forth in the Convention and should be confined to the provisions relating to the Court’s operating procedures, and solely on the Court’s own initiative.”

It may only be hoped that the above conclusions of the Group of Wise Persons, irrespective of the controversial nature of some of them, will be accepted in its final report, whose submission is expected at the session of the Committee of Ministers in November 2006. The implementation of this scenario would be tantamount to the acceptance of the concept of three-level legal bases for the European Court of Human Rights and to paving the way for granting the terms of reference to appropriate bodies and to commencing the work by experts and diplomatic negotiations at the intergovernmental level.
MAIN PROBLEMS RELATED TO THE REFORM OF THE ECHR

Ms Hanna Suchocka

Polish Ambassador to the Holy See Member of the Wise Persons Group

The Warsaw Summit of Heads of State and Governments of Member Countries of the Council of Europe, which took place on 16 and 17 May 2005, led to the founding of a reflection group (Group of Wise Persons) whose objective was to consider the effectiveness of the Court’s control mechanisms and the initial effects of the application of Protocol No. 14.

The proposals put forward by the Group, pursuant to the mandate it was given, were to go beyond the solutions provided for by Protocol No. 14, as the mandate did not involve seeking immediate remedies which were to reduce the present backlog in the ECHR. The Group was to determine long-term, systemic solutions and also propose amendments to the text of the Convention, which would help accommodate the incremental backlog in the Court.

There were two basic assumptions at the core of the Group’s efforts, indicating the direction of the proposals. These were:

1. to maintain the basic philosophy which served as the basis for the Convention, i.e. treating the ECHR as a court of human rights, with the common right to an individual application, and
2. to maintain the principle of subsidiarity of the Court in reference to national courts.

The first meeting of the Group took place in October 2005. So far there have been 10 meetings held and an Interim Report has been prepared which was presented by the Group’s Chairman, Judge Rodrigues Iglesias, to the Committee of Ministers in May this year. The report is also available online. Hence my remarks are more a general commentary on the proposal put forward in the report, indicating the basic areas of discussion on the most important problems of key significance to the effective functioning of the system.

The interim report is the basis for the final report, which is to be completed by the Group by October this year. Therefore, all the remarks and proposals voiced here, at the conference, will be taken into consideration at the subsequent sitting of the Group.

The issues discussed by the Group can most generally be split into two basic blocks, i.e. those issues which are related to amending the Convention and those which refer to the improvement of the effectiveness of national systems. In my presentation I shall concentrate on those problems which seem most controversial and which are connected with the need to amend the Convention.

The Group paid particular attention to the following issues:

1. creating an effective application filtering mechanism (the issue of application admissibility),
2. ensuring a higher degree of flexibility in reforming the Convention’s judiciary system,
3. co-operating with national courts,
4. increasing the significance of pilot judgments, and
5. strengthening the role of the Council of Europe’s regional offices.

One of the key problems which the Group has dwelled much upon was the creation of a more effective system of filtering applications lodged with the Court. The Group organised a number of meetings with the representatives of the ECHR Registry, so as to get acquainted with the mechanism of the application registration system and the mode of handling appli-
cations deemed inadmissible. The work of the Registry aiming at facilitating the process of application handling was assessed extremely well by the Group.

Having also positively evaluated the solutions proposed in Protocol No. 14, the Group came to the conclusion that it was justified to create an additional mechanism, which would go beyond the scope of Protocol No. 14.

The basic premise for the adoption of solutions regarding the “filtering” mechanisms was the assumption that the reform proposed cannot by any means infringe the fundamental principle of the right to lodge an individual application. Thus the possibility of introducing the notion of “certiorari”, known in the American justice system, was refuted as one in violation of the European philosophy of the system of human rights which serves as the Convention’s foundation.

The idea of creating a decentralised system of European courts was also dismissed, as it was concluded that the mechanism should be anchored in Strasbourg.

The Group proposed to create a special filtering organ – the Judicial Committee. It would be associated with the Court but separate from it. It would guarantee that the decisions regarding the applications lodged were judicial (taken in a judicial system) and not administrative. The Committee would be composed of judges whose status would differ from that of the Court’s judges. Membership in the Committee would be limited, and the number of members would be determined by means of a decision of the Committee of Ministers. However, the rule of “one state – one judge” is not foreseen here. The Judicial Committee would be chaired by a judge delegated by the Court. The Committee would have jurisdiction in:

a) all cases where there is a problem of the application’s admissibility;

b) in all cases where there is a well-established case-law of the Court;

c) in all cases which are obviously well-founded or obviously ill-founded.

As has been the case so far, each application lodged would be analysed by the Registrar, who would decide on whether the case is to be forwarded to the Committee or to the Court.

The Committee would have the power to pass on the application to the Court should it determine that it has no jurisdiction in the case, or should it conclude that the application includes profound problems of merits which, for reason of significance, should be considered by the Court.

The new Committee would not mean a return to the previous system of the commission. All decisions taken by the Committee would be final and could not by subject to verification by the Court. However, the possibility of appeal against the Committee’s decision should be limited to the maximum, so as not to double work and so that the new mechanism is truly an effective one. (Details pertaining to the regulation are subject to a further discussion by the Group).

The Group has also considered putting forward certain proposals related to an application being lodged, such as the duty imposed on the applicant to pay a certain fee or to have legal representation. It has been stressed in the course of the discussion that such means could possibly reduce the number of obviously ill-founded cases, hence accelerating the proceedings. However, the opinions as to the effectiveness of such means were split. In consequence, they have not been adopted in light of the fact that they could excessively limit the common right to application. It has been decided, however, that regional offices could play an important role in this respect.

In the debate carried out by the Group it has also been observed that there is a need for increased flexibility of the possible changes in the Convention’s judicial system. Protocol No. 14 is a sound, most recent, as well as negative proof of the lengthiness of the process of introducing amendments to the Convention pertaining procedural issues. There is a suggestion in the text of the Interim Report that perhaps the Committee of Ministers should be given a mandate to introduce certain changes of procedural nature, regarding the functioning of the judicial system, by means of unanimous resolutions. It would mean that these procedural changes would not cause the need for amending the Convention in every case they were made. However, this type of a mandate seems somewhat overly general and
not entirely within the scope of the Convention, as it would be difficult to introduce some amendments solely pursuant to a decision of the Committee of Ministers in matters which are subject to the provisions of the

Convention and without the introduction of amendments to the Convention in the mandatory mode. Therefore, the Group considered the possibility of adopting a more systemic solution. During the last sitting of the Group, a possibility of adopting a solution similar to the one in the European Court of Justice in Luxembourg was generally accepted. It would mean the adoption of a three-tier system of sources which would regulate the procedural system of the ECHR. Thus:

1. Convention with all protocols. Any amendments to the Convention would take place pursuant to the mode in force so far;

2. Statutes of the Court (a new category), which would include provisions pertaining to the functioning of the Court and the Judicial Committee and which could be amended by means of a decision of the Committee of Ministers based on a Proposal put forward by the Judicial Committee;

3. Rules of the Court, which would be adopted and amended by the Court itself, which has been the procedure thus far. Such solutions regarding the regulation of the legal sources of the judicial system was raised on numerous occasions throughout the discussion on the reform of the Court of Human Rights, also in the debate in Poland. Such a system would allow for a swifter reaction to new challenges related to the need of facilitating the Court’s functioning. The concept was in principle accepted by the entire Group, with details to be discussed at subsequent meetings.

Forms of co-operation between the European Court of Human Rights and national courts. This was a problem that the Group has spent much time on discussing. In particular, much focus was placed on the issues of “preliminary ruling” and “consultative (advisory) opinions”. The distinctness of the European Court of Human Rights from the European Court of Justice does not allow for the transposition of certain solutions to the system of the Council of Europe, even if these solutions have tested well in the EU system. Hence, the criticism of the concept of “preliminary rulings”. The objective of the solution (Article 177, presently 233 of the Treaty of Rome) in community law is to ensure unity of interpretation thus, in principle, leaving very little room for manoeuvre for national courts. This is because the community judicial system is different, as is the relation between the European Court of Justice and member states. The rules governing the relations between the ECHR and national courts are dissimilar to what is found in the EU. The main principle here is that of subsidiarity. Therefore, national courts are left with a significant margin of discretion. And so the Group did not see it possible to introduce the concept of preliminary ruling to the system of ECHR. However, it is positive in its perception of the institution of consultative (advisory) opinions. The Group believes that the right to request an advisory opinion should be extended beyond the current provisions of the Convention. Presently, pursuant to Article 47 the Court can issue such decisions also upon the request of the Committee of Ministers. This right, however, should be vested in the supreme courts of the different states. It would obviously be optional, not obligatory. During the debate it was pointed out that the ECHR has always played a dual role, i.e. the quasi-constitutional function by interpreting the Convention, and a judicial function – in individual cases. Due to the extension of an individual application and once Protocol No.11 had come into force, the constitutional function has been somewhat overshadowed. Requests for advisory opinions could strengthen the constitutional role of the Court. It would be justly supposed that the general interpretation provided in advisory opinions would be taken into consideration by the different states, even if it did not have any binding force. This would stem from the justified conviction that the Court would proceed in line with this opinion in the future when issuing judgments in individual cases. Thus advisory opinions could become an important instrument allowing for national courts to issue decisions which would not be in conflict with the Convention.
The ECtHR: Agenda for the 21st century

One of the proposals aimed at reducing the backlog in the ECHR is to pass on to national courts the right to adjudicate just satisfaction in cases where the Court has established a violation of the Convention. Once the Court has established that a violation has taken place, it must also decide whether the ruling itself is not yet a sufficiently just satisfaction. If not, then the case of just satisfaction is referred to the given state. It has been a question for discussion whether a decision on just satisfaction taken as a result of the Court’s ruling should be left to the courts or the ombudsman, once it is transferred to the national level. The dominant opinion has been that the case should be taken up by the court. Should these cases be transferred to national judiciary, the Court would be substantially relieved of the backlog of cases. This is particularly clear in those compensation cases which require a multitude of expert opinions. The Group is of the conviction that the issue of just satisfaction can be better considered in a given state, as issues such as the conditions of the given country, standard of living, and existing costs would be taken into account. However, the Court would not waive all its powers in the matter as it would retain the right to control the judgment taken by a national court in the case. The party (applicant) would have the right to appeal, however it should be limited and the time for filing the appeal should be a short one.

The Group does not share the view where it would be justified to have a “table of rates” for the different types of violations.

The Group pays much attention to increasing the role of pilot judgments, seeing their possibly profound role in accelerating proceedings in cases lodged with the Court. Once the Court determines a case as a pilot one, all similar applications against the given state could be stayed until general decisions take place at the national level. However, the Group has expressed a doubt whether the existing judicial mechanisms, the present Rules of the Court including, are sufficient for the pilot judgment procedure to bring about expected results. The Interim Report of the Group does not include any detailed solutions in this respect.

The Group has expressed its extremely positive perception of the roles of information offices, on the example of the Warsaw Information Office. The Group has admitted this initiative to be an extremely valuable one – which should be disseminated among other states. These offices should employ at least one lawyer. The size of such a specific lawyer’s office should be determined by the number of applications from the given country. The role of the office should not be one of issuing decisions but rather, as is the case of the Warsaw institution, of informing about the admissibility of a given application, focusing particularly on the inadmissibility grounds such as the exhaustion of domestic remedies. Offices should also inform potential applicants about the existing national remedies, non-judicial included, and play the important role of assisting in filling out application forms and in providing broad information about the mechanisms of the Convention.

The possibility of introducing a mandatory system of seeking friendly settlement before lodging an application with the Court and transferring these competencies to information offices was a subject of detailed discussion. However, the concept to obligatorily seek conciliation before an application is lodged has not been met with acceptance. Nevertheless, it seems justified to use the logistics of information offices whenever the parties express the wish to come to a friendly settlement (as is the experience of the Warsaw office).

The Group has not devoted more space in its report to the detailed issues pertaining to the functioning of information offices, as it has come to the conclusion that this topic has been dwelled on in Lord Woolf’s report.

The Group has deemed it exceptionally important for the national courts to have access to the case-law of the Court in their own national languages, seeing it the obligation of each state to translate and publish these judgments.

However, the Group has come to the conclusion that the Court should be particularly interested in the broad publication and distribution of judgment reviews – not only in the official languages of the Council – and that these should be disseminated among courts,
police authorities, schools of law, and NGOs of member states. Better information and education is a key precondition for the improvement of the effectiveness of national judgments, thus taking the burden off the ECHR.

The Group has adopted a concept of developing an extremely condensed interim report, which would indicate the key directions of amending the Convention, proposing only general solutions without elaborating on procedural details. Hence all comments and proposals which can be taken into account in developing the final report are of utmost importance.
CO-OPERATION OF THE ECHR WITH SUPREME NATIONAL JUDICIARY BODIES (CONSULTATIVE OPINIONS) AND THE ROLE OF POPULARISING THE CASE-LAW OF THE ECHR

Ms Ewa Łętowska
Judge of the Constitutional Tribunal, Poland

Theses

1. European legal systems are presently of a multi-centre nature. As a result of this situation not only national institutions make the law which is binding in domestic territory (multi-centre character of the legislature). Moreover, the binding application of law by courts in the territory of a country also takes place by national and “external” courts (multi-centre character of the judiciary – ECHR and ECJ). The focus of the present article is – as the title suggests – the relations between national courts (limited to the courts of the highest instance) and the ECHR.

2. The co-creation of legal relations in the territory of Poland via the case-law of national courts and the ECHR inevitably leads to “getting in each other’s way”. The co-existence and co-functioning is simultaneously a fact and a legal necessity. Therefore, in order to increase effectiveness and raise standards of legal protection instead of “getting in each other’s way”, it is necessary to satisfy a number of conditions, by both the domestic bodies as well as the European Court of Human Rights itself.

3. The work of the Group of Wise Persons, as well as the proposals put forward by the Group aiming at improving the co-operation of ECHR with national courts involved a silent assumption that the dialogue is there. This assumption seems somewhat overly optimistic. The dialogue is non-existent: instead there are two monologues. Both national courts, as well as the ECHR frequently adjudicate in the same cases. These cases are those in which, upon consideration by national courts, an accusation is made of a human rights violation by one of the national authorities. In such a situation the judgment of the national court has either not prevented the rights of an individual being infringed upon by legislative or executive organs which eventually has led to the need of transferring the case to Strasbourg on grounds of the European Convention of Human Rights being violated, or it is even the activity of the national court itself which is the source of the violation. Thus national judgments function in the same legal space as the judgments of the ECHR, with the ECHR taking advantage, to an effect, of the assessments made by national authorities.

86. The issue is more broadly dwelled on in: E. Łętowska, “Multicentrycznosc” (Multi-centre nature of the legal system and its friendly interpretation) in: Rozprawy prawnicze (Legal Debates), Commemorative publication to the memory of Prof Maksymilian Pazdan, Krakow 2006.
courts, verifying these assessments at the same time. The judgments of the ECHR should be most diligently executed by national authorities (which in itself is an extremely complex issue)\textsuperscript{87}. Dialogue, however, involves the presentation of one’s point of view before the interlocutor and verification of one’s position as a result of the exchange of opinions. In other words, there must be a conscious interaction in response to the behaviour of the partner in dialogue. What we are dealing with here, however, is more of a presentation of the perspectives of national courts which are not exactly aware of actually participating in a dialogue and do not see the need to verify the routine of making judgments for reasons of the duty to also respect the standards stipulated in the European Convention of Human Rights. The European Court of Human Rights, on the other hand, can only allow itself (as it does) to just present its expectations in hope that national courts abide by them.

4. In order to eliminate the barriers to dialogue, the following is needed on the part of national courts:

– Awareness of mutual influence of axiology and the case-law of the multi-centre judiciary and its phenomenal forms (in lieu of the current negation of them);

– Mutual knowledge of the judgments of national courts and the ECHR; honouring ECHR decisions by national courts (instead of neglecting them in any form, also intellectually);

– The existence of an institutional back-up to ensure the organisational, procedural, and financially complex execution of the ECHR’s judgments;

– The will of courts to follow the axiology of human rights when applying national law. Just to give a banal example: when the court makes a decision on court fees or on the interpretation of the factors of admissibility of court proceedings, the court must know the acquis of the ECHR with regard to the right to court; when adjudicating in disputes concerning administrative, civil or criminal issues – it is indispensable to know the ECHR’s case-law on discrimination or the specific Convention based rights. On that basis the national courts need to develop their interpretative creativity, making it possible to make the axiology real.

5. Dialogue conditions which are to be satisfied by the ECHR are also important. Contrary to the situation of the past, the current judgments of the ECHR are more active and, at the same time, leave less room for decision assigned to national courts by the ECHR.\textsuperscript{88} In consequence, one could have the impression of a certain nonchalance with which the Court treats its national partners. It could be seen if only in the superficial and seemingly senseless – from the point of view of a procedure before the Court – reports on the national court procedure presented in the ECHR’s judgments. The descriptions of “actual state of affairs” revealing the course of proceedings at the national forum, presented according to the chronology of judgments, do not really provide any insight into the reason these judgments were to serve. As a result, drastic mistakes are made, e.g. in the scope of insufficiently deep control of the subsidiarity condition, as was the situation with the 

\textit{Zwierzynski} case, where the superficial approach to national procedure and adjudications led to an erroneous decision that bore very costly consequences. The ECHR decided that the Polish state was guilty of a violation of a property right hence compensation was adjudicated, only that it was adjudicated to a person who was not the owner. The mistake in the assessment of the subsidiarity factor could have been picked up if only the report on the domestic procedure was performed more dil-

\textsuperscript{87} See P. Grzegorczyk, “Skutki wyroków Europejskiego Trybunału Praw Człowieka w krajowym porządku prawnym” (Results of the judgments of the European Court of Human Rights in the national legal system), Przegląd Sadowy (Legal Review) No. 6/2006.

\textsuperscript{88} K. Drzewicki, “Reforma Europejskiego Trybunału Praw Człowieka – filozofia zmiana czy zmiana filozofii” (The reform of the European Court of Human Rights – the philosophy of change or a change of philosophy), Europejski Przegląd Sadowy (European Court Review) No. 6/2006, p. 5.
igently. Obviously, it is the duty of national authorities to pick up on such errors. However, there is a problem whether the ECHR itself is not obliged ex officio to act more carefully in the name of the probity of its own procedure.

6. If the ECHR had a better understanding of the motives of national courts at earlier stages of considering a given case (judicially and axiologically), the selection of pilot cases would be better. The Broniowski case is an example of how an atypical case was selected for pilot purposes. The sluggish approach to paying out compensation to Polish repatriates from former Polish eastern territories (the so-called territories beyond the Bug river), and the fact that the promises once made to repatriates are not kept is an obvious violation on the part of Polish authorities and calls for compensation. However, the claim that Poland is responsible for violating property rights not only due to the fact that immovable property had been left behind abroad (for which a compensation was provided by the Republican Agreements), but also for damages to property inflicted by Soviet authorities (e.g. in case of a forfeiture of property before repatriation) is by no means obvious. It is highly doubtful whether it is fair to level the situation of repatriates who had not received anything to date (with regard to whom the state has failed to execute its obligations) with those who had taken advantage of some compensations, even if these were a fraction of what had been owed. Standards of property protection (particularly when we are dealing with historical repossessions) have to be seen from a historical perspective. If a repatriate was given a real property in the 1960s as partial compensation, sold it and now is queuing again for more, claiming that what he/she had received initially was not enough, then at least the part that he/she had already “consumed” should be deducted. The fact that the Broniowski case was deemed a pilot one (this case is precisely about a situation in which the repatriate sold what he had been given years ago by means of compensation and is now demanding full compensation, without taking into account what he had already received) has led to the “reopening” of the entire issue of property of Polish repatriates from former Polish territories in the East. Certainly it is the ineffectiveness of Polish authorities that has led to the closing of the case without sufficient fact-based documentation but that is another story. The mistake would not have been made had there been a better awareness of the procedure and of the different judgments in the case at the pre-trial stage. Therefore, there has not been enough respect for the national partner. Had there been more respect, it would have been expressed in a higher degree of diligence and understanding of the national court’s position.

7. The bad selection of pilot cases (treating as typical and identical something that is atypical and different) not only ruptures the dialogue but takes away the legitimacy of the procedure of using pilot cases. Thus it wastes the opportunity to use these cases in playing an important role of rationalising the inflow of applications to the Court.

8. The ECHR has problems with repossession cases in connection with systemic transformations. These situations are very difficult to understand by lawyers from the West who have never had the chance to encounter such problems. Therefore, a better dialogue with national courts could make the situation for the ECHR easier. For example, in many categories of repossession cases, throughout the years the courts (the Supreme Court in Poland) have developed a position which is a compromise between contradictory axiological postulates. Should the ECHR address national courts asking for their positions, it could be a valuable contribution to the dialogue, helping all to better understand repossession issues and, at the same time, making national courts better aware of the ECHR’s acquis. Furthermore, it should also help improve pilot cases.

9. One of the forms of cooperation between national courts and the ECHR (which had been considered but probably refuted in the end by the Group of Wise Persons) is the institution of preliminary (prejudicial)
questions (a concept borrowed from community law, Article 234, Treaty on European Union). I believe this concept to be a mistake. Should it be implemented, no inflow of queries to the ECHR is to be expected. The problem here lies in the different procedures of issuing judgments by national courts and the ECHR. After all, national courts do not apply the Convention, or if they do – only to the extent so as to “decipher” standards of national law. This situation is different than what we have in the case of community law, as here national courts which function as courts of first instance in community law must apply this law. The situation with the ECHR is somewhat different. The Court assesses whether national authorities have violated the rights of an individual protected by the Convention. National courts, on the other hand, apply the law of the country. When doing so, they should follow the axiological inspiration of the Convention and the acquis of the European Court of Human Rights. In case of community law there is the identity of an adjudication standard for both the inquiring party (the national court), and the responding party (ECJ). No such identity exists in the case of national courts (national law) and the European Court of Human Rights (European Convention of Human Rights). Hence, there is no material for building a preliminary question to the ECHR. The doubts which national courts might have in terms of the law they apply naturally cannot relate to the Convention as national courts simply do not apply the provisions of the Convention, hence there is no need to ask about it. In case of community law, however, the court does ask the ECJ for its interpretation of provisions it plans to apply. Obviously, national courts should know the case-law of the ECHR and want to use it in the interpretation of law it applies, i.e. domestic law. However, the imposition of the duty of submitting doubts in understanding the Convention would be an introduction of a duty to ask about something which does not constitute a normative basis for the adjudication. Hence no practical success of such a measure could be expected.

10. One of the proposals put forward by the Group of Wise Persons was to introduce (as an instrument for operational dialogue) the institution of consultative opinions.

89. For differences in this scope see decision of the Constitutional Court of 18 October 2005, P 8/04, OTK-A No. 9/2004, item 92: “Observance of international duties of Poland and attention to the cohesion of the legal order (created by both domestic law, as well as international treaties and supranational law – to the extent which is constitutionally admissible) call for the compliance of law (substance of provisions, principles of law, legal standards) formulated by the different adjudicating centres and authorities which apply and interpret law...” The control performed by the ECHR is not in itself of the internal legal order of a given state which has committed a violation of the rights of a specific individual. Therefore, it is not a control of the provisions and standards constituting this legal order. Instead, it is a review of the infringement of human rights and freedoms. Such control can reveal, however, that the internal legal order includes norms the enforcement of which has led to the violation of human rights in concreto in the case considered by the ECHR and which (despite the fact that this issue exceeds the framework of the ruling by ECHR), if applied pro futuro, can lead to further violations. Effects of the judgment on the violation of human rights are directly exhausted in the formulation, included in the ECHR ruling, of the duties of the applicant and the state, the authorities of which have committed the violation. This is first of all related to a statement whether the applicant has had any of the human rights violated which are stipulated in the ECHR ruling, of the duties of the applicant and the state, the authorities of which have committed the violation. This is first of all related to a statement whether the applicant has had any of the human rights violated which are stipulated in the ECHR ruling, of the duties of the applicant and the state, the authorities of which have committed the violation. This is first of all related to a statement whether the applicant has had any of the human rights violated which are stipulated in the ECHR ruling, of the duties of the applicant and the state, the authorities of which have committed the violation. This is first of all related to a statement whether the applicant has had any of the human rights violated which are stipulated in the ECHR ruling, of the duties of the applicant and the state, the authorities of which have committed the violation.
which would be issued by the ECHR at the request of national courts. This is a proposal worth taking into consideration. The practical use of this instrument would take place in a relatively peculiar form: using the Court’s authority in situations when the national court intends to rule a judgment in the “spirit” of the European Convention on Human Rights, which would call for breaking away from the domestic tradition (which is met with great resistance politically and criticised by public opinion). In such cases the national court would be asking for presentation of international obligations which would indicate that the judgment has to be formulated in this specific manner. A consultative opinion would therefore be a legitimising and a persuasive factor. From this point of view, this concept should be seen as a project which is worth the while (see also the remarks made in point 8).

11. The importance of this optional instrument above must not, however, be overestimated, believing that it could be commonly used. When it comes to strengthening dialogue and co-operation between national courts and the ECHR, it is most important, to my mind, to remove all obstacles which hinder this co-operation presently (see points 4-6 above). The creation of new tools will not contribute much if this initial indispensable stage is neglected. ★
The seminar on the European Court of Human Rights – Agenda for the 21st Century was organised in Warsaw on 23-24 June 2006, by the Warsaw Information Office of the Council of Europe, in co-operation with the Polish Ministry of Foreign Affairs. The seminar brought together representatives of the Council of Europe, including the representatives of the Commissioner for Human Rights, of the Registry of the European Court of Human Rights, a judge of the Court of Justice of the European Communities, government agents before the European Court of Human Rights representing member states, representatives of Ministries of Foreign Affairs and Ministries of Justice, the diplomatic corps, including representatives of the OSCE, judges of Poland’s Supreme Court, Constitutional Court and Supreme Administrative Court, judges and prosecutors of courts and prosecutor offices across Poland, National Bar Association, practising lawyers, Polish and foreign scholars (including scholars from Belarus), NGOs and students.


The discussion was centred on a general debate on the system of human rights protection, directions of its procedural development which would not require amendment of the Convention, as well as on the future evolution of the European Convention beyond the amendments introduced in Protocol No. 14. The debate also covered more effective execution of the judgments.

The following conclusions were presented:

1. It is necessary to restructure the European system of human rights protection in order to prepare it for the challenges of the 21st century. A three-tier normative system of the European Convention is proposed, including: the Convention and the Protocols, the Statute and the Rules of Court. The Statute would regulate procedural issues arising from the Convention and would be subject to change through a vote without national ratification. In this way the European system of human rights protection can be adapted to evolving circumstances more effectively and promptly than before. It is proposed that the Committee of Ministers should be empowered to make such procedural changes in the operation of the Convention mechanism through resolutions adopted unanimously.

2. A long-term vision of human rights protection in the process of European integration should be based on co-creation of the European legal space sensu largo by the Strasbourg and the Luxembourg Courts, and on the European Union's accession to the European Convention on Human Rights and Fundamental Freedoms.

3. The participants emphasised the importance of Protocol No. 14 and the recommendations of the Committee of Ministers in creating a balance between the national and the international systems of human rights protection.

4. The European Convention on Human Rights ought to be applied by the national judicial system which should resolve human rights protection issues and disputes. Resorting to international institutions in order to resolve minor issues creates an unnecessary burden to those institutions. It was considered in this context that the introduction in Protocol No. 14 of “significant disadvantage” as a criterion of admissibility of individual applications to the Strasbourg Court was a step in the right direction.

5. The participants emphasised the importance of striking the necessary balance between the aim of reducing the number of applications through filters and the right of each individual to lodge an individual ap-
6. It is important to reinforce the dialogue between the European Court of Human Rights and national courts, and some participants proposed to establish the right of the national supreme courts to refer to the European Court of Human Rights for a consultative opinion. In practice, the referral for a consultative opinion would serve a specific function: that of support afforded by the authority of the European Court where the national court wants to give a judgment in the spirit of the European Convention and to do so it has to diverge from the national tradition (which is politically controversial or criticised by the general public). In that case, the national court's referral would aim to underscore international obligations requiring an evolution of the national case-law, and would serve as a legitimising and persuasive factor. From this perspective, consultative opinions would be a useful mechanism.

7. It is crucial to use the pilot judgment procedure as it can help to reduce the number of applications and to reinforce the dialogue with the states in order to eliminate systemic defects.

8. Some participants proposed the notion of “legal peace” to be used in pilot judgments. It would help the European Court of Human Rights and the government to negotiate the striking out of clone cases and their referral back to the country. This would be a new negotiating procedure where the interests of applicants in clone cases would be represented by the Council of Europe’s Commissioner for Human Rights. Under the procedure, the government would be required to agree with the European Court on the necessary general remedies to be implemented in the national legislation in order to prevent further violations. The remedies should also pave the way for the resolution of clone cases which should be conditionally struck out of the European Court’s registry. The government would need to present a timetable for implementation of the remedies. Should the government fail to fulfil its obligations, the European Court could withdraw from the “legal peace” and give judgments in the clone cases as it did in the pilot judgment. However, some participants expressed their misgivings about the practical implementation of this concept.

9. It is necessary to deepen the reflection on the possibility for the Court to deliver judgments of principle dealing with issues of general application affecting several contracting states. Such states would be encouraged to intervene in proceedings in which issues of this nature arose. Indeed all contracting states could be systematically informed when such a case was pending and given the possibility of intervening. Judgments of principle would help to extend the effect of case-law to other states whose practice, legislation or case-law are in conflict with the general principle defined in the European Court judgment against a state and could improve the quality of the Court’s case-law based on comparative analysis of the legal systems of multiple contracting states of the Convention. One proposal would be to distinguish between such cases and cases of purely national interest in the particular respondent state, with the former being made binding erga omnes. This would be a step beyond the existing pilot judgment procedure, and it would require amendment of the Convention. However, some participants expressed their doubts about this idea.

10. With the entry into force of Protocol No.14, it is desirable to establish co-operation between the Commissioner for Human Rights and information offices of the Council of Europe, ombudsmen, and non-governmental organisations. NGOs could also be active in pilot judgments.

11. The third party intervention of the Commissioner under Article 36§3 of the European Convention on Human Rights – once Protocol No. 14 has entered into force – will have the added value of opening new possibilities of addressing patterns of human rights violations, including ongoing ones. The Commissioner’s field experience in member states allows him to put into a wider perspective the Court’s
judgment, which deals by definition with an individual case that concerns only one responding state.

12. Extension of the Commissioner's functions even beyond Protocol No. 14, in particular regarding co-operation with national human rights institutions, ombudsmen, and decentralised offices. The group further envisaged a general coordinating role for the Commissioner. In his reply to the Group of Wise Persons, the Commissioner considered possible avenues for his involvement in procedures under the Convention.

13. With respect to pilot judgments, the Commissioner could engage in a continuous dialogue with the member state(s) concerned, either specifically or in the course of his visits or of bilateral contacts, or via his privileged relations with national ombudspersons and/or national human rights institutions. The idea is, basically, that systemic problems unveiled by a pilot procedure or judgment should become a priority in the continuous dialogue between the Commissioner and the member state in question. The Commissioner could, in particular, suggest or validate the means to redress the systemic defect. Moreover, the possible contribution of the Commissioner to the execution of pilot judgments would seem applicable to the execution of judgments in general.

14. Verification of the compatibility of draft laws, existing laws and administrative practices with the standards laid down in the Convention is deemed to constitute one of the main remedies to the Court’s excessive workload. The Commissioner has already carried out compatibility exercises via Recommendations and Opinions. Provided that relevant information is given to him by the Court and the Committee of Ministers, the Commissioner could enhance his activities and his direct involvement in this field, in close co-operation with national human rights institutions.

15. Some participants considered whether the Commissioner for Human Rights should have the right to initiate applications of principal interest before the European Court of Human Rights. This discussion, however, was not conclusive.

16. Some participants considered the potential presence of representatives of the European Court Registry in several states with the highest number of applications, in addition to the presence of the information offices of the Council of Europe whose function is to provide information and education. In this context, it is important to note Lord Woolf’s proposal of establishing “satellite offices” based on the pilot lawyer project at the Warsaw Information Office of the Council of Europe. The function of “satellite offices” would be, for instance, to provide information on admissibility of applications to the European Court of Human Rights and on alternative dispute resolution (ADR) initiatives. However, it was pointed out that the practical implementation of the proposal might face problems, including financial ones.

17. It is necessary to reinforce the function of the information offices of the Council of Europe which should play an even greater role in the promotion of human rights and the dissemination of the information on the European Convention on Human Rights, the European Court’s case-law and procedures. The pilot lawyer project, launched by the Warsaw Information Office of the Council of Europe to provide information about the European Convention and, in particular, the admissibility criteria of applications and national remedies, should be extended to other countries. The information offices of the Council of Europe are an important institutional element of the Council of Europe’s visibility in some member states, hence the need to continue their development, especially in the human rights area. It is important to continue the ongoing human rights information campaign pursued by the information offices, ombudsmen, and non-governmental organisations.

18. It is necessary to improve the process of submitting applications to the European Court by imposing greater discipline on applicants. However, Lord Woolf's proposal to require that only applications submitted on mandatory standard forms could interrupt the running of the six-month period and could hinder access to the Court. Citizens of those member states which are new democracies, especially living in non-urban areas, have insufficient information about human rights and little access to legal aid and advice. Their access to the Court would be more restricted, hence if Lord Woolf's proposal were to be accepted certain exceptions would have to be made.

19. The participants endorsed Lord Woolf's proposal to draft a *Handbook on Admissibility* consisting of two parts: one on the Court's procedures for registering and processing applications (same for all member states), the other on the effect of the Strasbourg admissibility criteria in a given legal system drafted by national lawyers.

20. Government agents suggested that the European Court practice of registering applications be made more consistent (e.g. coherent rules for the registration date of applications). In their opinion the Court follows different practices concerning the registration date of applications, hence it would be useful to treat the postage date as the registration date of applications. The Court's practice is not always clearly understood and therefore more information should be made available in this respect.

21. Introduction of a transparent written code of rules of affording just satisfaction in repetitive cases (*Friendly Settlement Code*), also published on the Internet in the languages of the member states, would accelerate and facilitate the European Court's procedures.

22. In order to draft the *Friendly Settlement Code*, a task force should be set up, comprising government agents before the European Court, NGO representatives and European Court of Human Rights experts. The *Friendly Settlement Code* should be integrated into the Rules of Court as an Appendix.

23. The member states should implement adequate individual and general remedies as soon as possible after the judgment as a guarantee of a prompt procedure of dispute resolution. Effective execution of the European Court's judgments is a precondition for an effective system of human rights protection.

24. It is necessary to treat some applications as priority cases. A selection of applications based on the issues raised therein would be required to enable member states to ensure prompt satisfaction and remedies if the European Court finds violations. If an application is pending a long time before the Court and the Court eventually finds systemic violations, the respondent state may suffer while a prompt Court judgment would have allowed it to implement legislative remedies early and to prevent ongoing violations.

25. Some participants pointed to problems with the use of the procedure of joint examination of admissibility and merits (Article 54 A of the Rules of Court). In obvious cases, the government should restrict itself to presenting its observations on admissibility only rather than its observations on the merits. The decision on inadmissibility could be taken at this stage.

26. It seems useful to promote the *fast-track procedure* used by the European Court of Human Rights on several occasions. Some participants suggested that the Court should be able to strike out an application off the list based on the government's unilateral declaration recognising a violation of the Convention even if the applicant intends to proceed with the case. The Court would strike the application off the list subject to several conditions, in particular there being no dispute over the facts of the case, the government taking responsibility for the violation, and the government offering just satisfaction to the applicant.

27. Some participants stressed the need of restoring the European Court's autonomy in referring cases to the Grand Chamber. The referral now depends on the consent of the
Proceedings

parties. The Court’s independent decision to refer a case to the Grand Chamber should be possible in the event of a serious legal issue and mandatory in the event of a possible change in the European Court’s case-law, irrespective of the position of the parties.

28. There are important benefits of friendly settlement negotiations before the European Court, both to the applicant, the government and the Court, especially in pilot judgments. If the parties were willing, friendly settlement negotiations could be assisted by the information offices of the Council of Europe which have the necessary infrastructure (cf. the friendly settlement in the Broniowski case).

29. Some participants endorsed Lord Woolf’s initiative to set up a specialised Friendly Settlement Unit. The Unit would support the Court’s Registry in identifying cases where friendly settlement is possible.

30. It is necessary to draft a set of clear guidelines pursued by the Court in affording just satisfaction. A clear indication of the amounts of just satisfaction afforded by the Court would certainly encourage governments to negotiate friendly settlements with applicants at each stage of the procedure.

31. A wide range of methods of alternative dispute resolution is required. It is necessary to support non-judicial institutions, including the information offices of the Council of Europe, ombudsmen in member states and non-governmental organisations. Their role should be reinforced, especially in providing information on the European Convention on Human Rights and European Court procedures.

32. Considering methods of alternative dispute resolution, some participants stressed the importance of an early response mechanism which would help to resolve the dispute at an early stage, before the Court procedure is launched (by referring the case back to the state). Immediate referral of an application to mediation or conciliation involving professional mediators could reduce the number of the European Court’s cases. Under the procedure, at an early stage, immediately following the registration of an application and preliminary examination of admissibility, the application would be communicated to the government and the applicant, with a suggestion of mediation. The goal is to encourage the parties to resolve the issue and to withdraw the application from the Court. The mediator would communicate to the parties that in the absence of a friendly settlement, the Court will resolve the case taking account of its case-law on the one hand and of the parties’ will to resolve the dispute on the other. This must not restrict the right to submit applications. Some participants suggested that if the government does not redress the injury to the applicant, the Court should give a judgment in a simplified, fast-track procedure.

34. There is a need to have proper information available to the applicants and their representatives (practitioners) on the process of execution of Court judgments, including explanations of the procedural issues (such as questions examined, timeline), as well as practical examples of individual and general measures taken following the Court’s conclusions. Such information could be included in the Handbook on Admissibility, or prepared as a separate document.

35. The Committee of Ministers could take a more active role in supervising the execution of judgments which touch upon law or practices not only of the respondent state, but also other member states (i.e. judgments in cases where several states submit information to the Court about their domestic laws or practices), by requesting those member states with situations similar to that of the respondent state found by the Court to be in violation of the Convention, to provide the Committee with an assessment of possible general measures to be taken following the judgment against another state. Such dialogue would promote more active implementation of the Convention and its case-law at the national level and prevent “clone cases” from more than one member state from coming to Court.
36. The importance of national institutions of human rights protection (e.g. ombudsmen) should be reinforced in order to reduce the number of lodged applications. The states should promote the work of national human rights institutions.

37. Non-governmental organisations play a vital role in European Court of Human Rights procedures, and they must have immediate access to information. Cases communicated to the government should be published (e.g., on the Internet). NGOs should have a positive role in the early warning of Convention violations and in promotion of the Convention, including legal assistance for individuals. NGOs should be the Council of Europe’s important partner in this regard.

38. The European Court could seek to publish and disseminate reviews of the case-law (admissibility decisions and Court’s judgments), both in the official languages of the Council of Europe and in national languages, among courts, law enforcement institutions, legal departments and non-governmental organisations of the member states. Better information and education is a key condition of more effective national case-law, reducing the burden on the European Court of Human Rights.

39. The European Convention on Human Rights and the European human rights standards should be promoted in Belarus. A range of educational programmes are required to build civic society in Belarus.
FUTURE DEVELOPMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE LIGHT OF THE WISE PERSONS’ REPORT

Colloquy organised by the San Marino chairmanship of the Committee of Ministers of the Council of Europe

San Marino, 22-23 March 2007

Proceedings
The San Marino Chairmanship of the Council of Europe's Committee of Ministers decided to organise this Colloquy so as to enable a first broad exchange of views at a high technical level on the various measures recommended in the Report by a Group of Wise Persons set up by the Committee of Ministers of the Council of Europe following the 3rd Summit (Warsaw, May 2005).

The Report deals with the long-term effectiveness of the European Convention on Human Rights’ control mechanism, over and above Protocol No. 14 to the Convention and the decisions taken by the Ministers in 2004 to improve the implementation of the Convention at national level.

It is expected that the San Marino Colloquy will result in useful insights and suggestions for the preparatory work of the 117th Ministerial Session, in May 2007, at which the Committee of Ministers will take its first decisions on the follow-up to the Report within the relevant bodies of the Council of Europe.
Mr Fiorenzo Stolfi

Minister of Foreign and Political Affairs of the Republic of San Marino,
Chairperson of the Committee of Ministers of the Council of Europe

I am really pleased to open the works of this Colloquy on the future developments of the European Court of Human Rights in the light of the Wise Persons’ Report, which the San Marino Chairmanship of the Committee of Ministers of the Council of Europe has strongly desired and which is expected to give new impetus to the reform process under way.

The mechanism set up with extraordinary farsightedness by the European Convention on Human Rights and developed by its following Protocols is undoubtedly the most important achievement of the Council of Europe. Unquestionably, the “Strasbourg system”, especially the European Court of Human Rights, has been successful over the years, in that it has been able to ensure respect for rules protecting human rights and fundamental freedoms of individuals in all member states.

European citizens have learnt that, once all remedies available domestically have been exhausted, they can directly apply to Strasbourg, whenever they feel that their rights under the Convention have been violated. States have learnt to enforce the Court’s decisions, by adopting the measures requested for each case, but also, more broadly speaking, by amending, whenever necessary, their domestic legislation.

No country in the world can deem itself immune against human rights violations, no domestic legal system can be deemed “perfect” and, even where a legal system could be considered close to “being perfect”, this nonetheless issues, shortcomings or more simply mistakes in its application could not be ruled out.

Each state, like San Marino, has therefore greatly benefited from control over its legislation and case-law by the European Court of Human Rights in terms of strengthening and developing the rule of law.

The “Strasbourg system”, which European governments can and must be proud of in front of their own nationals and the rest of the world, has to cope, today, with an extremely demanding challenge.

Despite the creation of the permanent Single Court, with the entry into force of Protocol No. 11 on 1 November 1998, the workload of Judges has become too burdensome and, most of all, proceedings for applicants have become too lengthy. The time lag between an application and the Court’s decision has continued to increase over the years. This jeopardises the proper functioning of the whole mechanism and, consequently, negatively affects the right of individual application.

The challenge, which must be faced successfully, is to speed up and simplify the system, without its high quality level being affected.

Governments are already committed to meeting the recommendations of the Committee of Ministers to member states, the implementation of which represents an important step towards improving the functioning of the control mechanism of the Convention. I am referring notably to Recommendation...
As Chairman in office of the Committee of Ministers, I am committed to advocating your reflections and conclusions within the various institutions, notably the Committee of Ministers, which, as you know, during its next session in May this year, will have to decide on the follow-up to the Report.

I hope – and in this regard I call upon you all – that this Colloquy will be a truly interactive dialogue among all participants based on the reports to be tabled. In particular, I deem it most desirable to identify those measures which could be adopted immediately, without having to amend the Convention, or otherwise follow time-consuming procedures.

For example, the Wise Persons insist on the need and urgency for the Court to be relieved of a large number of cases which I would define “minor” – that is inadmissible or repetitive – the examination of which goes to the detriment of those cases, where more serious violations of fundamental rights are involved.

What measures do you deem appropriate to immediately solve this issue, even before the entry into force of Protocol No. 14?

Given the importance for domestic case-law to be in line with the Court’s case-law in interpreting the Convention, do you consider acceptable and feasible the Wise Persons’ proposal to allow national courts to ask the Court for advisory, non-binding opinions on legal issues relating to the interpretation of the Convention and its Protocols?

The San Marino Chairmanship expects that these two working days will result in technical and practical responses to well-known issues, which we are called to address.

I warmly thank you for having accepted the invitation to this Colloquy, which I hope will be interesting and productive. I wish you all a fruitful work and an agreeable stay in the Republic of San Marino, which has the pleasure and the honour to host you.

Thank you.
The European Court of Human Rights is unique in Europe. Indeed, I believe that it is unique in the world. It is the only international court to which individuals, regardless of nationality or citizenship, can complain about alleged violations of their human rights by a government. This is one of the great achievements of the 20th century in Europe, and we should bear this in mind whenever we are discussing anything which would affect the future of the Court.

In my view, it is not an exaggeration to say that this Court has been given its far-reaching powers because it was created in the aftermath of World War II. I am not sure that governments would be equally enthusiastic about the creation of such a court if the decisions had to be taken today. Instead of a concerted effort to reinforce the existing mechanism of human rights protection, we see the multiplication of bodies and instruments with very little effort to ensure the coherence and the hierarchy which are essential for the rule of law. Instead there is an increasing risk of creating a Europe in which human rights are protected à la carte and governments can pick and choose the report or the judgment they prefer. The mechanisms of human rights protection are like parachutes. Some people say the more parachutes we have the better it is, and to some extent these people are right, but what we need to do is establish a clear order – or face the risk of opening two or more parachutes at the same time with the risk of getting them entangled with the accompanying risk of disaster. This is clearly a danger in Europe today.

To avoid this risk, we must make sure that the European Court of Human Rights and the Council of Europe as a whole remain the primary source of human rights standards and their interpretation for the whole of Europe.

Another point I should like to make is that we should stop simply talking about how to reduce the number of applications to the Court. On the contrary, our aim should be to make sure that as many people as possible are aware of the existence and the availability of the Court and the steps which need to be taken to complain to the Court if they believe a government has failed to protect their rights. Our task is to protect individual human rights, not to protect the Court from individual complaints.

Our approach should be constructive and realistic, and we should seek to identify and take measures which would increase the capacity of the Court to process applications, reduce the number of outstanding applications and deliver justice to everyone in Europe. As I see it, justice includes a quick – not hasty, but quick – response to every application.

Our basic objectives should therefore be to ensure that, in the future, the Court is in a position to respond, within a reasonable time, to everyone petitioning it and to continue to deliver high-quality judgments. Furthermore, we should ensure that the Committee of Ministers is in a position to supervise the execution of judgments effectively. If the decisions of the Court are not quickly and fully executed, similar violations will occur elsewhere and unnecessarily aggravate the backlog of pending applications.
The call for more money is always a tempting option, but budgetary austerity is not the only reason to seek solutions which go beyond pumping more money into the Court.

First, additional resources will not solve the problem of the ever-increasing flow of new applications. Second, leaving aside problems of coherence of case-law which inevitably arise with a huge registry, a continuous increase of resources might even reduce the effectiveness of the system.

Let me explain this last point by recalling the tragic story of the thousand horses which died frozen in the Ladoga lake in 1942 while trying to escape from the flames of the bombed forest. The Ladoga syndrome, describing a solution which, in fact, kills you, is a real danger for the Council of Europe. A headlong flight into ever-increasing budgets for the Court – at the expense of the rest of the Council of Europe – would inevitably suffocate all intergovernmental, monitoring and capacity building activities – which must be preserved in order to save the system of human rights protection as a whole in the long term. These other activities are essential in preventing violations of human rights as well as reinforcing the impact of the Court decisions and consequently the effectiveness of the Convention system.

Moreover, the experience of recent years shows that sustained annual increases in resources for the Court have failed to produce the desired effect. I know that some people will say that this was because, in the end, the Court did not receive as much as it had asked for. Others may add that the increase in the number of applications has continued to grow faster than the money was coming in. However, the fact is that the backlog has continued to grow – with 81,000 applications pending at the end of 2005 and 89,900 at the end of 2006. I am not sure that simply giving more money and more staff is the answer.

What we need are simple short-term measures, such as those suggested in the report by Lord Woolf in December 2005, combined with the rapid entry into force of Protocol No. 14. This should give us the breathing space we need to see the long-term effect of the recommendations put forward by the Wise Persons’ Report – recommendations which will themselves take years to discuss, adopt and ratify according to our experience with Protocol No. 14 and our Conventions dealing with terrorism and trafficking in human beings. All this must be supported by adequate financial and political support to the activities of other parts of the Council of Europe aimed at preventing future violations of human rights.

I will begin with some short-term measures. These measures are without prejudice to both the entry into force of Protocol No. 14 and the reflections on the Wise Persons’ Report. I should like to make four specific suggestions to improve, in the short-term, the effectiveness of the Court.

First, it is important to see the scale of the problem clearly. To this end, we need better statistics – not more statistics, but better statistics. Put simply, the Court should stop counting applications which are not applications. A year ago, Lord Woolf recommended that the Court should redefine what constitutes an application. It should only deal with properly completed application forms which contain all the information required for the Court to process the application. This would simplify the task of the Registry, which would no longer register and treat letters from potential applicants as if they are already real applications. I am very strongly in favour of this suggestion, and I am frankly disappointed that the Court has not yet fully implemented it. I realise that this suggestion is opposed by the NGOs because they “consider that a requirement that applications be lodged on the relevant form may bar effective access to the Court for some of the most vulnerable individuals”. I can see their point, but I still think that if one wants to bring a case to a court, it is not unreasonable to ask for the necessary form to be completed. As far as I can discover, this applies to all courts in all our member states, and I see no reason why the European Court of Human Rights should be an exception. Of course, I would like vulnerable people to be helped to apply to the Court of Human Rights, but I do not think that counting every scrap of paper received by the Court as an application, sending forms which never come back and then sending reminders to people who cannot cope with the forms is good enough. It only muddies the water to count
such correspondence as an outstanding application. I know that such applications are eventually deleted and removed from the statistics – why count them in the first place?

Second, the Court should no longer deal with repetitive cases. Cases which may serve as pilot judgments should be given priority, and all similar cases should be stayed pending the outcome of the pilot case. Several NGOs support this approach and go even further by suggesting that the Council of Europe should carry out comprehensive monitoring of the adequacy and timeliness of compliance with pilot judgments.

Third, more than 50% of applications come today from Poland, Romania, Russia, Turkey and Ukraine. Without going as far as proposing the creation of Satellite Offices of the Registry as suggested by Lord Woolf, I would suggest that each Information Office of the Council of Europe in these countries should be equipped with an information desk with a qualified staff member in order to help applicants to complete the application form. This is not legal advice, but practical assistance helping people to fill their forms correctly.

My fourth point is an idea for which I am indebted to the Deputy Secretary General who suggests that the Court should make an innovative use of the provision relating to ad hoc judges. Article 27 of the Convention provides that, if a judge is unable to sit, the state concerned may appoint an ad hoc judge. Normally, this provision applies to situations where there is the possibility of bias – when the national judge was involved in the national case or is related to the applicant – but the term “unable to sit” could be interpreted in a broader manner, for instance, in relation to the excessive workload of the Court. This would enable the capacity of the Court to be doubled because a state would have its national judge and an ad hoc judge operational at the same time. This is of course only a suggestion which I leave to your consideration, together with the three previous ones.

My second set of proposals concerns accompanying measures. I have already made the point that the Court is not an isolated entity, but a vital and inextricable part of the Council of Europe. The Court needs other parts of the Council of Europe as much as other parts of the Council of Europe need the Court.

Our standard-setting, monitoring and capacity-building activities provide a crucial supporting environment for the work of the Court, which in turn nourishes and enriches these activities through its constantly evolving case-law. A Court at the heart of a defunct Council of Europe would lose its effectiveness, its credibility and therefore its legitimacy. It is ludicrous to imagine that it could operate in an institutional and political vacuum.

We must not lose sight of the fact that the Court’s judgments must be fully executed under the supervision of the Committee of Ministers and must also be integrated, with the help of targeted Council of Europe activities, into national legal order and practice.

The activities of the other human rights bodies and institutions within the Council of Europe, such as the European Committee for the Prevention of Torture, the European Commission against Racism and Intolerance, the Framework Convention for the Protection of National Minorities, the Commissioner for Human Rights and others, help to prevent both new abuses and repeated violations and are essential in reducing the flow of applications to the Court.

Finally, the protection system established by the Convention would become rigid without strong intergovernmental cooperation in Europe, capable of foreseeing problems and of submitting specific proposals to the Committee of Ministers for the continued development of human rights and the improvement of procedures for the protection of these rights. It is through intergovernmental co-operation that the member states manifest their “ownership” of the European Convention on Human Rights and the European Court of Human Rights.

All this shows that we must be realistic. If the growth of the Court continues to be funded by transferring resources to the Court from the ordinary budget of the Council of Europe, this will endanger the other activities of the Organisation which are essential for the long-term effectiveness of the system as a whole.

The 2004 reform package adopted by the Committee of Ministers centred around three
points: first, enhancing the Court’s case-processing capacity; second, improving implementation of the obligations arising from the Convention on Human Rights and protection of human rights at national level; and third, improving the execution of judgments.

The problem with Protocol No. 14 is of course that, three years after its adoption, it still has not entered into force. We all hope that the Russian State Duma will ratify the Protocol. We need the increased capacity which the Protocol is expected to bring about. Protocol No. 14 was itself a compromise, but it was a compromise agreed by all our member states including the Russian Federation in an attempt to tackle the problems of the Court by reducing judicial involvement in respect of plainly inadmissible cases and repetitive cases.

However, the 2004 reform was not limited to Protocol No. 14. The Committee of Ministers also adopted other Recommendations aimed at reducing the future workload of the Court. These Recommendations encourage member states to meet their obligations under the Convention. In fact the experts who drafted the protocol and these Recommendations regarded these instruments as a package of complementary measures.

Since June 2004, the Steering Committee for Human Rights (CDDH) has undertaken a major review of the implementation of the recommendations on national measures such as the improvement of domestic remedies, the verification of the compatibility of domestic law with the standards of the Convention and the re-examination or reopening of some cases at the national level.

All these measures should improve the performance of our member states and reinforce their ability to protect individuals from human rights violations. We should not forget that the member states bear a primary responsibility in this respect, and that really the role of the Court is the role of a safety-net.

Finally, I should like to offer a response to the proposals made in the Report of the Wise Persons.

Many of these proposals are not new. Many of them were examined during the negotiations for Protocol No. 14. This does not mean that we should not re-examine them, but it does mean that we should begin by checking whether the reasons for not including them in Protocol No. 14 are still valid today.

It is interesting to note that several ideas put forward by the Wise Persons could be put into effect immediately without amending the Convention. For example, there is nothing in the Convention to stop us enhancing the authority of the law of the Court by widely disseminating its decisions. Similarly, there is nothing to prevent greater use of pilot judgments by the Court, encouraging mediation at national level and extending the mandate of the Human Rights Commissioner to respond actively to Court decisions.

Of course, some other proposals would require amendments to the Convention or a separate Council of Europe legal instrument.

A new judicial filtering mechanism and the idea of reverting to a two-tier system have clear potential for efficiency savings provided that the judges sitting in such a restructured Court would be assisted by the existing registry staff.

However, we must remember that in the preparation of Protocol No. 14 the prevailing opinion was that a separate filtering body would not solve the current problems, would be politically difficult to accept, would prolong the proceedings and would make them more complicated.

Personally, I think that we should seriously consider another idea, not contained in the proposals of the Wise Persons. I am referring to making it possible for the Registry itself to reject obviously inadmissible applications, which are inadmissible because, for instance they fall outside the time limit of six months, and frankly speaking, I do not think you need a judge in order to count to six.

The second main suggestion of the Wise Persons is to have greater flexibility in reforming the judicial machinery, by amending the Convention with unanimously adopted Committee of Ministers’ resolutions. Personally, I support this idea, but only for amendments concerning the procedure – not substantive rights of course. It is worth mentioning that NGOs have expressed their support, provided that the process is accompanied by provisions requiring transparency and consultation with key stakeholders including the Court’s users,
Future developments of the ECtHR in the light of the Wise Persons’ Report

civil society and National Institutions for the protection and promotion of Human Rights”.

A third major suggestion by the Wise Persons focuses on improving domestic remedies for redressing violations of the Convention. It recommends the adoption of a Council of Europe Convention obliging member states to introduce domestic legal remedies to redress violations in particular resulting from overly-long judicial proceedings. Again, this looks obvious. It is a pity that only a few member states have established these measures to date, and I have therefore asked my colleagues in the Secretariat to prepare a report on this point for the Committee of Ministers. On the other hand, I am less enthusiastic about encouraging national courts to ask for advisory opinions on legal questions relating to the interpretation of the Convention. It may appear attractive at first sight, but it is an open question as to how much additional work it would create for the Court.

That said, all these various proposals are now back on the table, and they deserve to be examined in detail. I am convinced that this Colloquy provides an excellent opportunity to do precisely that and, why not, perhaps even come up with a few new ones. The room for improvement is the biggest room in the world and given the situation the Court is in, we need all the space we can get.

Of course, any future measures will need to be implemented with the active participation and support of the Court and especially its new President. Judge Costa has already made it clear that he is determined to devote his term in office to efforts to reduce the backlog of work at the Court, and I am confident that his efforts will produce results to the benefit not only of the Council of Europe but also – more importantly – to the benefit of hundreds of thousands of people who look up to and trust the European Court of Human Rights as their last chance of obtaining justice and protecting their human rights. ★
THE 2004 REFORM AND ITS IMPLEMENTATION

Ms Ingrid Siess-Scherz

Former Chairperson of the Committee of Experts for the improvement of Procedures for the Protection of Human Rights (DH-PR)

First of all, I should like to thank the authorities of San Marino whole-heartedly for the organisation and their kind invitation to this conference. I am very proud and honoured that I am able to present the work of the DH-PR conducted in the last two years. For me this invitation is a strong signal of the importance that is attributed to the implementation process of the reform package.

Introduction

As you are all aware, currently we – meaning the Council of Europe, the European Court of Human Rights, member states, civil society – find ourselves in a reform process. If one recalls the past, it seems as if a certain, dynamic reform process has always taken place over the last decades, not only since 2000 or 2004, especially if one recalls the deliberations and aims that formed the background to Protocol No. 11.

But we have to face a major difference: the situation in which the Court finds itself, has never been as urgent as it is today. So, in some way the reform process of the Convention, since 1950, has accelerated and today urgent measures are necessary, not only on the side of the court, but on all levels of human rights implementation and protection; everybody is concerned and everybody can and must contribute.

As you might know, I was the chairperson of one of the CDDH’s expert committees, the DH-PR, for the last two years. This Committee was mandated to work on the implementation of very important measures that form part of the reform process. The discussion on the reform of the Court often refers only to Protocol No. 14. This protocol is undoubtedly the centre-piece of the reform, but it is also part of a wider package of interdependent measures adopted by the Committee of Ministers in May 2004.91

In what follows I shall give you an overview of the work of the DH-PR, the background, the problems and the hopes and wishes that underlie this very important project, which is all the more important since one major part of the reform package has not yet come into force.

Why?

The starting point for this new reform process was at the European Ministerial Conference on Human Rights, held in Rome in November 2000 to mark the 50th anniversary of the signing of the Convention.

The Ministers found that “the effectiveness of the Convention system [...] is now at issue” because of “the difficulties that the Court has encountered in dealing with the ever-increasing volume of applications”. It accordingly called on the Committee of Ministers to “initi-

91. Declaration “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels”, adopted at the 114th Session of the Committee of Ministers (12-13 May 2004).
ate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation”. It also thought it “indispensable, having regard to the ever-increasing number of applications, that urgent measures be taken to assist the Court in carrying out its functions and that an in-depth reflection be started as soon as possible on the various possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation.”

Following this Conference, work, deliberations and discussions took place in different groups and committees, at different levels. From the earliest phase of the reform process on all levels it was recognised that measures taken at the national level would have to form part of any reform package. It was clear that measures could not only focus on streamlining and improving the work in Strasbourg – both at the Court’s level as well on the level of execution of the Court’s judgments – but that prevention of violations at national level, including improving domestic remedies, should also be a main issue. It has already been stated by others: human rights protection begins and ends at home.

It was obvious that only a comprehensive set of interdependent measures tackling the problem from different angles would make it possible to overcome the Court’s present overload. The CDDH was accordingly instructed to prepare a set of concrete, coherent proposals in the three following areas. (The first one refers to the national level, whereas the other two concern the European level.)

- prevention of violations on a national level and improvement of domestic remedies;
- optimisation of the efficiency of filtering and dealing with subsequent applications;
- improvement and acceleration of the execution of judgments of the European Court of Human Rights.

In the light of these instructions, the CDDH prepared several draft legal instruments:

- draft Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, with an explanatory report;
- draft Recommendation of the Committee of Ministers to member states on improving domestic remedies, with an explanatory memorandum;
- draft Recommendation of the Committee of Ministers to member states on verification of the compatibility of draft laws, existing legislation and administrative practices with the standards laid down in the European Convention on Human Rights, with an explanatory memorandum;
- draft Resolution of the Committee of Ministers to member states on judgments which reveal an underlying systemic problem.

The final activity report of the CDDH, adopted by the Steering Committee in April 2004, contained all the draft legal instruments mentioned, together with a draft Declaration on “Ensuring the effective implementation of the European Convention on Human Rights at national and European level”, for examination.
and adoption by the Committee of Ministers at the 114th Ministerial Session in May 2004.

The Declaration of the Committee of Ministers contains the key recommendations that will have to be implemented by member states, namely:

- 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 European Convention on Human Rights;

Besides these three recommendations, some further documents that had already been adopted at an earlier stage were also regarded as measures that aim to prevent human rights violations at national level and were referred to in the Declaration:

- Recommendation Rec (2002) 2 of the Committee of Ministers on the reexamination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights;

The measures aiming at the prevention of human rights violations at national level seek to stress the responsibility of national authorities according to the principle of subsidiarity. If fully applied, these measures will relieve the pressure on the Strasbourg Court in various ways: they should reduce the number of individual applications where a possible incompatibility of national law with the Convention has been avoided, or where the alleged violation has been remedied at the national level, but also because the work of the Court will be made lighter if the case has been the subject of a well-reasoned decision at the national level. It goes without saying that these effects will only be felt in the medium to long term.

In the following I will not present to you the content of these recommendations. They can be easily found on the Council’s website.96 I would rather discuss with you the process of implementation; I would like to outline the importance of this project.

96. http://www.coe.int/t/e/human_rights/ECHR-Reform.asp/

How?

Following the Declaration of May 2004, the Committee of Ministers mandated the CDDH to deal with the European as well as the national level, being more precisely, the improvement of the execution process and the implementation of the five recommendations.97

Working group A

The first working group was instructed to work primarily on two aspects:98

- to draft proposals for amendments to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements;
- to come up with practical suggestions to the Ministers’ Deputies to address situations of slow or negligent execution of judgments of the Court.

The reasons for the first aspect of this work – the amendment of the Rules – were the amendments contained in Protocol No. 14. It

was deemed advisable to submit a comprehensive restructured set of Rules; for example, new regulations concerning friendly settlements according to the amendments made by the protocol, but also for new powers given to the Committee of Ministers by the new Article 46.

This exercise was completed in April 2006 (final activity report of the CDDH99).

Work regarding the second aspect of this working group, being the suggestions concerning improvements in the execution process, is still under way. The first phase of the work was primarily dedicated to drafting the new rules for the Committee of Ministers as quickly as possible; whereas the discussion concerning slow and negligent execution focused on the possible reasons for delays and therefore primarily addressed its prevention.


Working Group B

The second working group is given a more difficult task: following the implementation of the five recommendations on national level. There was consensus amongst all member states that the basis of the exercise was that it had to be constructive. Good practice should be established and distributed to member states.

It has to be noted that at the beginning of this work, only information provided by member states was used to assess the state of implementation of the five recommendations. Non-governmental organisations, as well as national institutions for the promotion and protection of human rights were not invited to provide additional information. Furthermore, information was not sought from other Council of Europe bodies at this stage.

Member states were repeatedly invited to submit information on efforts undertaken to implement the five recommendations. It was highlighted that such information should provide a realistic picture of domestic law and practice, including good practices and lacunae. Member states replied to these appeals by submitting a considerable amount of information.102

I should also note that the working methods of this group were outstanding: following a suggestion by the Secretariat responsible for the committee, each member of this group served as rapporteur, meaning that he or she served as a main point of contact for the Secretariat. This expert was asked for a more detailed examination of the draft analysis submitted by the Secretariat.103

Subsequently, the Committee of Ministers decided to follow this very important process more closely. Five co-ordinators were appointed by the Committee of Ministers in order to follow the work carried out by the CDDH on the five recommendations with a view to preparing the GR-H political conclusions on the follow-up exercise.104

Main problems

Although, finally, all member states contributed to the exercise, there were some problems. The information provided by member states was often incomplete (it concerned only some aspects of the measures required) or uneven and difficult to compare and to assess – especially since the only source of information so far having been the member states themselves.

Therefore, in May last year, the Deputies were of the opinion that the review of implementation of the five recommendations concerning measures to be taken at the national level should be pursued with a view to obtaining a better assessment of their actual implementation and providing member states with continued encouragement to implement them. The following mandate was adopted. Member states should fill the gaps where information is still lacking. The review exercise should be deepened by focusing on the effectiveness and impact of implementation measures, particularly in three priority areas:

- re-examination or reopening of cases following judgments of the Court;
- verification of compatibility of draft laws, existing laws and administrative practice with the ECHR;
- improvement of domestic remedies.

At the same time, the review exercise should be widened by involving other bodies and institutions, both within the Council of Europe and beyond, and inviting them to submit comments on the implementation of the recommendations.

Following this mandate, the Secretariat and working group B of the DH-PR tried to encourage NGOs and national institutions to contribute and comment on the documents that had been delivered by the respective member states. Unfortunately, at first, only a very small number of NGOs and institutions responded to this invitation. So, after the last meeting of the DH-PR in November 2006, a further letter was sent out, again requesting information on the situation of human rights, especially in the light of the five recommendations. The result of this further invitation was very frustrating. For the time being, only three further contributions were received.

In my opinion there are different reasons for this reluctance. I am absolutely convinced that it is not lack of interest. The information from member states which came in during the last two years was very considerable. The main document contains over 400 pages (covering all forty-six member states) and it certainly difficult to assess the information in its totality; the information from member states was accumulated by many different organs. NGOs have only limited resources. They have to decide whether time and resources will lead to any results, meaning to an improvement of the human rights situation in the country where they are active.

But at this point I would like to repeat our invitation to contribute to this exercise. We all know that it is burdensome, sometimes tiring. But we really appreciate any contribution, any information we get. Of course we do not expect NGOs to comment on the whole document, not even on the complete information we got from each member state. But we are convinced that NGOs can comment on aspects that are directly linked to their work.

The states will have to react to the assessment, to criticism. If we get no information from civil society, some member states might use this as evidence that there is nothing to be improved in their efforts on raising the level of human rights protection.

In addition to this written procedure, it is intended to organise an event with civil society in September this year. The exact topic and the participation will depend on the further work of the group and the responsible Committees.

At the last meeting, an exchange of views on contributions expected from other Council of Europe bodies took place. Colleagues from the Court Registry, the secretariat of the European Commission for the Efficiency of Justice,

105. See Declaration on sustained action to ensure the effectiveness of the implementation of the ECHR at national and European level (adopted by the Committee of Ministers on 19 May 2006 at its 116th session).

the Venice Commission, the Parliamentary Assembly and the Office of the Commissioner for Human Rights were invited. Positive impact from these contacts are envisaged, the work undertaken on all sides will definitely influence and enhance the process on all sides.

Assessment of the process

To assess the project from my personal point of view, I should like to underline that the review process concerning the implementation of the recommendations does not intend to create a new monitoring exercise. The aim is not a heavy bureaucratic reporting obligation, like that required by the United Nations human rights bodies, but a means of discovering an accurate picture of the present situation in the member states on the various matters covered and a way of helping the states to make best use of the various instruments, following the examples of good practice which develop over time.

The fact that the recommendations are instruments that are not legally binding does not mean that they are therefore ineffective. In their totality they form a perfect check list, helping member states in their efforts to improve their human rights protection. The importance of the measures listed in these instruments is uncontested. So it was not surprising that some of the recommendations are referred to in the report of the Wise Persons.

I should like to stress that this is a very important exercise at the intergovernmental level, with the purpose of alleviating the workload of the Court. The complete and full implementation of the five recommendations that form the heart of this process would ensure that the level of human rights standards could be raised in each member state. The influx of human rights applications would not necessarily diminish to a great extent. Comparative studies have shown that the better the Convention is known at national level, the more people tend to turn to Strasbourg. But the applications could be more easily examined, and many would be inadmissible because the national authorities and courts have already done their best to fulfil the human rights obligations of their respective country.

Parallel to these contacts, a further questionnaire for member states was elaborated, with more targeted questions, in order to gather more precise information from member states. At the moment the working group is examining this new information and trying to undertake a new assessment.

In this context I should like to note that especially the discussion with the registry revealed – not very surprisingly – that the introduction of domestic remedies or adoption of general legislative measures is of utmost importance. In some member states, like Turkey, Romania, Croatia, Denmark, France, Italy, the Netherlands, Poland, Spain, Portugal and Slovakia, legislative reforms were taking place. It was not yet possible to demonstrate the positive impact of these initiatives with exact figures; nevertheless it was felt to have a positive impact on the workload of the Court.

And I’m convinced. I do think that every delegation that takes part in this exercise has realised very clearly that each and every state can and also must improve its human rights standards. Although the process of implementation is difficult and every member state encounters problems, very positive effects can already been reported. Many member states have definitely taken measures in order to improve human rights protection. I should like to give some examples. These examples are in no way exhaustive; they should only be illustrative.

- Following the recommendation on re-examination and reopening of proceedings, Germany has introduced this instrument in civil proceedings. The new law entered into force in January this year.
- Serbia has introduced re-opening in both civil and criminal proceedings.
- In Cyprus a human rights sector of the Attorney General’s Office was set up.
- In Greece, at the beginning of 2005, a special Commission was set up, under the presidency of a “Conseiller d’Etat”, composed of senior magistrates and university professors. It examines systematically the jurisprudence of the European Court of Human Rights and the legislative changes
Azerbaijan broadened the competencies of the Constitutional Court in 2004 by including the establishment of a constitutional complaint.

The improvement of these standards is a dynamic process and it will never end. Human rights never stand still. Hopefully. Every official, every professional working with human rights can improve the situation of human rights at national level and therefore can help to improve the situation of the Court.

So my clear message to you all is: Please take part in this exercise. It is essential that all actors and institutions concerned mobilise themselves in order to exploit to the full the important potential which this reform offers. There is not a single member state that could claim it has already fulfilled all requirements of the recommendations. Human rights are dynamic, they are demanding, they mean work, they mean steady movement.

The review on the implementation of the recommendation is – according to my personal opinion – one of the most important projects within the intergovernmental work of the Council and it can contribute to guaranteeing the effectiveness of the Court so that the Convention and the Court can together remain the main standard-setter of human rights throughout Europe. Investing in human rights does not mean that resources only go to one single institution, the Court in Strasbourg. Investing in human rights guarantees the improvement of our own living conditions. Not only in Strasbourg. Everywhere. And for everyone.

Thank you for your attention ★
PRESENTATION OF THE WISE PERSONS’ REPORT

Mr Gil Carlos Rodríguez Iglesias

Chair of the Group of Wise Persons

It is my task today to present to you a report with which you are already familiar, either because you are the recipients, or simply because it was published by the Council of Europe’s Committee of Ministers on 16 November last year.

This is a collective report which has been approved by all the members of the Group of Wise Persons. In presenting it, I shall try to speak for the Group, which I had the honour of chairing, remaining faithful to the spirit of consensus which guided our work. Nonetheless, whenever they depart from the text of the report, my comments will necessarily be personal, for which I take sole responsibility.

In presenting the report, I shall proceed as follows:

First of all, I shall try to explain how we understood our terms of reference. This is a vital point, since it obviously conditioned our approach to the whole report, and also the content of our recommendations.

Secondly, I shall discuss our proposals.

Finally, I shall look briefly at each of the four categories of measure which we proposed and make a few comments on some of our suggestions.

The terms of reference, given to the Group by the Heads of State and Government of the Council of Europe’s member states in the Action Plan which they adopted at the Warsaw Summit in May 2005, are referred to in Section 1 of the report. The Group was asked to “consider the long-term effectiveness of the ECHR control mechanism, including the initial effects of Protocol No. 14 and the other decisions taken in May 2004” and “to submit, as soon as possible, proposals going beyond these measures, while preserving the basic philosophy underlying the Convention.”

First of all, the Group took these terms of reference to mean that its proposals should cover structural changes to ensure the judicial machinery’s long-term effectiveness, rather than changes in the European Court’s working methods. This distinguishes its report from the one presented late in 2005 by one of its members, Lord Woolf, which specifically dealt with working methods – and indeed provided an exceptionally useful reference point for the Group’s work.

Secondly, we took the terms of reference to mean that we should confine our discussions to the model for judicial protection of human rights enshrined in the Convention and its Protocols, the most distinctive feature of which is the right of individual petition. For that reason, we were against leaving the Court free to decide whether or not to examine cases – like the US Supreme Court, with its certiorari procedure – since we felt that this would imperil the substance of the right of individual petition, and so contradict the Convention’s underlying philosophy.

In fact, the explosive increase in the number of individual applications is the very thing which most threatens the efficiency, and even survival, of our human rights protection system. We emphasised that this increase had created a serious situation which was likely, in spite of the various measures adopted by the Court, to get worse and lead – if not remedied – to collapse of the whole system. The report’s main proposals were accordingly aimed at tackling that fundamental problem.
Finally, the Group’s terms of reference expressly stated that it was to make proposals “going beyond” Protocol No. 14, which we therefore took as our starting point. I can only regret that problems have arisen in the meantime to stop the Protocol from coming into force immediately.

Having identified the increase in the number of disputes, and the excessive caseload this imposed on the Court as the main problem, the Group felt obliged to make proposals which would relieve the Court of numerous cases which should not be allowed to “distract” it from its vital task of guaranteeing human rights. I can tell you that its members all agree that a high-level international court of this kind should not spend much of its time ruling on the admissibility (or, more accurately, inadmissibility) of individual applications, or deciding repetitive cases, of which there are also a great many. On the contrary, it should be able to concentrate on monitoring states’ respect for human rights, formulating human rights principles and standards, and defining a minimum level of protection which all states must provide.

With this end in view, we proposed a series of measures which, taken together, should allow the system to function effectively. These proposals apply, not only to the functioning of the Convention’s judicial control system, but also to decentralised initiatives by member states. In this respect, the report points out that the subsidiarity principle is a basic part of Europe’s human rights protection system. In fact, national remedies, which are the first line of defence for the rule of law and human rights, must be effective – and the public must know about them. National courts bear prime responsibility for protecting human rights within their own legal systems and ensuring respect for the rights guaranteed by the Convention. Some of our proposals are intended to give them a bigger role in this.

The measures proposed in the report are broken down into ten points and grouped under four headings: structure and modification of the judicial machinery, relations between the Court and the States Parties to the Convention, alternative or complementary means of resolving disputes, and the institutional status of the Court and the judges.

The report contains two proposals on the structure and modification of the judicial machinery.

Our proposal on greater flexibility of the procedure for reforming the judicial machinery is designed to enable us to adapt it to new circumstances without having to activate the cumbrous procedure required for reform of the Convention.

Basing ourselves on EU rules and the EU’s experience, we propose reforming the Convention to allow the Committee of Ministers to amend some of its provisions on the judicial system.

For this purpose, the report envisages a standard-setting system based on three levels of rules – the Convention and its Protocols, the Court’s Statute, and texts (e.g. the Rules of Court) which the Court can itself amend. The innovation here is the Group’s proposal for a second level of rules – those embodied in the Statute, which could be amended by unanimous resolution of the Committee of Ministers, approved by the Court. Paragraph 49 of our report indicates provisions in the Convention which could, we feel, be included in the Statute and therefore covered by the simplified amendment procedure, and also provisions which could be kept in the Convention or included in the Statute, but would not be open to “simplified” amendment. Our aim here was to exclude provisions which regulate essential institutional, structural and organisational features of the Convention’s judicial system, i.e. the establishment of the Court, its jurisdiction and the status of its judges, from simplified amendment.

A new judicial filtering mechanism is the report’s most innovative structural proposal. The aim is to relieve the Court of a large number of cases, so that it can focus on its essential role, but also to ensure that judicial decisions attended by all the requisite guarantees will still be taken on applications which it no longer hears. We accordingly propose the setting-up of a Judicial Committee, attached to (but distinct from) the Court, to deal with all applications which raise admissibility issues, or which can – on the basis of the Court’s well-
established case-law – be declared manifestly well or ill-founded. When empowered to rule on the merits, the Committee would have the same powers as the Court in the matter of just satisfaction.

To ensure the reform does not make the system more ponderous, rather than less, we suggest that the Judicial Committee’s decisions should not be open to appeal. In exceptional cases, however, the Court would have the power to review them of its own motion. The decision to do this would lie with the President of the Court and the Chair of the Committee, who – we propose – should be a member of the Court.

The Committee’s members would be judges whose independence would be fully guaranteed, with all the qualifications required for judicial office. We also propose that the Court assess their professional qualifications and language skills before the Parliamentary Assembly elects them. At this point, I would venture to voice an idea which is not in the report, and is not easily formulated: in a sense, the judges on the Committee would normally, but not necessarily, be junior to those of the Court – junior, but not “less of a judge”.

The report proposes that the Committee has fewer members than the Council of Europe has member states, their number being determined and, when necessary, adjusted by the Committee of Ministers.

The Committee’s decisions would normally be taken by three-judge benches. Following Protocol No. 14, however, the Group proposes that manifestly inadmissible cases be heard by a single judge.

Institutionally and administratively, the Committee would come under the Court’s authority. Its chair should be a member of the Court, appointed by the latter for a set period. It should be assisted by the Registry of the Court. The Group considers that a section of the Registry might usefully be assigned to the Committee, but that there should be no rigid demarcation. On the contrary, the Registry’s human resources should be deployed to optimum effect in the service of both bodies.

Serving both, the Registry would have the task, not only of preparing all applications for hearing (as it does at present), but also of referring them to the body it considers best qualified to deal with it. Obviously, neither the Court nor the Committee would be bound by its opinions in this matter. The Committee could refer applications to the Court, not simply on grounds of jurisdiction, but whenever it felt that they raised issues better dealt with by the latter. Similarly, the Court could refer applications to the Committee on grounds of jurisdiction, but could also decide to hear them itself for reasons connected with the proper administration of justice, e.g. for reasons of procedural economy.

Concerning relations between the Court and States Parties to the Convention, I shall only comment on a few points.

First of all, I should like to try and clarify the thinking behind our proposal on advisory opinions, since some of the reactions I have heard make me suspect that it has not always been understood.

For that reason, I should like to insist on the point already made in paragraph 80 of our report, namely that we are not trying to make preliminary rulings in the European Convention’s judicial system, of the kind provided for in EU law.

Our purpose here is different. The proposal is designed to make it possible for national supreme courts to ask the European Court of Human Rights for a ruling on any fundamental question of general interest concerning interpretation of the Convention or its Protocols.

Our feeling was that this would promote dialogue between national supreme courts and the European Court. Essentially, however, this procedure is meant to be exceptional – hence the stringent conditions laid down in paragraph 86 of our report, which also allows the Court to refuse to give an opinion.

Under the same heading (“Concerning relations between the Court and the States Parties to the Convention”), there are two proposals which we regard as particularly important for ensuring the long-term effectiveness of the Convention’s supervisory machinery. They are concerned with the improvement of domestic remedies for redressing violations of the Convention, and changes in the system for the award of just satisfaction in cases
where the Court – or the Judicial Committee – finds that the Convention has been violated.

These two proposals are intended to increase the Strasbourg system's subsidiary character by giving national courts a bigger role in the matter of compensation for damage caused by violations of the Convention – but without diminishing the European Court's function as guarantor of the rights protected by that text. We are convinced that our two proposals would reduce the burden on the European Court, and would also make judicial protection of those rights more effective by improving the procedures for reparation of damage caused by violating them.

The starting point of our first proposal is Recommendation (2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies, which recommends that member states

“I. ascertain, through constant review, in the light of case-law of the Court, that domestic remedies exist for anyone with an arguable complaint of a violation of the Convention, and that these remedies are effective, in that they can result in a decision on the merits of the complaint and adequate redress for any violation found;

II. review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court;

III. pay particular attention, in respect of the afore-mentioned items I and II, to the existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings.”

Essentially, what the Group is proposing is that explicit and detailed provisions be inserted in the Convention, requiring member states to adopt the measures advocated in this recommendation, and stating that the action they take for that purpose must respect certain criteria which can be deduced from the Court’s case-law.

The second proposal is more innovative. It involves amending Article 41 of the Convention and leaving states to determine the amount of compensation in cases where the Court or the Judicial Committee decide that there is a breach of the Convention.

This proposal is intended to relieve the Court (and Judicial Committee) of tasks which national bodies can discharge more effectively, e.g. when a case’s complexity makes it necessary to seek expert opinions.

To ensure that the proposed change does not create additional procedural problems for victims, or intolerably protract administrative and judicial proceedings, the proposal covers a number of points which I shall briefly summarise:

- The Court or Judicial Committee will have power to decide on just satisfaction when it considers this necessary to protect the victim effectively.
- States left to decide on compensation will be required to provide it within a time-limit set by the Court or Judicial Committee.
- Each state will be required to designate a single judicial body with responsibility for determining the amount of compensation.
- Unnecessary formalities or the charging of unreasonable costs or fees must not impede the procedure.
- The amount of compensation must be determined in a manner consistent with the criteria laid down in the Court’s case-law.
- The national decision will be open to challenge before the Court or the Judicial Committee.

Concerning this last possibility, I venture to anticipate a question which will certainly be asked, and which our Group itself considered. Surely allowing applicants to come back to the European Court will invalidate the reform or even make it counter-productive, since it may well complicate and protract the proceedings without substantially reducing the burden on the Court?

We do not think so.

Of course, there is no guarantee that this will not happen in certain cases, although the Court’s being able to waive the rule and determine compensation itself should – depending
on circumstances – allow it to avert this danger.

Be this as it may, we believe that this reform would have very positive long-term effects, since every member state would have its own procedure for determining compensation in cases where the Court found that there had been a violation – and this would usually make it unnecessary to involve the latter again.

The third group of proposals concerns alternative or complementary means of resolving disputes, which may often prove more effective than judicial proceedings, and so relieve the Court of many cases.

The report contains two proposals on this.

The first concerns friendly settlements and mediation, and involves encouraging parties to use these means at national or Council of Europe level whenever the Court or Judicial Committee considers that an admissible case can be resolved in this way. Proceedings in such cases would be suspended for a limited and specified period pending the outcome of mediation.

However, there would be no question of parties being obliged to accept this form of settlement, which would always require their consent.

The purpose of the second proposal is to extend the duties of the Commissioner for Human Rights.

We go further than Protocol No. 14, which allows the Commissioner to present written observations and participate in hearings before the Court, and believe that he should be given the resources he needs to play a more active part in the Convention system.

We have pinpointed a number of functions which he could usefully discharge. Specifically, he could: take action on judgments in which the Court found that there had been serious violations of human rights; assist national mediation structures and promote the setting-up of such bodies to resolve human rights violations at national level; extend his current cooperation with national and regional ombudspersons and national human rights bodies.

Finally, the last part of the report is devoted to the institutional status of the Court and the judges. The measures it proposes are not concerned with the explosive increase in the number of disputes, nor are they designed to reduce the burden on the Court. They are measures which we consider important to ensure, in the long term, the quality and effectiveness of the judicial machinery and the independence of the Court and its judges.

These measures are:

- introduction of a social security scheme for judges, which we consider vital to protecting their independence;
- assessment of the professional qualifications and language skills of candidates for judgeships during the election procedure;
- an eventual reduction in the number of judges, bringing it into line with the Court’s functional requirements and the need to ensure consistency of case-law;
- giving the Court maximum operational autonomy, particularly with regard to presentation and management of its budget, as well as appointment, deployment and promotion of its staff.

Both on the Group’s behalf and on my own, I should like to thank the organisers of this Colloquy and the participants for the attention they have given to our report.

I am well aware that the report is not meant to be “approved”, but to be studied and discussed. The Group’s members hope that it will play a useful part in promoting adoption of the measures needed to ensure the long-term effectiveness of the judicial control machinery established by the European Convention on Human Rights – itself one of Europe’s greatest achievements. ★
Proceedings

Comments on the Wise Persons’ Report

From the perspective of the European Court of Human Rights

Mr Jean-Paul Costa

President of the European Court of Human Rights

Minister, Mr Secretary General of the Council of Europe, Mr Chairman of the Group of Wise Persons, Excellencies, ladies and gentlemen,

I would first like to extend my sincerest thanks to the authorities of the Republic of San Marino for the warmth and quality of their welcome, in line with their legendary reputation for hospitality. For the past four months San Marino has chaired the Committee of Ministers in the person of Minister Fiorenzo Stolfi, and one of the highlights of its Chairmanship will undoubtedly be this colloquy of such importance for the future of the European system for the protection of rights and freedoms.

On 19 January I had the pleasure of meeting you, Minister, at the Court, and on 21 February the Court had the honour of receiving the Captains Regent – the Heads of State of San Marino – and yourself at a formal hearing.

I am glad that, through the considerable delegation which I am leading, comprising the two Vice-Presidents of the Court, two other judges including Ms Antonella Mularoni, the judge elected in respect of San Marino, and its Registrar and Deputy Registrar, the Court can in some way repay this visit.

I should also like to emphasise that the Republic of San Marino has for many years enjoyed a special relationship with our Court; indeed, it was here that, on the initiative of Federico Bigi, the former judge in respect of San Marino, the only plenary session of the Court ever held outside its seat in Strasbourg took place on 3 September 1992.

The priorities defined from the outset by the San Marinese Chairmanship show how San Marino has sought to place human-rights protection at the heart of its activities. As President of the European Court of Human Rights, the keystone of the system, I welcome this.

It was against this background that Mr Gil Carlos Rodríguez Iglesias, Chairman of the Group of Wise Persons, submitted the Group’s report on the long-term effectiveness of the Convention’s control mechanism to the Committee of Ministers of the Council of Europe on 17 January 2007 and presented it again today. This colloquy will provide an opportunity for some particularly well-qualified personalities to comment on what is now usually known as the “Wise Persons’ Report”.

I wish to offer my sincere congratulations to the “Wise Persons” and, in particular, their Chairman, Professor Gil Carlos Rodríguez Iglesias, the eminent former President of the Court of Justice of the European Communities, and the other ten particularly distinguished members of the group, for accomplishing the task entrusted to them by the Committee of Ministers following the decision of the Heads of State and Government of the member states of the Council of Europe at their Third Summit in Warsaw in May 2005.

The Wise Persons, working at an intensive pace, have managed in the space of a year to
produce a most interesting report containing numerous proposals. One may agree or disagree with individual proposals, but they form a coherent and stimulating whole, which to my mind fulfils the task the Wise Persons were assigned with the aim of assisting the Court.

On taking office on 19 January I announced that a process of reflection on the Wise Persons’ Report would be initiated within the Court and the Registry. The process is now almost complete.

Accordingly, what I am going to say today will give you the Court’s first impressions on the report. In April, and at all events in time for the ministerial session on 10 and 11 May, the Court will express its official opinion on the report and the proposals set out in it.

The report is to be seen as a continuation of the development of the protection machinery of the European Convention on Human Rights through a series of reforms over the past ten years.

I feel that it is important, by way of introduction, to put these various reforms into perspective.

Putting the various reforms into perspective

As you know, the main reform of the supervisory machinery in the European Convention on Human Rights resulted from Protocol No. 11, which, in particular, created the single Court as is in operation today.

However, this overall reform of the system very soon proved insufficient on account of the substantial changes that took place within the Council of Europe between the start of the drafting process and the implementation of the reform on 1 November 1998.

The accession of the states of eastern Europe led to a considerable increase in the number of applications lodged. It should be noted that, apart from Turkey, the four countries generating the most applications are east European states that joined the Council of Europe in the 1990s, first among them in terms of number of applications being, by some distance, the Russian Federation.

The Court has been far from inactive. Besides the institutional reforms which I shall return to in a moment, it has considerably increased its efficiency and productivity, not least as a result of the reorganisation of the Registry, even before Lord Woolf, another eminent member of the Group of Wise Persons, submitted his report on the Court’s working methods in late 2005. Indeed, the Court now works on the basis of the conclusions set out in the Woolf report.

Shortly after the entry into force of Protocol No. 11 and the beginnings of the new Court, it became apparent to everyone that a further reform was urgently needed in order to preserve and strengthen the long-term effectiveness of the control system, owing to the continuous increase in the Court’s workload. This was what my predecessor, Luzius Wildhaber, referred to, and advocated, as a “reform of the reform”.

Following the Rome ministerial conference in November 2000 a new process was accordingly initiated. Several years of negotiations between the States Parties and their representatives were required to draw up Protocol No. 14, which was opened for signature on 13 May 2004. Protocol No. 14 is, in my view, an essential tool for the Court to be able to cope effectively with the continuous accumulation of new applications. It would enable the Court to increase its output of judgments and decisions by approximately 25% with no increase in its budget or resources. By converse implication, however, it is quite clear that if this instrument does not come into force quickly, the Court will either be unable in practice to deliver a greater number of judicial decisions, thereby increasing the backlog and the time taken to deal with applications, or it will have to ask the Council of Europe, and hence the member states, for increased budgetary and human resources without encroaching on those of the rest of the Organisation.

Realising the urgent need for this new reform, the Committee of Ministers recommended ratification of Protocol No. 14 within two years – a time span that was, if not rapid, at least reasonable – that is, by May 2006.

Admittedly, 2 years and 10 months after the Protocol was opened for signature, it has
been signed by all member states without exception, but unfortunately it has still not been ratified by the Russian Federation and has thus been prevented from coming into force. This state of affairs is both regrettable and barely comprehensible, as the Russian Federation played an active role in drafting the protocol, which indeed it has signed, and its President tabled a bill in Parliament authorising ratification, but the bill has yet to be passed. A vote was held in the State Duma on 20 December 2006 and was marked in particular by a large number of abstentions; this would appear to foster hopes that the undecided can be persuaded and hesitations dispelled through explanations.

The Court, confident that Protocol No. 14 would come into force quickly, has done its utmost to adapt its working methods and amend the Rules of Court. Consequently, once the Protocol has come into force, very little effort will be needed at internal level for it to be applied immediately. It therefore seems highly desirable that the last remaining ratification should take place as soon as possible. With the help of my colleagues from the Court and the Registry, I am striving to persuade our Russian friends of the need for ratification, but I know I can also count on all the component parts of the Council of Europe: the Committee of Ministers, the Secretary General, the Parliamentary Assembly, not forgetting the member states themselves.

The protocol’s entry into force is certainly very important for us and for the stability of the system, because it provides the Court with essential tools for its survival in the current phase of reform, which, if we are realistic, is likely to take many years. I strongly believe that this is in the interests of the Russian Federation itself and its citizens. Despite difficulties, which, indeed, many other states have experienced in the past, the rule of law is making progress there, as is shown in particular by the increased sensitivity of the Russian judicial system to the application and implementation of the Convention. I formally urge the Russian Federation to ratify Protocol No. 14 and, for reasons which I do not wish to examine in detail here, but which are very important, to do so before 1 July this year. I do not think I am being too optimistic in hoping that my call will be heard.

With regard to the Wise Persons’ Report itself, we must also bear in mind that the terms of reference assigned to the Wise Persons in Warsaw in May 2005 instructed them to consider the long-term effectiveness of the Convention’s control mechanism, including the initial effects of Protocol No. 14, and indeed the Wise Persons worked on the principle that Protocol No. 14 was in a sense “a starting point” (paragraph 33 of the Group’s report).

It seems essential to me, before going any further with the discussion of the report itself, to recapitulate the general structure of the reform process. The Wise Persons’ Report presupposes Protocol No. 14, and cannot, unless we are to betray the intention expressed unanimously by the governments in Warsaw, act as a substitute for it or a kind of “Plan B”. The recent history of the construction of Europe, moreover, has shown us what “Plan Bs” entail …

Obviously, and this is the very purpose of this colloquy, there is nothing to stop us from examining the Wise Persons’ Report straight away, but the opinion we shall be giving on the report is necessarily contingent on the entry into force of Protocol No. 14, if you will excuse me for the insistence with which I am stressing this requirement.

As experience shows, reform of the Convention is a quasi-permanent and relatively slow process. The flow of applications to Strasbourg is increasing continuously and there is a risk that this increase will outstrip the pace of the reforms. Just looking at 2006, a comparison with 2005 reveals an increase of 11% in the total number of new applications, which would mean the figure doubling in about six years. The Wise Persons themselves speak of an explosion in the number of cases. It should not be forgotten that over the past nine years the Registry has grown from 250 to 520 staff and, thanks to the unstinting efforts of the judges and members of the Registry, the Court was able to decide almost 30 000 cases in 2006. This is a far cry from the 3 657 decisions delivered in 1998, the year in which the new Court came into being. Needless to say, the ratio between the number of decisions and the
number of staff (I am not even talking about the number of judges, which has remained the same; I wish to stress this point in reply to the Secretary General’s comments earlier) has increased considerably and has almost quadrupled in nine years. The Court and its Registry have therefore played a large part in the reform without any changes to the basic legal instruments, but we might ask ourselves whether this effort to increase output – although this term is scarcely appropriate to the performance of a judicial activity – has not reached its physical limits, or at any rate is not approaching them. On this subject, another figure – the 90 000 pending cases – cannot be anything other than a cause for concern. It is worth noting that if, by some impossible miracle – which, above all, would be undesirable since it would mean the demise of human-rights protection in Europe – no further applications were lodged, it would take at least three years to deal with the cases that are already pending. This illustration by way of an absurd example shows the inevitable nature of the reform process. It is therefore time to start examining the Wise Persons’ Report, which, as regards the medium and long term, provides an excellent basis for reflection.

This brings me to the second and last part of my contribution.

The Court and the Wise Persons’ Report

Let us start with the Court’s position vis-à-vis the Wise Persons’ Report as a whole.

It is fair to say, I think, without the risk of being contradicted, that this report cannot be regarded as revolutionary. But are the Wise Persons to be blamed for that? I do not think so, bearing in mind both the limitations of the exercise they were asked to conduct and the various constraints in institutional terms and in terms of resources.

The report presupposes that the two cornerstones of the European system are to be maintained, namely judicial supervision and the right of individual application. These are clearly what make the mechanism so original and lend it exceptional value on a global scale. The right of individual application, in particular, became universally binding only in 1998; the eventual acceptance of this principle by all states was a gradual and remarkable achievement. And the aim of the current reforms – in the first place, those under Protocol No. 14 but also, in the longer term, those recommended by the Wise Persons – is precisely to preserve the richness of the system while ensuring that it does not collapse under the weight of the thousands of applications lodged each year. Or, in other words, the remarkable judicial mechanism for protecting everyone’s rights under the Convention is jeopardised only by the risk of self-destruction, just as, in history, runaway inflation has ruined certain monetary systems. It goes without saying that everything must be done to prevent the system from collapsing or self-destructing. I am convinced that this is possible, and would point out that many of these applications have, it must be said, no prospect of success, for various reasons inherent in the limitations of the Convention itself; hence the sensible idea that a filtering mechanism is needed. Let us now look, if you will allow me, at the various proposals put forward by the Wise Persons.

The Court’s stance to each proposal of the report

The proposals can be divided into three categories: those which the Court fully endorses; those which the Court endorses while considering that they require a more thorough examination both within the Court and within the States Parties; and lastly, those in respect of which the Court is unfavourable or at least has reservations.

The proposals which the Court accepts without any difficulty:

The Wise Persons were keen to simplify the procedure for amending the Convention. Drawing their inspiration from a method used within the European Communities – and you will allow me to imagine that President Rodriguez Iglesias, with his intimate knowledge of the Community system, is not unfamil-
iar with this idea – they proposed that such amendments should be possible by means of a unanimous decision of the Committee of Ministers.

At present, for the slightest amendment to the Convention it is necessary to wait until all the States Parties have signed and ratified the amended text. The situation in which we now find ourselves with regard to Protocol No. 14 shows how excessively cumbersome the reform process is.

Making it more flexible is therefore a necessity because things are constantly changing and the machinery has to adapt.

In proposing such a method, the Wise Persons advisedly suggested a number of safeguards: firstly, all amendments would at least have to be submitted to the Court for approval; secondly, the provisions that could be amended under the simplified procedure would be exhaustively listed, as the report indicates, and would obviously not include the most fundamental provisions of the Convention, which would continue to be governed by the existing procedure.

The Wise Persons referred to this set of rules, which could be amended with greater flexibility, as the “Statute of the Court”, and this is a reform which the experts of the Steering Committee on Human Rights (CDDH) could begin looking into straight away. The proposal for a Statute of the Court is realistic and practical; it is a good illustration of the fact that the history of the Convention is one of continuous adaptation to changing circumstances. Future generations of diplomats will thank the Wise Persons for making such essential changes easier to effect.

The Court also unreservedly endorses the part of the report on enhancing the authority of its case-law. The Court already makes a considerable effort to translate and publish the most important judgments. It is essential, however, that this work should be furthered within the member states and that judgments should be distributed and translated, including into languages other than English or French. This is the responsibility of the states concerned and is a prerequisite for ensuring that the subsidiarity principle becomes a reality; if the domestic courts are to be able to apply our case-law, it needs to be accessible to them. The authority of the Court’s judgments, however, as the report also noted, does not derive solely from their distribution and hence their linguistic accessibility; it entails engaging in dialogue, in particular with the national authorities and courts and with civil society.

Lastly, the Court has noted with great satisfaction the Wise Persons’ proposals concerning the institutional dimension of the control mechanism. The Wise Persons clearly wished to strengthen the status of judges. The vulnerable position in which a number of my colleagues have now been placed as a result of the non-ratification of Protocol No. 14 shows the extent to which their situation must be improved. In particular, the complete lack of social security and a pension scheme is unique in this field and is unworthy of an institution – the Council of Europe – within which the European Social Charter was drawn up. The fate in store for my colleagues is profoundly unjust and, above all, strikes at the very independence of the Court; above and beyond individual circumstances, this is unacceptable. Our Court cannot perform its unique role if it is subject to pressure, or even manipulation, and I say this in all earnestness.

I would add that the Court fully endorses the Wise Persons’ proposal to give it greater operational autonomy as regards both the presentation and management of its budget and the appointment, deployment and promotion of its staff. This does not in any way mean a separate budget from the Council of Europe, since autonomy does not mean independence. As regards budgetary matters, we should not delude ourselves: the implementation of a number of the proposals in the Wise Persons’ Report will have financial implications. I am duty bound to draw the member states’ attention very clearly to this point. It should not be overlooked that the Wise Persons have called on them to make the necessary resources available to the Court. An effective reform cannot take place without any change in the budget, and this is particularly so if – although I refuse to countenance the thought – Protocol No. 14 should prove abortive.

With regard to pilot judgments, the Court is satisfied that the Wise Persons’ Report
Future developments of the ECtHR in the light of the Wise Persons’ Report

encourages it to make use of this procedure, which is intended to identify structural problems in a particular country. We shall continue to look into the possibilities offered by this procedure and the context in which it should be implemented.

I would now like to go on to the second category of proposals set out in the report, those which the Court does not disagree with in principle but which it considers require thorough examination both by the Court itself and by the States Parties.

First of all, and this is one of the key proposals in the report, there is the idea of setting up a new judicial filtering mechanism. This proposal, which is consistent with the Court’s view and has been advocated by us since 2003, requires extremely careful consideration as to how to put it into practice. The Court is in the best position, on the basis of its experience, to indicate how such a mechanism could be put in place.

Secondly, there is the extremely interesting idea of setting up a mechanism to improve domestic remedies. This is an area for states to look at, and our Court, being very attached to the subsidiarity principle and to dispute prevention, can only welcome the prospect of a large number of minor cases, concerning in particular (but not exclusively) the length of proceedings, being settled at national level. In this connection, the drafters of the Convention would surely be surprised to see that recourse to Strasbourg has often become an opportunity for individuals and lawyers to obtain financial compensation, sometimes without any close link to the inner or central core of human rights. Some observers even scoff that the Strasbourg judges have become accountants.

In any event, although the proposal in the report deserves to be examined in greater detail, the Court is prepared to take part in discussions on the subject.

The proposals on friendly settlements and mediation are also among those which the Court endorses, subject to a thorough examination by itself or by the States Parties. This is also the case as regards the Council of Europe’s Commissioner for Human Rights, and in this connection we will have the great benefit tomorrow of hearing the words of the Commissioner himself, Mr Thomas Hammarberg.

It is sometimes said that the chief merit of a report is the criticism directed at it, and I have to say that on some of the Wise Persons’ proposals, the Court’s position is somewhat reserved, not to say, as regards certain points, unfavourable. One example is that of advisory opinions. We have a clear feeling that in our Court’s current situation, assigning it this additional task would not be realistic. Furthermore, such a mechanism is liable to lead to legal difficulties at a later stage, both in terms of exhaustion of domestic remedies and from the point of view of the Court’s authority. However, the idea, from an intellectual standpoint, is a very attractive one in my opinion and I am sensitive to the explanations President Rodríguez Iglesias has just given us. Is it not part of the essential dialogue between judges, at national and European level? Maybe one day it will be possible to realise this proposal, either through an amendment of the existing Article 47 of the Convention, by which the Committee of Ministers may request the Court to give an opinion, or through a more innovative method, or through a combination of the two.

Referring decisions on just satisfaction to the state concerned is likewise a proposal which, on the face of it, is far from gaining the Court’s approval. We are concerned that this measure, which at first sight might seem capable of lightening the Court’s workload, would ultimately result in applicants being disappointed and coming back to the Court to complain about the insufficient amounts awarded at domestic level. Just satisfaction would risk leading to unjustness and dissatisfaction, but this remains to be seen.

Lastly, the Court does not consider that the proposal to reduce the number of judges is advisable.

The Court’s legitimacy derives precisely from the fact that all legal systems are represented within it. The judgments of a court that did not include a national judge among its members would quickly be contested for lack of knowledge of the domestic system. Moreover, the presence of judges from certain countries only would create inequalities between
states, whereas international law is founded on the sovereign equality of states.

San Marino is a particularly appropriate location for me to reiterate what I said on 21 February when receiving the Captains Regent: “Your state may be one of the smallest in Europe in terms of size, but before the European Court of Human Rights all states are naturally equal, in accordance with a well-established rule of international law.” It is to be feared that a reduction in the number of judges might seriously undermine this principle of equality. I also have difficulty imagining that, when the “one judge per state” principle has applied since 1950, some countries would now accept no longer having a judge elected in respect of their state.

This concludes my broad outline of the initial reactions which the Wise Persons’ Report has elicited on the Court’s part; I have tried to present them as faithfully as possible. However, the Court’s opinion will of course also take into account today’s and tomorrow’s discussions.

Ladies and gentlemen,

This San Marino colloquy is of historic importance. The European Court of Human Rights, whose first judgment was delivered in late 1960, has in half a century seen a remarkable development of its authority and influence, which are unique in the world, but also a number of crises, mainly growth crises. It has overcome them all, just as, thanks to the trust placed in it by states and citizens, it has been victorious in resisting the attacks which have sometimes been directed at it, and which I consider to be unfair, in particular the serious and unfounded accusation that it is politically motivated.

The growth crisis has perhaps never been so severe; and the criticism levelled at our Court has perhaps never been so strong, even though, I repeat, I consider it unjustified.

The Wise Persons’ Report, which I again welcome, can and must provide the system with the means to move into a new phase. There are three conditions in my opinion: the 46th and final ratification of Protocol No. 14 must take place without delay; the most useful and easily workable proposals of the Group of Wise Persons must be swiftly examined by the States Parties and introduced; and we must start thinking immediately, beyond the Protocol and the report, about the long term. If we wish to maintain and even develop the protection of rights and freedoms in Europe, we and you must all transform into futurologists. The European Court of Human Rights has already proved itself to be a great judicial body. Only fresh impetus and a bold vision of Europe and justice will make the 21st century Court the great institution it deserves to become, serving human rights and thus human beings.

Thank you all for your attention.
I am honoured to be invited here, to present my views in a personal capacity, without prejudice to the position the Parliamentary Assembly or its Committee on Legal Affairs and Human Rights might adopt on the proposals of the Wise Persons.

The diagnosis

I cannot but agree with the diagnosis presented by the Wise Persons in paragraph 37 of their report: “that there is a fundamental conflict between the size of the population who have access to the Court with the right to lodge an individual application and the Court’s responsibility as the final arbiter in human rights matters for so many different states.”

Maybe the term “diagnosis”, which makes us think of a patient, a sick person, is not quite fitting: whilst the Court is in a certain way becoming a victim of its own success, we must not lose sight of the fact that we are talking about a success story. The very fact that so many of our citizens find it worth their while, despite all the shortcomings of the system, to make use of the Court to ensure the respect of their rights under the Convention, is a resounding success. It is simply our responsibility now to provide the right conditions to enable the Court to continue this success story. Clearly, the Wise Persons have made an important contribution to this endeavour.

The Court’s double role

I agree with the basic analysis of the Group of Wise Persons that the Court has a double role – a “constitutional” mission of “laying down common principles relating to human rights and to determine the minimum level of protection which states must observe”, and a role of individual supervision and adjudication.

In my view, the Court’s two functions are inextricably joined together, very much like the functions of those of many national constitutional courts which, in addition to their jurisdiction over disputes between organs of the state on the interpretation of constitutional provisions determining their powers, also have the function of deciding on “constitutional complaints” of individual citizens, who claim that their fundamental rights as guaranteed in the constitution have been violated by decisions of the executive, or even by ordinary civil or administrative courts that have rejected their claims. These constitutional courts have likewise been confronted with the need to develop strategies to avoid becoming a “fourth instance” and to deal effectively with huge numbers of obviously inadmissible or substantively unjustified applications – but to my knowledge, none of them have abandoned the

Ms Marie-Louise Bemelmans-Videc

Member of the Parliamentary Assembly
adjudication of constitutional complaints of individual citizens to “lesser” judges. For the highest judges of the land to continue facing the flood of ordinary citizens’ grievances is seen by them not so much as a burden, but as a useful and necessary link with reality, a direct link with the individual.

I am convinced that this link with the grievances of a large number of ordinary individuals from all forty-six member states must be preserved. The Court is unique because of its direct “link” to the individual, who under the Convention is a fully fledged party before this international judicial body, reminding governments of their promises and pledges. This direct link also creates the dynamics in the Court’s judgments where social change is reflected in the cases brought before the Court.

The Court has a pioneering role in trying to find a consensus on the values incorporated in the Convention and its protocols, which have often, with the passing of time, acquired a new meaning. The Court is a “living instrument” which must keep pace with social change and translate new orientations into specific, binding decisions.

Which brings me to a role that I find crucial in the Court’s functioning and which is explicitly recognised in the Wise Persons’ Report: the role the Court plays in the cultural dialogue, that is the dialogue on values, which represent “the common good”, the bonum commune of a conglomerate of nations. As Mr Luzius Wildhaber, Mr Jean-Paul Costa’s distinguished predecessor as President of the Court, has explained in an interview with a Dutch journalist: “Fundamental freedoms and human rights are guaranteed in very wide formulas which are utopian, programmatic and ideal, and which require someone to give them a concrete shape. Judges have the ‘final say’ in this.”

Yes, the Court has the “final say”, but this “say” will be rooted in a (growing) consensus, nourished and legitimised through dialogue.

The need for a dialogue among cultures on the rights of all people and of the human being in its fullness seems to have never been more urgent. This dialogue can only be successful if countries are not only involved but also feel involved, and their cultures have an attitude that allows for self-criticism.

The same direct link to the citizen is also a basic feature of the Parliamentary Assembly. In the words of the Belgian Prime Minister Guy Verhofstadt: “The Council of Europe is particularly well equipped to listen to the voices of citizens. Members who sit in the Assembly have a double mandate to represent citizens at their national parliaments as well as the Council of Europe. They are therefore in an ideal position to represent the views of European citizens.” Intercultural and indeed also interreligious dialogue is one of the priorities set by the President of the Parliamentary Assembly, René van der Linden, in the following terms: “The members of our Assembly directly represent 800 million citizens, 800 million people with different cultures, different nationalities, a wide range of political views and religious beliefs, but who are united by common values. Values that can strengthen social cohesion in our societies and further peace and stability on our continent.”

For me as a member of the Parliamentary Assembly, four comments on the Wise Persons’ Report flow directly from this analysis of the Court as a privileged locus of dialogue:

- Firstly, I welcome the different proposals aimed at improving dialogue between the European Court of Human Rights and the national courts, e.g., placing more emphasis on human rights training for national judges, maintaining and expanding working relations between the Strasbourg Court and the highest national courts. Here, as we have heard from Ms Ingrid Siess-Scherz this morning, the full implementation of the 2004 “reform package” accompanying Protocol No. 14, at the national level, will make a significant contribution to alleviating the Court’s case-law. As a national parliamentarian, I am aware of my and my colleagues’ responsibilities in this respect.

In this connection, it is indeed worth reflecting upon the idea of creating the possibility for national courts to request the European Court of Human Rights to give advisory opinions on questions of the interpretation of the Convention. While I
agree with the Wise Persons that requests for such opinions should be optional, and that the Court should have the discretion to refuse to answer a request for an opinion, the counter-argument concerning this idea still merits further reflection. For, as the Wise Persons themselves recognised, the proliferation of requests for opinions may have adverse effects on the Court’s workload and resources.

Secondly, I welcome the Wise Person’s support for the improvement of dialogue by the extension of the role of the Council of Europe’s Commissioner of Human Rights and the network of national ombudspersons and national human rights institutions, referred to by Mr Thomas Hammarberg as “National Human Rights Structures”. These alternative or complementary means of resolving disputes could indeed help reduce the Court’s workload by addressing systemic problems at national level before they trigger a large number of applications to the Court. I very much look forward to tomorrow’s contribution of Mr Thomas Hammarberg on this subject.

Thirdly, I welcome very much the Wise Persons’ support for the right of individual application and its rejection of various proposals for the establishment of filter mechanisms at the national level, or of a US-style procedure of “certiorari”. The Assembly has expressed its attachment to the right of individual application so often and so clearly that I cannot afford to go into any more detail here without creating the impression of weakening this commitment in any way.

And fourthly, and for the same reasons, I feel a bit uncomfortable with the Wise Persons’ statement (paragraph 35) that the Court should be “relieved” of manifestly inadmissible applications or repetitive cases which “distract” it from its essential role. Adjudicating individuals’ applications complaining about violations of their Convention rights by States Parties is the Court’s essential role, which creates the unique link between the Court and individuals whose importance I tried to explain before.

I therefore think that the proposal of the creation of a “judicial committee” composed of somewhat “lesser” judges – although the Wise Persons did not say so, the proposed modalities do imply a clear hierarchy – to deal with clearly inadmissible or repetitive cases needs further serious reflection. Can we still justify the unusually high number of judges, by comparison with other international courts, if they are to deal exclusively with the Court’s “constitutional” function? Would the authority of decisions in “repetitive” cases not suffer from being decided by the lower tier of a two-tier system of judges? We are, after all, talking about cases in which member states are found to violate Convention rights of large numbers of individuals, in such vital – often in the literal sense of the term – cases as inhuman conditions of detention, overtly long or otherwise unjustified pre-trial detention (often also in inhuman and degrading conditions), etc. Repetitive cases, rather than being a “distraction”, may often be indicative of a systemic problem within a state that needs to be addressed urgently.

No doubt it is necessary, and quite feasible, to deal with such cases in an efficient manner – very much in the interest of the victims of violations themselves. The rule of “justice delayed is justice denied” applies also at the European level. The Strasbourg Court cannot, without losing its credibility, take five or six years to decide that domestic legal proceedings lasting the same amount of time are too long and in violation of Article 6 of the Convention!

While I tend to agree that the “pilot judgment procedure” is a significant development, I should like to express a note of caution. The definition and criteria for this procedure have yet to be defined, and the weakness of its legal basis has already been pointed out by Judge Zagrebelsky. In two partly dissenting opinions, Judge Zagrebelsky recalled that this procedure, although approved by the Committee of Ministers, is not yet reflected in the text of the Convention. He considers that the Grand Chamber is the proper forum for identifying the existence of systemic problems and drawing the neces-
sary consequences therefrom.\footnote{108} Please also allow me to refer, in this connection, to the report on the “Implementation of judgments of the European Court of Human Rights” of my Dutch parliamentary colleague, Mr Jurgens, in which he pointed out that this procedure deals with complex systemic problems on the basis of a single case without necessarily revealing possible other related aspects in similar but not identical cases. Hence the danger that “pilot judgments” may not allow for a comprehensive assessment of a systemic problem. And – in the meantime – all other related cases may be “frozen”, further delaying their determination by the Strasbourg Court.\footnote{109}

Pilot judgments would in most instances concern principally, but not necessarily, the same member state. This leads us to the question of whether Grand Chamber judgments should have some form of “precedent value”, not to say an erga omnes effect. This issue concerns a complex interplay between Articles 46 §§2, 1, 13 and 19 of the Convention. The Group of Wise Persons refrained from making any proposals concerning such “judgments of principle” (see paragraphs 66 to 69 of the Report). Yet this aspect of the Court’s authoritative interpretation of the Convention and its protocols deserves deeper reflection, especially when one looks at such “judgments of principle” as the Marckx case\footnote{107} and the Court’s obiter dictum in the case of Ireland v. the United Kingdom.\footnote{111}

Also, before rushing to another stage of the process of the Court’s reform, after Protocol Nos. 11 and 14, let us allow the Court to fully implement reforms that have already been decided upon.

Protocol No. 14 – whose entry into force is now contingent on ratification by Russia – and with respect to which our Committee chair Dick Marty and his colleague of the Monitoring Committee, Eduard Lintner, will in early April be travelling to Moscow to discuss this subject with their colleagues of the Russian State Duma – holds a number of possibilities to streamline and simplify the Court’s procedures. The single judge empowered to dispose of evidently inadmissible cases as well as the committee of three judges for handling manifestly well-founded cases have the potential of ensuring speedier resolution of such cases and increasing the Court’s capacity. Before acting upon any further proposals that may alter the very essence of the unified Court, the effects of these reforms, and of the additional admissibility criterion laid down in Protocol No. 14, ought to be monitored for some time. They should be assessed in a transparent way, associating the Assembly as well as non-governmental institutions representing the interests of all stakeholders, including applicants and potential applicants.

107. In Hutten-Czapska v. Poland (judgment of 19 June 2006), he stated on the one hand that the arguments set out by the Committee of Ministers in Resolution Res (2004) 3 and Recommendation Rec (2004) 6 of 12 May 2004, which are addressed to governments, “are undoubtedly of much importance and must be taken into account by the European Court of Human Rights with a view to ensuring that the reasons given in its judgments are as clear as possible”. On the other hand, he disputed that the “fact that the proposals to which the European Court of Human Rights refers in paragraph 233 of the judgment were not included in the recent Protocol No. 14 amending the European Convention on Human Rights” cannot be overlooked.


110. Judgment of 13 June 1979. Interestingly enough, on 18 January 1980 the Dutch Supreme Court (Hoge Raad), basing itself on the Strasbourg Court’s judgment, decided to follow the Strasbourg Court’s reasoning concerning the negative legal consequences of maintaining the legal, discriminatory, distinction between “legitimate” and natural children.

111. “[T]he Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the states of the engagements undertaken by them as Contracting Parties (Article 19)” (judgment of 18 January 1978, §154). See also, in this connection, e.g., Section 2 (1) of the United Kingdom Human Rights Act, 1998, which obliges courts to “take into account” the Strasbourg Court’s case-law, and the German Federal Constitutional Court’s judgment, of 14 October 2004, in the Görgülü case, http://www.bundesverfassungsgericht.de/.
The Court’s role and the principle of subsidiarity

As you know, the political party I belong to strongly believes in the principle of subsidiarity – allowing the lower level of society, closer to the individual, to deal with problems before the next higher level takes over – the family before the local community, the local community before the region, the region before the country, the country before Europe. This principle should also apply to the resolution of legal issues. But it must be tempered by the need to protect the equality of treatment and the application of uniform standards – or at least common minimum standards – of human rights protection for all 800 million individuals served by the European Court.

I therefore agree with the Wise Persons that improving domestic remedies for redressing violations of the Convention is essential, especially as concerns the length of proceedings. In this respect, our Committee has recently broken new ground by including, in the list of commitments to be made by Montenegró in joining the Council of Europe, the establishment of a new remedy for individuals who consider themselves victims of excessively lengthy court proceedings.

But I am not so sure whether we should take subsidiarity so far as to delegate to national courts the determination of “just satisfaction” in the case of a Convention violation determined by the Strasbourg Court. This threatens to undermine the equal treatment of victims of human rights violations, and places yet another potentially time-consuming procedure in the path of applicants before they can finally obtain satisfaction. From the point of view of the applicant, the procedure is already too long and cumbersome, and as a parliamentarian, I have certain reservations to the idea of adding another layer of procedure (not to mention possible “appeals” to Strasbourg if the amount of “just satisfaction” is considered insufficient).

The Assembly’s role

As I made clear in the beginning, I have made these brief comments in my personal capacity. In due course, I will present a more elaborate version of my views to the Committee on Legal Affairs and Human Rights, which will adopt a position that will also need to be discussed by the Assembly as a whole. In due course, the Committee of Ministers will be informed of the position of the Assembly, which takes the Court and its future development much too seriously to come up with quick answers or proposals that have not been thoroughly considered.

The Assembly has consistently shown its support for the Court, as demonstrated by the recent reports of my compatriot Erik Jurgens on the Implementation of the Court’s judgments and of my EPP colleague Christos Pourgourides on member States adequately to cooperate with the Court. As our Committee stressed in adopting Mr Pourgourides’ report, this duty includes protecting applicants and their lawyers from undue pressure, and the need to fully co-operate with the Court in establishing the facts of the cases before it.

Please permit me to draw your attention to the fact that Mr Pourgourides’ report touches upon Article 38 of the Convention. In this connection, it would be interesting to ponder over how the Court is able to reconcile the need to clearly establish the facts where they are disputed and at the same time limit the need for in loco investigations? The Court’s fact-finding procedures consume an enormous amount of time and energy of the judges and registry officials. That said, the Court must nevertheless continue to address human rights violations in “trouble spots” in a meaningful way, even – and I would even say: especially! – when underlying facts are disputed.

You can count on the Assembly, and in particular its Legal Affairs and Human Rights Committee, to help maintain the authority of the Court. The reports by Messrs Jurgens and Pourgourides bear witness to this. But this authority of the Strasbourg Court also depends on the irreproachable moral and professional qualities of the judges elected by the Assembly.

112. See Parliamentary Assembly Doc. 11183 of 9 February 2007
on the advice of the Sub-Committee that I have the honour of chairing.

This prompts me to devote my final comments to this issue. I am well-placed to assure you, first of all, that the Assembly already applies to the best of its ability an “election procedure” summed-up so ably by the Wise Persons, including the need for states to propose candidates of the highest professional and moral standing, with appropriate linguistic abilities.

The Wise Persons refer to the selection process at the European level, recommending the involvement of “prominent personalities” to advise the Assembly on the professional qualities of candidates, a proposal which merits consideration. In my own experience, it is especially important to ensure the best possible and above all transparent selection procedures at national level.

A report on this subject is presently under preparation. In this connection, it will be interesting to find out how many states already now operate open and transparent procedures like those in the United Kingdom and (if I may) in the Netherlands. These procedures involve a public announcement of the vacancy followed by a transparent pre-selection procedure by a panel of recognised experts, making it very hard for politicians to deviate from objective criteria in order to place a less qualified “political friend” on the list. Such a transparent and “objective” procedure at national level supports the work in finalising the selection in my Sub-Committee and in the Assembly.

Please permit me a last, but important remark. At its forthcoming part-session in April the Assembly will devote a day to the subject of the “situation of human rights and democracy in Europe” which will no doubt underline the significant work of all the Organisation’s core human rights institutions and monitoring bodies. Here, one proposal that is likely to emerge from discussions necessitates, in my view, renewed priority treatment, namely accession of the European Union/European Community to the European Convention of Human Rights. The implementation of any proposals to safeguard the remarkable acquis of the Strasbourg Court must be seen in a wider context. Hence the need, first and foremost, to ensure that there are no unnecessary competing and potentially conflicting systems of human rights protection in Europe.

I thank you for your attention. ★
THE NEW JUDICIAL FILTERING MECHANISM: INTRODUCTORY COMMENTS

Mr Martin Eaton
Former Chairperson of the Steering Committee for Human Rights (CDDH)

Opening remarks

I had the honour to chair the Reflection Group (GDR) 2001-2002 and the Steering Committee for Human Rights CDDH 2003-2004, and was fully involved throughout the reform process of 2000-2004 which negotiated Protocol No. 14 and the associated Recommendations and Declaration.

It is a privilege to be asked to comment on the work of the Wise Persons, which aims to look beyond the Protocol to further reforms which may be needed. There is great merit in this kind of “thinking outside the box” by an eminent group of relative outsiders. It means ideas can be floated and advocated which either do not occur to those of us insiders who have spent a long time living with the problems of overload and backlog at the Court, or which get stifled at too early a stage. In the latter category I think in particular of the idea of a second level of rules – a statute of the court containing provisions which could be amended by a simpler and quicker process, a good idea which to my mind was discarded too quickly in the 2000-2004 process.

Protocol No. 14 has of course not yet entered into force because the ratification of one state is still outstanding. I very much hope that the remaining issues surrounding that ratification will soon be resolved so that the protocol, which is the result of so much thought and effort, can enter into force. This is not just my view – as the Chair of CDDH when it was negotiated and adopted I suppose I might be expected to have some fond paternal feelings towards the protocol. We have heard this morning numerous appeals for that entry into force, none more eloquent and forceful than that of the President of the Court, Mr Costa.

In this current situation, before its entry into force, however, there is something a little unreal in looking at more far-reaching reforms, without the benefit of any practical experience of the difference the protocol will make. The Report before us has to rely on predictions of that effect, which may or may not be accurate. That is not to say that anybody connected with the negotiation thought then or thinks now that Protocol No. 14 was the last word or would solve all the problems. But I do think it fair to say that all these thoughtful and valuable proposals, and our discussions of them, will need to be revisited in the light of the experience of the protocol before any decisions can properly be taken on the way forward. We have to proceed step by step and build on what has gone before, just as Protocol No. 14 itself built on Protocol No. 11.

Proposals for new filtering mechanisms during the negotiations for Protocol No. 14

Several proposals for new filtering mechanisms were made during the 2000-2004 reform process. The first was by the Evaluation Group in its report of 2001. It proposed a separate
division within the Court, composed not of elected judges but of “appropriately appointed independent and impartial persons invested with judicial status”. CDDH rejected this for two main reasons:

- first, admissibility decisions should be by elected judges
- secondly, there should not be differing categories of judges within the same court.

Later, the Court argued for a reinforcement of the filtering mechanism, preferably through the creation of a separate filtering body. The CDDH responded with the proposal for single judges assisted by rapporteurs. The Court acknowledged this as an improvement but continued to look for a separate filtering mechanism composed of new “judicial actors”, with limited decision-making power not extending beyond clearly inadmissible cases and uncontested repetitive cases. This lower level of judges would take over the largely routine mass of judicial work flooding into the Court. Again the CDDH was not persuaded, considering, among other reasons, that this would represent a return to a two-tier system, that it could lead to a large filtering body and a smaller Court, that the Court’s overload problems might simply be transferred to the filtering mechanism, and that the costs would be too high.

The Wise Persons’ proposals

The proposal, in very brief summary, is for a Judicial Committee, a judicial filtering body which would be attached to, but separate from, the Court, in order to guarantee, on the one hand, that individual applications result in a judicial decision and, on the other that the Court can be relieved of a large number of cases and focus on its essential role. The members would be elected judges, fewer in number than the member states and subject to a system of rotation. They would have the same qualification requirements as the judges of the Court, but their jurisdiction would be limited to hearing:

“all applications raising admissibility issues;
all cases which could be declared manifestly well-founded or manifestly ill-founded on the basis of well-established case-law of the Court” (paragraph 55 of the Report).

This proposal, which is developed in a good deal more detail in paragraphs 51-65, is obviously far more sophisticated than either of those which were made and rejected during the reform process of 2000-2004. In particular, the members are fully judicial and subject to the same qualification requirements and election process as the judges of the Court. So the first, and most serious, objection raised against the Evaluation Group proposal, that admissibility decisions would be taken by non-elected judges, does not apply. There remain, however, a number of questions:

a. **Two-tier system.** A main aim and achievement of the Protocol No. 11 reforms was the unified, fully judicial system. This proposal does not restore the old Commission – the new judicial committee has on the one hand judicial power, on the other far narrower jurisdiction – but it is a form of two-tier system. Does the increase in judicial capacity and the freeing of the Court for its more constitutional role justify this reversion? And is it serious that the cases dealt with by the Judicial Committee will escape the unified judicial control of the Court, with a risk of divergent practice? Is the device of making the president of the Committee a judge of the Court a sufficient link to guarantee consistency?

b. **Two categories of judge in one Court.** Although the judges of the Judicial Committee and of the Court would have the same qualification and election requirements, their jurisdiction would differ sharply. Many members of the CDDH always objected to this on principle and the same objections may be expected to be raised again. But how justified is that objection? It may be unusual, even unprecedented, but is it not open to the Council to structure the Court in this way if it is more efficient?

c. **Is the proposed power of review wise?** At paragraph 63 the Wise Persons, quite rightly in my view, recommend against a right of appeal against the decisions of the
Committee. But at paragraph 64 they recommend a special power of review for the Court, initiated by the President of the Court or the Chair of the Committee. Does this not go against the principle of finality of decisions on admissibility and add to the workload by creating a two-stage process where there is now only one? It is worth remembering throughout that the key aim is to reduce the work load and backlog, not increase it.

d. **Does the expansion of judicial capacity aim at the right target?** Most of the work on inadmissible and repetitive cases at present is done by the Registry, not by Judges. Evidence given to the CDDH and GDR during the negotiations suggested that the current three-Judge Committees deal with very high numbers of inadmissible cases in a session, but only because they do not dispute the result recommended by the Registry after careful work. It is the Registry that carries the main burden and that is where the overload primarily occurs. The proposal makes clear that the Registry's role would continue (paragraphs 58 and 59). The CDDH accepted that the judges too are overloaded, which led to the proposal for single judges sitting with rapporteurs, but the greater burden falls on the Registry. If that is right, is it not a better (and cheaper) strategy to reinforce the Registry rather than increase the numbers of judges?

e. **Does the proposal simply shift the problem rather than solve it?** The proposal would certainly free up the existing Court judges to concentrate on key standard-setting judgments on the merits and thus help to preserve the quality of those judgments – which has to be a good thing. But, in so doing, would it not simply transfer the overload problem of the mass of unmeritorious and repetitive cases to the new Committee? It seems likely that such a Committee would itself be asking for expansion in staff and judge numbers after a year or two.

f. **Fewer judges than member states will be controversial.** Every time proposals of this type were made in the 2000-2004 reform process there were objections from states. Even when, exceptionally, the proposal to amend Article 20 to insert a power for the Committee of Ministers to appoint extra judges on request of the Court was passed by a majority of CDDH members, it failed in the Committee of Ministers because of opposition on this ground, that it is wrong for only some states to have extra judges and not others (it was also opposed by the Parliamentary Assembly on this ground among others). The proposal for rotation of the extra places may help. Such a system works for the appointment of Advocates-General in the European Court of Justice. But arguably judges are different, and so far that has always been the reaction of at least some states. Even more controversial is the idea, recommended in paragraph 121, that in future the main Court too could have fewer judges than the number of member states. It seems odd in the first place to say that at the beginning of the Report that more judges are needed to cope with the workload only to float at the end the idea of doing away with some of the existing judges. Secondly, a key reason why there needs to be a judge from each state is not because he or she in any sense represents the state or its government, but so that they can inform their colleagues about the substantive and procedural law of their country, e.g. on the availability of domestic remedies. This is a vital role, not lightly to be cast aside. It is not an adequate answer to provide for an ad hoc judge for the defendant state where no national of that state is on the Court. There needs to be continuity and experience both of national law and of the Court’s case-law and practice available to it from each member state on an ongoing basis. And there are so many applications from some states that any ad hoc judges for them would have to be virtually permanent, which would defeat the object. With respect, the suggested parallels of the International Court of Justice and the Inter-American Court of Human Rights break down, because neither accepts applications from individuals, but only from states and international organisations in the one case, and states and the Inter-
American Commission of Human Rights in the other, so the caseload of these courts is far more limited. No wonder they can manage with fewer judges.

g. Will the Judicial Committee be an attractive job? The proposal to require the same high qualifications of candidates for this job as for the Court raises the question whether persons qualified for appointment to high judicial office will be interested in a post which denies them virtually any serious and challenging judicial decision-making. By definition its functions will be limited, on the one hand, to formal admissibility decisions, which are overwhelmingly routine; and on the other, to manifestly ill-founded cases, cases of the new admissibility criterion introduced by Protocol No. 14 and cases on the merits but only where the case-law has already been well-established by the Court itself. The Court of First Instance of the European Union is in no way a parallel, having as it does an interesting and very important jurisdiction on the merits of certain classes of case. Nor is the old Commission, which also decided important issues on the admissibility and merits and whose decisions on admissibility and opinions on the merits often served to establish and develop the case-law.

h. Cost. Judges are expensive, to pay and to accommodate. Inevitably they would want more registry support than is currently available so registry costs would also rise. The question once again arises: would it not be more cost-effective to expand the Registry instead so that the existing judges can manage the demands of admissibility and repetitive cases as well as the contentious cases?

Conclusions

The new proposals for a separate filtering mechanism are, as one would expect from the calibre of those putting them forward, well constructed and deal with many of the objections levelled at previous suggestions of similar intent. But serious questions still arise, which need further consideration, and, as I said at the outset, I do think they will in any event need to be reconsidered in the light of the actual experience of the effect of the changes introduced by Protocol No. 14.

Postscript

My prepared text ended there, but after hearing the Secretary General this morning I want to add that I very much agree with him that it would be a mistake to tackle the problems of overload at the Court by pouring money into the Court at the expense of the other programmes of the Council of Europe. Many of these also contribute directly or indirectly to reducing abuses of human rights and hence the inflow of cases to which they give rise. For example, after leaving the CDDH I have been working on Education for Democratic Citizenship and Human Rights Education, a less glamorous and certainly less well funded sector of the Council’s work but, in my view, absolutely vital for developing the sorts of skills that should help to reduce the risks of human rights abuses in the future. We should make sure programmes continue and expand as well as providing the Court with extra resources. ★
RELATIONS BETWEEN THE COURT AND STATES PARTIES TO THE CONVENTION

Ms Wilhelmina Thomassen

Judge at the Supreme Court of the Netherlands

First I wish to thank the organisers for inviting me to take part in this discussion on the Wise Persons’ Report.

I have been asked to comment on the parts of the report concerning relations between the Court and the States Parties to the Convention and I have identified four topics: the judicial filtering body, enhancing the authority of the Court’s case-law in the States Parties, advisory opinions and the award of just satisfaction.

I should first like to congratulate the Wise Persons on their report, which makes a very clear choice from among the various proposals that have been discussed in the Court and outside it over recent years, during the debates on Protocol No. 14. It does not propose to introduce a discretionary power for the Court to decide whether or not to examine a case, similar to the certiorari procedure of the United States Supreme Court (the power to “pick and choose”). Instead, it takes individual applications as its starting point. The group insists that the right of individual application is now one of the key elements of the system and a fundamental aspect of the European legal culture in this area.

Establishment of a new judicial filtering mechanism (“Judicial Committee”)

The group recommends the establishment of a new judicial filtering body attached to, but separate from, the Court, to carry out functions that under Protocol No. 14 are assigned to the committee of three judges and single judges.

A filtering committee could ensure that a judicial decision was taken on all individual applications while enabling the Court to concentrate more on cases that required closer attention.

The committee's jurisdiction

According to the report, the Committee would perform the functions that, under Protocol No. 14, are assigned to the committee of three judges and single judges. The Judicial Committee would have jurisdiction to hear all applications raising admissibility issues and all cases which could be declared manifestly well-founded or manifestly ill-founded on the basis of well-established case-law of the Court.

The Committee’s jurisdiction could be still further clarified. Could it hand down inadmissibility decisions that would today be the responsibility of the chambers? Examples include such cases as Bankovic (NATO bombardment of Belgrade), Vo v. France (Article 2
and the unborn child), *Kok v. the Netherlands* (anonymous witnesses in criminal cases) and others declared inadmissible but which are well reasoned.

If it were thought appropriate to maintain the current distinction between decisions on ill-founded cases that are dealt with by committee and inadmissibility decisions on well reasoned cases that are dealt with by a chamber, a new criterion could be introduced to distinguish between the two sorts of cases, namely cases that were ill-founded and ones that were manifestly ill-founded. The Committee would only have jurisdiction to hear cases in the second category.

The organisational structure of the Committee and its relationship to the Court

The members of the Judicial Committee would be elected by the Parliamentary Assembly. They should be fewer in number than the number of member states, and drawn from the different countries on a rotating basis. Their term of office would be limited. The establishment of the Judicial Committee should eventually lead to a reduction in the number of Court judges.

The proposed structure could lead to a very clear distinction between the two types of decisions on applications, namely on admissibility and on the merits, and between the two sorts of judges.

Some 90% of cases coming before the Court would be declared inadmissible by a committee of judges that took no part in its legal work.

Moreover, the committee's judges would perform most of the donkey work but play no part in establishing case-law.

The first question to be asked is whether the best national legal specialists would be prepared to give up their functions to undertake such work without having any role in developing case-law. There would also be a clear hierarchical distinction between the two sorts of judges, in addition to the separation of judicial functions. This dual separation – of judges and of judicial functions – could well influence the quality of those selected and adversely affect the coherence of the Court's case-law.

Such a filtering out of 90% of the caseload should actually be carried out at the highest level of the Court system.

I would therefore ask whether this filtering committee should not be located within the Court itself.

The committee could be composed of members of the Court selected on a rotating basis, so that during his or her nine year term of office each judge would serve for a fixed period on the committee.

This would help to secure both the internal coherence of the Court's case-law and the quality of those selected. Filtering would be carried out by judges with suitable experience because they would have been involved in establishing the case-law and would be again later.

This should achieve the same results as those sought by the Wise Persons, namely a separate and well organised filtering system, but without elections to a committee whose responsibilities would be very limited and also without reducing the number of Court judges, which would not be easy to achieve. It would also obviate the need to introduce what would otherwise be the very complicated arrangements for appointing ad hoc judges whenever cases concerned states that did not have a judge on the Court.

Enhancing the authority of the Court's case-law in the States Parties

The group lays great stress on the importance of disseminating the Court's case-law, securing recognition of its authority above and beyond the binding effect of specific judgments on the parties and translating Court judgments.

I fully subscribe to these comments.
Disseminating the case-law

My observation concerns the group’s view that responsibility for translation, publication and dissemination of case-law lies with the member states.

Nowadays, in many member states the oral delivery of decisions and judgments at hearings is increasingly being replaced by publication on the Internet. It might almost be said that electronic publication is based on the positive obligation in Article 6 of the Convention that requires states to pronounce judgments publicly (Davids en Thomassen). There is no easier way of publishing and disseminating case-law than using electronic means of communication.

All the reasoned decisions of the ECHR are published on HUDOC. However, this main source of Convention law is not equally available throughout the world.

Advisory opinions

The group has considered the introduction of a preliminary ruling mechanism on the model of that existing in the European Union.

Its reasons for deciding that such a system would not be appropriate for the Convention are convincing.

The Convention model presupposes the exhaustion of domestic remedies and member states have a certain margin of discretion. Such a system does not readily lend itself to preliminary rulings. It would also add considerably to the Court’s workload and lengthen proceedings.

Instead, the group thinks it should be possible to ask the Court for advisory opinions on legal questions relating to interpretation of the Convention and its protocols.

Such requests would be optional for national courts and the Court’s opinions would not be binding.

Let the national courts decide

The proposal bears a certain resemblance to the preliminary ruling mechanism and I believe that the same reservations apply to advisory opinions.

This applies in particular to lawyers and officials in countries where the majority of the population do not understand the two languages concerned. This lack of access diminishes the effectiveness of the Court’s case-law.

One can only hope that all the member states will translate all the judgments into their own language and distribute these translations to their officials, NGOs and legal profession.

However, the Wise Persons’ recommendations concerning the dissemination of the main judgments could easily be implemented by publishing translations of them in several languages on HUDOC.

Responsibility for this could be taken on by the Court or the Council of Europe, and could also extend to the translation of judgments and reasoned decisions in the language of whichever state is concerned.

All the States Parties to the Convention should have the opportunity to submit observations to the Court on the legal issues on which an opinion is requested.

The Court’s new advisory powers would be subject to strict conditions. It is proposed that:

a. only constitutional courts or courts of last instance should be able to submit a request for an opinion;

b. the opinions requested should only concern questions of principle or of general interest relating to the interpretation of the Convention or its protocols;

c. the Court should have discretion to refuse to answer a request for an opinion. For example, the Court might consider that it should not give an answer in view of the state of its case-law or because the subject-matter of the request overlapped with that of a pending case. It would not have to give reasons for its refusal.

Firstly, as with the former, the right to request opinions could be an easy option for national courts.

Such requests might also lengthen proceedings. Under this procedure, any member
state’s observations would have to be circulated to the other member states and if the supreme court concerned failed to accept the Court’s ruling, as would be its right, the proceedings might then continue anyway before the Court.

Moreover, this option would be unlikely to reduce the Court’s workload.

Finally, the Convention case-law is more protective than technical in nature. This protective character is not particularly suited to requests for opinions. Individuals’ protection is essentially a national responsibility. Rather than seeking the Court’s opinion, national courts must decide for themselves whether treatment is inhuman or proceedings are unfair.

Courts should not be invited not to reach a decision, and their relations with other branches of government should not be weakened.

**The individual and a fair hearing**

A final comment should be made on the position of the individual.

The proposal would grant states the right to refer cases to the Court, which would be an innovation. However, this new feature should not mean that discussions before the Court were confined to a national supreme court, the government of the same country and other states, without the participation of the individual who was party to the proceedings or would be the subject of the request for an opinion. If states are to be granted a right of referral, the same should also apply to other parties, such as NGOs.

Unfortunately, the Court was unable to rule on the merits of the *Emesa Sugar v. the Netherlands* case, in which the applicant complained that in the preliminary proceedings in Luxembourg it had not been allowed to respond to the opinion of the Advocate General to the Court of Justice of the European Communities. The applicant relied on the case-law of the Court, which had ruled in numerous cases against France that the impossibility of responding to opinions of the Advocate General was in breach of the adversarial principle. This issue needs to borne in mind in the context of requests for opinions.

**The award of just satisfaction**

The group thinks that the functions arising from Article 41 should be assigned to national courts, unless the Court considers that there are no grounds for awarding compensation to the victim, in particular because full reparation is possible or because the judgment finding the violation constitutes sufficient reparation in itself.

On the other hand, where the Court considers that the victim must be awarded compensation, the decision on the amount of compensation should normally be referred to the state concerned.

The following rules would apply to national courts: each state should designate a judicial body with responsibility for determining the amount of compensation and inform the Committee of Ministers of the Council of Europe of the body so designated, the determination of the amount of compensation should be consistent with the criteria laid down in the Court’s case-law and the victim should be able to apply to the Court to challenge the national decision by reference to those criteria, or where a state failed to comply with the deadline set for determining the amount of compensation.

**The position of applicants**

From a human rights standpoint, it is not necessarily logical to oblige applicants to return to the domestic courts after they have already exhausted domestic remedies and the Court has found that their rights have been violated.
The position of the Court

On the other hand, the group is probably correct in arguing that the Court cannot be expected to act as a court of auditors, particularly since the preparation of and discussions on Article 41 decisions take a certain amount of time. The proposal would enable the Court to concentrate on its main task rather than making complicated calculations about the causal relationship between violations and damage suffered.

But there would be appeals against national decisions in complex cases such as those of Beyeler or the King of Greece, in other words precisely the type of case that the group is trying to spare the Court.

The position of national systems

It is not clear whether the obligation to establish a single national body to establish the level of compensation would be sufficiently compatible with domestic civil law. Many European systems allow applicants to claim damages in the domestic courts following Court findings of violations, even when the latter has ruled under Article 41. In the Netherlands, for example, such applicants can take their cases to three levels of courts: first instance, appeal and cassation (Van Mechelen).

It is also reasonable to assume that national appeal and supreme courts are in a better position to rule on decisions at first instance since these often revolve around the preparation of evidence and the causal link between the violation and the damage. The proposal could be incompatible with national systems and impose restrictions on domestic remedies.

Alternative

How then can we reconcile applicants’ best interests with that of the Court not to become a court of auditors?

One possibility is to draw a distinction between pecuniary and non-pecuniary damage. Since the latter reflects the extent to which the Court considers that an applicant’s rights have been breached, it might retain its jurisdiction in this area.

This would in fact be an extension of the function assigned to it by the group of deciding that there were no grounds for awarding compensation to the victim, in particular because full reparation was possible or because the judgment finding the violation constituted sufficient reparation in itself. The workload arising from such decisions would be limited because they could be standardised.

In the case of material damage, rather than referring cases to domestic courts the Court could lay down fixed sums, thus avoiding the risk created by the group’s proposal that applicants would find themselves in the middle of a game of ping-pong between the national authorities and the Court. If an applicant did not agree with the amount proposed, he or she would be free to initiate domestic proceedings, without the need for the national authorities to change their appeal structure or for the Court to act as a court of final instance. There would be no reason to inform the Committee of Ministers.

If a domestic system did not function properly, an applicant could bring the matter before the Court for violation of the Convention, in particular Article 6, if the domestic decision was not executed, or Article 13, if the national remedy was ineffective. If the Court then found that there had been a violation it would afford just satisfaction.

These are the four subjects that I wished to consider. I hope that the Wise Persons’ Report and our discussions today will us help to find a way of securing the long-term effectiveness of this unique and irreplaceable body, the European Court of Human Rights.
We are all gathered here thanks to the hospitality of the Presidency of San Marino to mark the kick-off of the report of the Group of Wise Persons. I see this major event as a turning point of a reflection process which started back in May 2004. The different steps of this process, namely the “reform package” of the recommendations accompanying Protocol No. 14 to the European Convention on Human Rights (or “the Convention”), the Oslo seminar in 2004, the Warsaw Summit which lead to the creation of the Group of Wise Persons were all animated by the same guiding principle: bring back the responsibility for respecting and protecting human rights to the member states in the name of the subsidiarity of the European Convention on Human Rights mechanism, affirmed forty years ago by the Court and qualified once again by the Group of Wise Persons as “one of the cornerstones of the system for protecting human rights in Europe”.113

The need to relieve the Court from its workload is one more reason to underline our attachment to the principle of subsidiarity. When we reaffirm our attachment to this principle – which the European Court of Human Rights (“the Court”) in its fertile case-law has defined in its various aspects115 – and we remind member states of their role as the natural guarantors of human rights, we actually pledge for the development of a human rights conscience at all levels of society. One year after the taking up of my functions and having visited different parts of our continent, this necessity appears even more evident. The development of a human rights conscience in our member states gives full effect to the objective character of the Convention and the collective guarantee of its system as it was qualified by the former European Commission of Human Rights. At this historic point in time, when we are planning to go further, we ought to remember the guiding principles of our history.

The title of my intervention “Alternative or complementary means of resolving disputes” is the one under which the report of the Group of Wise Persons – together with the part on

113. *Handyside v. the United Kingdom*, 7 December 1976. Application No. 5493/72, ¶48: “The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (judgment of 23 July 1968 on the merits of the *Belgian Linguistic* case, Series A No. 6, p. 35, para. 10 *in fine*). The Convention leaves to each contracting state, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26)”.


friendly settlements and mediation – envisages the new functions that the Commissioner should undertake with ombudsmen and national human rights institutions (“NHRIs”) in order to assist the long term effectiveness of the Convention. This title did not figure in the interim report issued by the Group for the Ministerial Session in May 2006. Thus, before entering into the substantive part of my intervention, I would like to make some preliminary remarks of a more formal nature.

When the interim report was issued, I had the honour to be invited by the Chairman of the Group, Mr Rodríguez Iglesias, to submit my comments in writing. The publication of the interim report coincided with the taking up of my functions and with the opening of two gates of major importance for the future of my work. First, the preparation for the entry into force of Protocol No. 14 which allows the Commissioner to take part in the judicial proceedings before the Court without betraying the explicit prohibition of a judicial competence as provided with by his mandate. Secondly, the decision to expand and intensify my cooperation with ombudsmen and NHRIs building on the very important foundations set up by Alvaro Gil-Robles.

I submitted my comments to the interim report and as the latter referred to the need for an enhanced co-operation with ombudsmen and NHRIs (which under my mandate are defined as National Human Rights Structures – “NHRSs”), I decided to consult the latter immediately. Indeed, the co-operation between NHRSs and the Commissioner was based, from the outset, on the mutual respect of each other’s independence. As a result of a conference in Vienna in June 2006, the European branch of the International Ombudsman Institute (IOI) prepared a questionnaire for the attention of its members in order to collect their reaction to the Group of Wise Persons’ interim report and my comments thereto. Preliminary discussions with the European Group of NHRIs were held in September 2006 in Athens during the 4th round table of the Commissioner and the European NHRIs. I had informed the Group of Wise Persons of all these consultations during the hearing they organised with me in September 2006. I am glad that in its final report the Group has noted “with approval that the Commissioner is extending his current co-operation with national and regional ombudsmen and national human rights institutes” (paragraph 112).

The discussions continued in Dublin in December 2006 and in January 2007 in Berlin respectively with NHRIs and ombudsmen. This intense dialogue will be pursued in Athens on 12 and 13 April 2007 on the occasion of a round table co-organised by the Greek Ombudsman and my Office. It will bring together the ombudsmen and the NHRIs of all Council of Europe member states and will mark the kick-off of a new phase of cooperation. With a view to preparing the Athens round table next month, my Office has prepared a draft background paper defining the terms of the future co-operation between NHRSs and the institution of the Commissioner.

Let me now turn to some of the detailed proposals contained therein, leaving aside issues not covered by the Wise Persons’ Report. I would like to stress that the proposals I am making to the National Human Rights Structures do make the necessary link between the suggestions of the Group of Wise Persons and those emanating from other Council of Europe instances on the same topics. I see them all as complementary. In this respect, particular reference is to be made to the work carried out by the Committee of Experts for the improvement of procedures for the protection of human rights (DH-PR) working under the aegis of the Steering Committee for


119. The initiative for that meeting came from the President of the European Chapter of the IOI, the Austrian Ombudsman Peter Kostelka.
Human Rights (CDDH) following the new mandate given to the latter by the Committee of Ministers. My office has participatory status in that Committee and is involved in the work carried out there.

The first proposal mentioned in the Wise Persons’ Report is that the Commissioner and his partners “should respond actively to the announcement of Court decisions finding serious violations of human rights” (paragraph 110).

There can be no better implementation of this proposal than co-operating with NHRSs in order to assist the other Council of Europe instances in rapidly executing the Court’s judgments, in particular pilot judgments. Indeed when it comes to monitoring the execution of judgments, NHRSs and the Commissioner are very well placed to inform the Court and the Committee of Ministers as to whether or not practices or situations declared in breach of the Convention by the Court persist or have actually been stopped and the relevant Court judgment thus been implemented. Given their long-standing experience of constructive dialogue with the authorities at all levels, they could not only play the role of a watchdog, but also be helpful to the authorities for achieving that objective. This becomes much more relevant with a view to the tripartite annual meeting on execution of judgments between the Committee of Ministers, the Parliamentary Assembly and the Commissioner in accordance with the Declaration of 19 May 2006.120

Many channels for the timely sharing of pertinent, reliable information need to be established. On the one hand, NHRSs could provide information to the Commissioner who could use it for his institutionalised relations with the Committee of Ministers and the Parliamentary Assembly. On the other hand, the Commissioner, in reaction to information provided by the Council of Europe instances, could work with NHRSs at the national level.

This could be done in the context of country visits or on an ad hoc basis. The latter modality might be appropriate with respect to pilot judgments where the Group of Wise Persons envisages a specific role for the Commissioner’s partners.121 Ombudsmen could act as mediators in order to assist in addressing the issue at national level. The Commissioner stands ready to offer his advice and his guidance to them in order to ensure that the procedures are fair and in keeping with ECHR standards. The Wise Persons’ Report does not mention explicitly the Commissioner in the part dedicated to pilot judgments. However, the role envisaged by the Group of Wise Persons for the Commissioner and the ombudsmen at national level does have a direct bearing on this issue.

I believe that, with the assistance of NHRSs, the Commissioner could assist the Court in identifying cases that should give rise to a pilot judgment, in defining the domestic measures required by the execution of a judgment in such a pilot case and in understanding the difficulties preventing national authorities from taking such measures. The Commissioner and his partners could help the Court to formulate realistic, inventive and precise prescriptions of the measures expected from the states concerned, not only the states party to the proceedings but also third states concerned by the substance of the judgment.

Furthermore, and although these proposals do not figure explicitly in the final report of the Group of Wise Persons, the work regarding the execution of judgments should in my view involve the top priority recommendations of 2004, namely 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 European Convention on Human Rights and the improvement of domestic remedies called for by Committee of Ministers’ Recommendation 2004/1304

120. Declaration of the Committee of Ministers on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels adopted on 19 May 2006, point X (c).

121. “113. This network could help to reduce the Court’s workload with the active support of the Commissioner, who could identify a specific problem in a state likely to trigger a large number of applications to the Court and help to find a solution to the problem at national level in conjunction with the national ombudsman […].”

122. Paras. 100-105.
Rec (2004) 6. I believe that the findings of the Court, especially in pilot cases, should lead the Commissioner and his partners to take a proactive approach in triggering verification procedures to assess the compatibility of draft laws, existing laws and administrative practices with the ECHR standards as they emerge from the Court’s case-law. From the work carried out at present by the DH-PR it becomes clear that NHRSs have a key competence regarding both recommendations. I stand ready to assist them in initiating such compatibility exercises in their respective countries, in discussing the findings of such exercises with the authorities and in issuing opinions related to national legislation and administrative practices. I also stand ready to support findings by the NHRSs with respect to deficient domestic remedies in the way they deem it appropriate Adequate communication channels and procedures between the Commissioner and his partners would need to be instituted for all these purposes.

The second package of proposals concerns the dissemination of information on human rights and the Strasbourg Court.\(^\text{123}\)

I have already explained on an earlier occasion my views on dissemination of information regarding the execution of judgments. During the meeting with the ombudsmen in Berlin, the discussion focused on the dissemination of relevant information on the Court’s case-law. The latter would be in line with the part of the Wise Persons’ Report on Enhancing the authority of the Court’s case-law in the States Parties.\(^\text{124}\) From the work carried out by the DH-PR it seems that most of NHRSs receive adequate information on the Court’s case-law, which was confirmed by some ombudsmen at the meeting in Berlin in January 2007. However, it has been decided in Berlin to explore the desirability and usefulness of receiving information on the Court’s case-law from the Commissioner’s Office on targeted issues dealt with by NHRSs at national level. In the Athens round table I intend to discuss if it would not be desirable that NHRSs, in cooperation with the Commissioner, accept the task of providing general information to individuals about the Court’s mandate and competence, admission criteria and just satisfaction policies.

I have read carefully the concrete proposals of the Group regarding friendly settlements and mediation. Although bargaining might well bring about relief for the Court’s workload, it might also entail the risk that the practical arrangements found between the parties to a case are questionable with respect to questions of law and principle. This procedure should remain in line with the spirit of the Convention. In case national ombudsmen are involved, I stand ready to contribute through advising and working with national ombudsmen in this respect in order to ensure that the procedures are fair and in keeping with the Convention’s standards.

Allow me to conclude by making some final remarks with respect to three remaining issues touched upon by the Group of Wise Persons in its report:

- First, the question of whether or not the mandates of NHRSs allow them to deal with human rights problems. The Group of Wise Persons has addressed that issue in the following terms:

> “Under his mandate, the Commissioner facilitates the activities of national ombudsmen and similar institutions. However, these are not always

123. “The Group notes with approval that the Commissioner is extending his current cooperation with national and regional ombudsmen and national human rights institutes in order to form an active network of all these institutions, so as to disseminate appropriate information on human rights and, as far as their competence permits, take action on alleged violations and abuses.

113. […] National ombudsmen could also play a role in informing the public about the right to apply to the Court by distributing application forms and, above all, informing the public about the Court’s mandate and competence and about the Court’s mandate and about the admissibility criteria contained in the Convention.”

competent in human rights matters. The Committee of Ministers might consider adopting a recommendation with the aim of assigning such competence to them.”

It was made clear in the meeting in Berlin, that some NHRSs cannot deal, without an extension of their mandate, with some of the issues envisaged by the Group of Wise Persons. This being a prerequisite for the implementation of the Group of Wise Persons’ proposals and for the other items of the enhanced co-operation, the participants of the Berlin meeting decided to consider during the discussions at the roundtable meeting in Athens, whether additional European standards are required in that respect.

Secondly, the issue of staff and resources at the disposal of the Commissioner and the NHRSs has been stressed by the Group of Wise Persons which “considers that the Commissioner should have the necessary resources to be able to play a more active role in the Convention’s control system, acting either alone or in co-operation with European and national non-judicial bodies”. This constitutes a prerequisite for the rapid and effective implementation of any programme of enhanced co-operation between them. I welcome such support which should be also benefit to NHRSs. However, much can already be achieved with mutual willingness and improved communication. Specific information provided to NHRSs on the Court’s case-law as well as a special training for their attention could facilitate their work.

Finally, the need to ensure full respect for the respective independence of the Commissioner and his partners should be the cornerstone of an enhanced co-operation agreement. This entails for me the obligation to respect their willingness to co-operate on any given case or not. One year after the beginning of the second mandate, having travelled in several parts of Europe, I have a clear picture of the effectiveness of the NHRSs and their contribution to the development of a Human Rights conscience at national level. While defining the lines of my further work with them, I feel that a major obligation lies on us, on the Council of Europe, now: We should offer a quantity and quality leap to NHRSs in order to co-operate with them more intensely and to complement and assist each other so as to be able to implement what the Wise Persons and others have advised us to achieve.

ENSURING THE LONG-TERM EFFECTIVENESS OF THE ECtHR

NGO comments on the Group of Wise Persons’ Report

Amnesty International; Justice; European Human Rights Advocacy Centre (EHRAC); Liberty; Human Rights Watch; Redress; Interights; Aire Centre

Introduction

We believe that the European Court of Human Rights (hereafter “the Court”) is a “pillar” in the European system for the protection of human rights.

The Court has ensured that applicants have obtained redress for violations of human rights when states have failed to provide an appropriate remedy. In doing so, it has played a crucial role in holding states accountable for these violations. Strengthened by the Committee of Ministers’ supervision process, the implementation of the Court’s judgments have led to human-rights-compliant changes in the law and practice in states which are parties to the Convention for the Protection of Human Rights and Fundamental Freedoms. The judgments of the Court have provided essential guidance to states of the Council of Europe and to other countries, on the steps necessary to respect and secure fundamental human rights.

In the words of the Group of Wise Persons, the Court “lay[s] down common principles and standards relating to human rights and determines the minimum level of protection which states must observe.”

The right of individuals (and organisations) to submit an application directly to the European Court of Human Rights lies at the heart of the European regional system for the protection of human rights, and is part of the fundamental philosophy of the European Convention on Human Rights. We consider that its essence is the right of individuals to receive a binding determination from the European Court of Human Rights as to whether the facts presented in admissible cases constitute a violation of the rights enumerated in the European Convention on Human Rights. We welcome the Group of Wise Persons’ intention to ensure that the reforms it recommends do not affect the substance of the right of individual application.

We recognise that the enormous number of individual applications which are being lodged with the Court, coupled with the backlog of cases pending before it, in the context of the Court’s current resources, jeopardise its functioning and consequently the right of individual application.

While addressing these issues was precisely the objective of the package of reforms adopted by the Council of Europe’s Committee of Ministers in May 2004, including a series of recommendations of the Committee of Ministers to member states and the adoption of Protocol No. 14 to the European Convention on Human Rights, these measures have yet to be implemented. Furthermore, it is clear that more is needed.

---

126. The Group of Wise Persons is mandated by the Council of Europe to make proposals aimed at ensuring the long-term effectiveness of the Court.
We welcome the continuing commitment of the member states of the Council of Europe to ensure the long-term effectiveness of the European Court of Human Rights. This commitment was evidenced, among other things, by the decision taken by the Heads of State and Government gathered at the 3rd Summit of the Council of Europe to establish a Group of Wise Persons to consider this issue.\(^{129}\)

We urge the Committee of Ministers to clarify, as a matter of urgency, the impact on the reform process of the recent negative vote by the Russian Duma on the ratification of Protocol No. 14 to the European Convention on Human Rights.

We consider it important that the Council of Europe carefully and transparently evaluate the impact on the Court of any reforms over a reasonable period of time, including those related to Protocol No. 14 if it enters into force. We urge the member states of the Council of Europe to ensure sufficient financial and expert resources to undertake such an evaluation.

We consider that any reform should be designed to meet the following seven objectives:

- Better implementation of the European Convention on Human Rights at national level, thereby reducing the need to apply to the Court for redress;
- Preservation of the fundamental right of individual petition (the essence of which is the right of individuals to receive a binding determination on admissible cases from the European Court of Human Rights);
- Efficient, fair, consistent, transparent and effective screening of applications received, to weed out the very high proportion (around 90%) of applications that are inadmissible under the current criteria;\(^{130}\)
- The expeditious rendering of judgments, particular in cases that raise repetitive issues concerning violations of the European Convention on Human Rights where the Court’s case-law is clear – which represent some 60% of the Court’s judgments on the merits – and those that arise from systemic problems;
- Effective execution of the Court’s judgments by Council of Europe member states, including appropriate follow-up by the Committee of Ministers where individual member states are slow to act or respond inadequately to Court judgments;
- Adequate financial and human resources for the Court, without drawing on the budgets of other Council of Europe human rights monitoring mechanisms and bodies;
- Transparent expert monitoring and assessment of the impact any reforms agreed on the workload of the Court, and their effect on the right of individual application.

The following contains our assessment of the proposals in the Report of the Group of Wise Persons, in light of those objectives. It also includes additional recommendations.

**Steps at the national level**

**Implementation of Committee of Ministers recommendations**

We remain convinced that achieving greater respect for the Convention at the national level would significantly diminish the Court’s overall case load by reducing the need for people to seek redress from the Court for violations of their rights. We agree with the

---


assessments of the Group of Wise Persons that “the remedies available at national level must be effective and well known ….”

We consider that “length of proceedings” cases, which account for some 25% of the judgments issued by the Court in 2005, result from systemic deficiencies in the states concerned. “Length of proceedings” cases involve the fundamental right of access to justice. Cases about excessive length of pre-trial detention, which also comprise a significant proportion of the Court’s judgments on the merits, touch directly on the right to liberty and the right of detained persons to trial within a reasonable time or release pending trial. Ensuring the prompt and effective implementation of such judgments should be a major priority for the Committee of Ministers. We consider that the Committee of Ministers should require the states concerned to develop and implement Action Plans which address both the issue of compensation and the necessary structural changes, without undue delay.

Since states are already obligated under the European Convention on Human Rights, (in particular under Articles 5 (5), 6 (1) and 13) to ensure effective, accessible domestic remedies in the event of such violations, we question whether an additional European Convention on Human Rights provision, as proposed by the Group of Wise Persons,” is necessary, or would result in states taking the measures necessary to address underlying structural problems. We consider, however, that the Committee of Ministers should bring concerted pressure to bear on states found regularly to violate these rights to take all necessary measures to implement these provisions of the Convention and Recommendation Rec (2004) 6.

We agree that governments have the responsibility to translate, disseminate and publish in appropriate, widely read and accessible journals, the Court’s judgments and ensure that “national judicial and administrative institutions should be able to have access to the case-law of the Court in their respective languages.”

Accordingly, we regret the fact that, despite repeated commitments to do so, the majority of Council of Europe member states have yet to implement fully the recommendations adopted in the course of the reform discussions which began in 2000, which aim at ensuring better implementation of the European Convention on Human Rights at national level, including effective and accessible domestic remedies.

We urge each Council of Europe member state to take all necessary measures to implement these recommendations rapidly. To that end, we recommend that each member state analyse its laws and practice in the light of the recommendations and that they each create and implement an action plan to fill lacunae between state law and practice and the elements set out in each of the five recommendations, without further delay.

Ombudspersons and national institutions for the promotion and protection of human rights

We agree with the Group of Wise Persons that ombudspersons and national institutions for the promotion and protection of human rights have the potential to play a significant role in providing information about and promoting human rights, including those secured.

Proceedings

under the ECHR. 135 We consider, however, that in many member states more must be done to ensure that these institutions meet the minimum guidelines set out in the Paris Principles and in particular, are truly independent, appropriately mandated, staffed with experts and adequately resourced. We welcome the work of the Council of Europe’s Commissioner for Human Rights in co-operating with, and facilitating, the activities of national human rights institutions and national and regional ombudspersons.

Council of Europe Information Offices 136

We agree with the Group of Wise Persons that Council of Europe Information Offices located in member states could play an important role in informing people about the European Convention on Human Rights and the case-law of the Court, including that related to admissibility. This might help to discourage individuals from submitting applications unnecessarily or prematurely, or without exhausting domestic remedies. (In this regard, we urge the Council of Europe to make public information about the Information Office in Warsaw, Poland, including the scope, methods and findings of any assessment into the Warsaw office pilot project.)

However, we are concerned at the Group’s suggestion that the personnel in these offices might also advise individuals about “the existing domestic and other non-judicial remedies”. Were such offices to offer advice, there is a danger of Council of Europe personnel influencing, or being seen to influence, individuals’ decisions whether or not to lodge claims. We do not consider that it is appropriate for Council of Europe personnel to provide such advice, however informal the arrangement; they would not be in a position to act as independent, impartial advisers (and indeed, conflicts of interest may arise). There is also a risk that if an applicant seeks redress with a non-judicial remedy identified by the Council of Europe Information Office, they may find that any subsequent application to the Court is time-barred, under Article 35 (1) of the European Convention on Human Rights. 137 We consider instead that such an advisory function should be played by independent lawyers and NGOs with relevant expertise. We therefore recommend that national authorities should be urged to provide adequate resources to lawyers and NGOs in order for them to assess and provide initial advice to would-be applicants to the Court. This should include the provision of free legal aid by the national authorities.

Reform of the European Court of Human Rights

We warmly welcome the fact that the Group of Wise Persons agreed not to pursue proposals to give the Court a discretionary power to decide whether or not to take up cases, a proposal rejected during the negotiations that led to the adoption of Protocol No. 14 to the ECHR. We endorse the Group of Wise Persons’ conclusion that such a power would be “alien to the philosophy of the European human rights protection system” and would undermine the right of individual petition. tend to politicise the system and risk inconsistency, if not arbitrariness, in decision making. 138 We also agree with their assessment that it “would be perceived as a lowering of human rights protection.” 139

We also welcome the Group of Wise Persons’ rejection of the proposal to establish


regional courts of first instance. We concur with the views expressed that such courts would, among other things, raise “the risk of diverging standards and case-law, whereas the essence of the Convention system is that uniform and coherent standards, collectively set and enforced should obtain throughout contracting states.”140

Screening body

We share the assessment of the Group of Wise Persons that the exponential increase in the number of individual applications, coupled with the backlog of cases pending before the Court, jeopardise its functioning and consequently the right of individual application.

It is widely agreed that the main challenges facing the Court are: screening quickly and effectively the very high proportion (90% or more) of applications received which are inadmissible under the current criteria, and handling in an effective and efficient manner the more than 60% of admissible applications that raise issues about which the Court’s case-law is clear, (known as “repetitive cases”).

We are concerned at the statement contained in the Group of Wise Persons’ Report that the Court should be “relieved” of manifestly inadmissible applications or repetitive cases which “distract” it from its essential role (paragraph 35).

The process of dealing with manifestly inadmissible cases is clearly burdensome. However, it is important to acknowledge that there is no way to prevent people from sending applications to the court. There is also no way around the fact that each application received by the Court will have to be separately thoroughly and effectively screened against the admissibility criteria. This takes time and resources and, arguably, would take more time and require even more resources if the Court were to apply the additional and complex admissibility criteria introduced into Article 35 of the European Convention on Human Rights by Protocol No. 14.141 (We consider that, if it enters into force, the impact of the application of the new admissibility criteria set out in Protocol No. 14 on both human rights and the Court’s productivity will need to be transparently assessed and monitored.)

As to repetitive cases – which make up a large part of the judgments on the merits issued by the Court – rather than being a “distraction”, on the contrary, they are almost invariably indicative of a systemic problem within a state that needs to be addressed. If Friendly settlements (to which both parties to the case consent) are not reached in these cases, measures must be taken to ensure that the Court can issue judgments on such cases within a reasonable time, and that these judgments are implemented, in a manner that ensures not only redress for the individual concerned, but also the resolution of any systemic problems from which they arise. With regard to repetitive cases, we believe that the expedited process for handling manifestly well-founded cases (by a Committee of three judges) set out in Article 8 of Protocol No. 14, which amends Article 28 of the European Convention on Human Rights, is one way to ensure their speedier resolution. If it is implemented, the effectiveness of this process will need to be transparently monitored and assessed.

We concur with the suggestion of the Group of Wise Persons that the effective and efficient screening of individual applications received by the court could be facilitated through the creation of a separate screening body, referred to as a Judicial Committee, within the Court. We welcome the recommen-
dations that this group of judges, to be elected by the Parliamentary Assembly of the Council of Europe, would be independent, of high moral character and possess the requisite qualifications for appointment to judicial office and that the composition of this committee would be gender and geographically-balanced.\textsuperscript{142} We also welcome the safeguard proposed by the Group of Wise Persons that would ensure that the Court could assume jurisdiction to review any decision of such a screening body, on its own motion.\textsuperscript{143} We look forward with interest to further examination of the proposal to create a Judicial Committee to perform this task.

\textbf{Application forms}

At present it is well established that a case can be introduced by letter, without using the Court’s application form.\textsuperscript{144} When a letter is used to initiate an application, the applicant is then asked to submit a completed application form, usually within six weeks.

We welcome the fact that the Court’s application form is soon to be made available in electronic form.\textsuperscript{145}Improving access for potential applicants (and their representatives) to the application form in this way is likely to increase the proportion of applications submitted within the appropriate time limit which incorporate all the requisite information. We recommend however, that measures be taken to ensure that the application form is made available not only in all the official languages of Council of Europe member states but also in other major languages used by individuals living in Council of Europe member states.

We would, however, oppose any recommendation which would impose a requirement that all the requisite information be submitted only on the Court’s application form. Instead, we strongly urge that the Court should retain discretion on this point (as recommended by Lord Woolf\textsuperscript{146}). We consider that a requirement that applications be lodged on the relevant form may bar effective access to the Court for some of the most vulnerable individuals. Even with the important development of the application form becoming available online, some people will find it difficult or impossible to access to the form. This may be because of a number of factors, for example: lack of access to the Internet, including for those in detention, or the inability to speak a European language.

\textbf{Pilot judgments}\textsuperscript{147}

We agree with the Group of Wise Persons’ analysis that the Court’s development of a “pilot judgment” procedure is significant. It would apply to cases disclosing the existence within a state of a shortcoming which has resulted, or is likely to result, in the widespread

\textsuperscript{142} Paras. 53 and 54 of the Report of the Group of Wise Persons, 15 November 2006.

\textsuperscript{143} Para. 64 of the Report of the Group of Wise Persons, 15 November 2006.


\textsuperscript{146} Review of the Working Methods of the European Court of Human Rights, The Right Honourable Lord Woolf, December 2005. “The Court could, if it considered that this was necessary in the interests of justice, suspend time on receipt of the initial correspondence, and pending receipt of the properly completed application form. Such an extension would be as a matter of grace.” (p. 22). Lord Woolf was invited by the Secretary General of the Council of Europe and the President of the European Court of Human Rights to make recommendations on steps that could be taken by the European Court of Human Rights to deal effectively and efficiently with its current and projected caseload.

violation of a human right guaranteed under the European Convention on Human Rights, and which may give rise to a number of well-founded applications being filed with the Court. We note that the Group of Wise Persons encourages the Court to use this procedure “as far as possible in future”.

We welcome Rule 4 of Rules of the Committee of Ministers for the supervision of the execution of judgments and the terms of friendly settlements, adopted on 10 May 2006. This rule requires the Committee of Ministers to prioritise the supervision of the execution of judgments where the Court has identified a systemic problem, in a manner which is not to the detriment of other priority cases, notably those where the violation established has caused grave consequences for the injured party. We consider that this will facilitate the rapid and effective implementation of such judgments. The rule should take into account the effects of the suspension of proceedings in similar cases pending before the Court.

Because the suspension of the cases of similarly situated applicants can prejudice those applicants, we consider that it will be necessary for the Committee of Ministers not only to ensure the rapid execution of “pilot judgments”, but also to take all possible measures to guarantee that the manner of implementation genuinely affords an effective remedy for similarly situated persons. In considering the effectiveness of the remedy, the state concerned and the Committee of Ministers should examine not only whether the measures proposed afford just compensation, but also whether such measures effectively address the systemic problem. In length of proceedings cases, for example, this would likely include not only providing financial compensation to those whose rights have been violated but also include reviewing domestic structures for the administration of justice or enhancing judicial capacity and resources.

We welcome the fact that the Group of Wise Persons has recommended that time limits should be laid down, to be supervised by the Court, to ensure that “victims who have already applied to the Court, [whose applications remain “frozen” while the pilot case is heard and the resulting judgment implemented] do not have to wait indefinitely for just satisfaction”.

We would go further than the Group of Wise Persons’ recommendations on “pilot judgments.” Because the procedure is in its earliest stages, we strongly recommend that the Council of Europe should carry out comprehensive monitoring on the adequacy and timeliness of compliance with “pilot judgments.” It should include consideration of the steps taken by the Committee of Ministers under its “priority supervision” and those taken by the respondent state, as well as the impact of such judgments.

The monitoring process should seek to answer the following questions:

- In what circumstances will the Court issue a “pilot judgment”?
- What steps can be taken by a respondent state to implement a “pilot judgment”?
- To what extent has a respondent state introduced measures that effectively address the systemic problem, as well as providing a remedy for the applicant?
- What is the effect on similarly situated persons who have already lodged applications with the Court?
- Within the domestic arena, what obstacles exist which may hamper effective implementation?
- What measures can be taken by the Committee of Ministers to encourage or facilitate implementation of “pilot judgments”?
- What assistance can be provided by other Council of Europe bodies, such as the Council of Europe’s Commissioner for Human Rights and the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE)?


What are the appropriate time limits for implementing “pilot judgments”?

Awards of just satisfaction

We oppose the proposal of the Group of Wise Persons to refer decisions on awards of compensation back to the state concerned.\(^\text{151}\)

We consider that this approach:

a. increases the likelihood of further and lengthy delay in the determination of compensation decisions. This would be particularly regrettable given that the individuals affected would already have had to wait a number of years for a judgment acknowledging a violation of their human rights;

b. increases the risk of sharply differing standards being applied to awards of just satisfaction in different Council of Europe member states; and

c. potentially places an additional monetary burden on victims of violations of the European Convention on Human Rights, who might be required to pay filing fees and lawyers’ fees, as well as other costs incurred in such proceedings. We believe that it would inappropriate to ask a successful applicant, in respect of whom the Court has established a violation of the Convention, to bear any further expenses in determining the amount of compensation for violations committed by the state concerned.

We also note that implementation of this proposal would require each member state to adopt the necessary laws and procedures which would grant national courts jurisdiction to consider such cases. The information provided to date by member states related to the implementation of Recommendation (2002) 2 indicates, that not all member states have procedures for the reopening or re-examination of all cases (civil and criminal), even following a judgment of the Court.\(^\text{152}\)

We remain, however, strongly supportive of the proposal made by Lord Woolf to establish a just satisfaction unit within the Court’s Registry which would carry out the task of assessing just satisfaction claims.\(^\text{153}\)

We believe that in this way, the Court would be able to rapidly develop the expertise to deal with such claims in an expeditious and logically consistent manner.

---

Advisory opinions

We note the Group of Wise Persons’ proposal to empower the Court to give Advisory Opinions at the request of national courts.\(^\text{154}\)

We consider that this has the potential to assist national courts in ensuring better implementation of the European Convention on Human Rights at the national level and reducing the number of applications submitted to the Court on the issue concerned. While our commentary on the Group of Wise Persons’ Interim Report endorsed the proposal, on further reflection we consider that the concept raises a number of important issues that require its further elaboration and development.

---


153. Review of the Working Methods of the European Court of Human Rights, December 2005, at page 40. This report is available by a link on the Court’s website http://www.echr.coe.int/ECHR/.

in the domestic proceedings. Fifth, we would recommend that an Advisory Opinion should be binding as to the interpretation of the Convention on all member states. Otherwise there is a substantial risk that member states might choose not to follow the Court’s opinion and thereby undermine its authority. Finally, we would be concerned if the new admissibility criteria set out in Protocol No. 14 to the European Convention on Human Rights were to be applied to any applications arising following a national court’s receipt of such an Advisory Opinion; we would consider that such applications would merit a full review by the Court of the manner in which the national court had applied the Advisory Opinion in the case at issue.

Concerning the institutional status of the Court and the judges

Nomination and election of judges

We welcome proposals of the Group of Wise Persons to enhance the reputation of the Court by strengthening the process by which judges of the Court are nominated and elected.

We consider that changes should be made to the nomination process in many states (including ensuring that they are open and transparent) and to enhance the Parliamentary Assembly’s election process. Doing so would enhance the credibility and effectiveness of the Court, and improve public confidence in Europe’s primary institution for the protection of human rights.

We endorse in particular the proposals to require that the professional qualifications and knowledge of languages of candidates be taken into consideration during the election of judges by the Parliamentary Assembly of the Council of Europe (PACE).155 We also consider that knowledge and experience in the application of international human rights law should be taken into account.

We welcome the proposal of the Group of Wise Persons for the establishment of a mechanism whereby PACE would consider, during the election process, the opinion of a committee of prominent persons on the suitability of candidate judges for the Court.156 More detailed recommendations in regard to the nomination and election of judges to the Court are set out in Annex B.157

Efforts should be taken to encourage a gender balance and diversity at the Court at all stages of the nomination and election process.


156. It is proposed that the Committee would be composed of former members of the Court, current and former members of national supreme or constitutional courts and lawyers with acknowledged competence.


Budget

We consider that the Court has been hampered by a lack of sufficient human and financial resources. This is true despite the fact that “no other international court is confronted with a workload of such magnitude while having at the same time such a demanding responsibility for setting the standard of conduct required to comply with the Convention.”158 While we note that the budget of the Court has been increased, we are concerned that this sum was taken from the existing budget of the Council of Europe which reportedly had zero real growth in recent years. This has meant that the increase of the Court’s budget has come at the expense of funding for other Council of Europe activities, including intergovernmental and targeted co-operation activities. We consider that implementing cuts in one part of the Council of Europe’s human rights budget to finance improvements in the performance of the Court is short-sighted, since a reduction on other human rights activities (for example awareness raising, etc.) is likely to increase the burden on the Court in the long run. We therefore call on the Council

of Europe member states to increase the budget of the Council of Europe overall, including the budget allocated to the Court.

**Making the system more flexible as regards the conditions for reforming it – Establishing a Statute for the Court**

We welcome in principle, but with some reservations, the proposal to empower the Council of Europe’s Committee of Ministers to amend certain “Operating Procedures” of the Court, so as to obviate the need for the time consuming process of drafting, adoption and ratification of additional Protocols for such purposes. We consider that this could provide more flexibility.

However, we would underscore that, if this proposal were to be further considered, a precise agreement of the contents of the Statute would have to be agreed in a transparent process. We agree with the Group of Wise Persons on the list of matters, now determined in provisions of the European Convention on Human Rights, that should be explicitly excluded from inclusion within any instrument that could be modified by any “simplified amendment procedure.” In addition, if Protocol No. 14 were to enter into force, we consider in addition that the new Article 27 (as would be amended by Article 7 of Protocol No. 14) and the new Article 28 (as would be amended by Article 8 of Protocol No. 14) should also be excluded from any simplified amendment procedure since, it is at this stage of the scrutiny of applications, that vulnerable applicants may risk losing the protection of the Convention organs if the rigour of the single judge and Committee procedures were to be significantly reduced.

Furthermore, the granting of such a power to the Committee of Ministers should be accompanied by provisions requiring transparency and consultation with key stakeholders including the views of Court users, civil society and National Institutions for the Promotion and Protection of Human Rights, before amendments to operating procedures are agreed. We also endorse the caveat proposed by the Group of Wise Persons that any such changes should be solely at the Court’s own initiative.


**Consultation**

We consider it incumbent on the Council of Europe and each of the forty-six member states to ensure that the public (and in particular Court users, civil society and national human rights institutions) is informed about the on-going discussions on reform of the Court. Past and future applicants to the Court have an interest in ensuring its future at least equal to that of member states. Representatives of civil society across the Council of Europe region should be consulted, and their views taken into account before any further reforms to the Court are made.
SYNTHESIS OF THE COLLOQUIY

Ms Maud de Boer-Buquicchio

Deputy Secretary General of the Council of Europe

Mr President of the Committee of Ministers, Mr President of the Court, Mr President of the Group of Wise Persons, Madame Representative of the President of the Parliamentary Assembly, Ambassadors, Distinguished participants, dear friends,

Let me start by thanking again the San Marino authorities for having taken the initiative to organise and host this Colloquy to reflect, at a high technical level, on the fundamental question of the future development of the European Court of Human Rights in the light of the Report of the Wise Persons. Let me also thank all participants for their active participation, their useful insights as well as for the many constructive ideas put forward.

My role this morning is not to provide you with conclusions but to give you a synthesis which does not close the discussions as these should and will continue. The Colloquy has indeed provided interesting food for thought for further work which will help preparations for the 117th Ministerial Session which will be held in May 2007. The Committee of Ministers and the intergovernmental committees of the Council of Europe will reflect further on the important proposals put forward by the Group of Wise Persons and the extremely rich discussions at this Colloquy. It is important not to lose this momentum.

I count on your understanding that it is simply impossible for me to do justice to all the speakers and thought-provoking interventions which have contributed to animated debates over these two days not only in the room but also during our social gatherings. I will merely try to extract from these debates some elements which in my view emerge as pointers for our priorities in the immediate, short and long term. In other words, a picture of where we stand today and some broad indication of where we should go from here.

In the immediate term, there is not a shadow of a doubt that everything should be done to ensure that Protocol No. 14 enters into force without delay. We have all heard President Costa’s solemn appeal to the Russian Federation to ratify the Protocol before 1 July, and he is absolutely right in stressing that the different organs and institutions of the Council of Europe are ready to work with our Russian friends to achieve this. Let’s give Protocol No. 14 a chance!

Many of you have underlined that the entry into force of Protocol No. 14, and acquiring some experience with its operation and effects, is a precondition for any further reform of the Convention system in the future. It is simply not yet possible to make a full assessment today of the kind or scale of reform which should be contemplated. This of course also constituted a real handicap for the work of the Wise Persons and the fact that they produced such a high-quality report under these circumstances is testimony to the collective wisdom assembled in the Group doing justice to its title.

However, waiting for Protocol No. 14 does not mean that we are bound to remaining passive. On the contrary, there was general agreement that it is urgent to start considering measures, not dependent on Protocol No. 14, which could be implemented in the short term. I will highlight just a few of the ideas mentioned in our discussions, some of which are among the Wise Persons’ proposals or Lord Woolf’s recommendations, without claiming that they all received universal support.

Many interventions stressed the potential of the Court’s developing practice of adopting
pilot judgments and suggested that its use and its potential be kept under close review in order to reflect on any flanking measures which could be adopted at national and/or European level. The idea of Council of Europe monitoring of compliance with pilot judgments could be one such measure. It would indeed make a big difference if we could achieve a situation where the Court would no longer be required to deal with the merits of repetitive cases.

Furthermore, as Lord Woolf has recommended, it was suggested that the Court should redefine what constitutes an application. As the Secretary General put it, one may wonder whether it is really necessary to systematically count each and every piece of paper reaching the Court as an application.

Support was also expressed for equipping Council of Europe Information Offices in high case-count countries with an information desk to provide practical assistance to applicants, although some pointed out that this should not lead to provision of legal advice.

Translation and wider dissemination to target groups of the Court’s key judgments in languages other than French or English is a further example of a short term measure. While this is primarily a responsibility of each member state, the Council of Europe already supports some activities of this kind and we should examine how we can work together more systematically to make the case-law more easily accessible in all countries, including, but not exclusively, electronically.

Similarly, support was expressed for the important efforts of the Commissioner for Human Rights to work in co-operation with national human rights institutions and Ombudsmen, whilst fully respecting their respective independence. This enhanced co-operation covers areas such as better dissemination of European standards, addressing systemic problems, promoting execution of judgments, encouraging recourse to pilot judgments and promoting full implementation of the 2004 Recommendations of the Committee of Ministers. This work will be all the more effective in that the European Convention is now part of the law of the land in all member states.

Part of the short term measures is what the Secretary General described as “accompanying measures”: the first of which is ensuring that the Court will continue to be surrounded by a crucially important supporting environment of Council of Europe activities: standard-setting, monitoring and capacity-building. I cannot but warmly welcome President Costa’s very important statement that increases for the Court’s budget should not be at the expense of the Council of Europe. Such approach would be extremely short-sighted indeed. Let’s not put in danger the very activities that will in the long term be the only ones which will take away the root-causes of the Court being overburdened.

In the same category falls the full implementation of the 2004 Committee of Ministers reform package and the Recommendations adopted by the Committee of Ministers concerning measures to be taken at national level. This work of the CDDH is crucial, but it is worrying to hear that there are some difficulties, especially in assessing the existence and real impact of national measures taken. There seems to be a need to reinvigorate this process and to mobilise support for it, from NGOs and National Human Rights Structures, but also in-house, from the Human Rights Commissioner, the Venice Commission, the CEPEJ, and possibly other bodies. Perhaps one should try to be more inventive in addressing this issue.

I will now move on to what one could call long-term measures. To be absolutely clear about what I mean here: these are measures which would take considerable time to elaborate and even more time to take effect. But precisely because they will take time, it will be important to initiate consideration of them in the short term.

It is here, of course, that the Wise Persons’ Report offers interesting perspectives, even if not all their proposals received unreserved support at this colloquy.

Our debates have shown that two proposals in particular proved controversial. Several participants saw important disadvantages in the just satisfaction proposal, arguing that it would risk complicating and prolonging the procedure, creating divergent standards, or
that it would not fit in well with domestic judicial infrastructure for dealing with damages. It might be interesting to explore whether some of these concerns could be accommodated along the lines suggested by Judge Thomassen, distinguishing between pecuniary and non-pecuniary damage.

Many interventions addressed the proposal to institute a judicial committee which would be responsible for filtering applications. While it was made clear that this proposal differed in important respects from earlier proposals for a separate filtering body, several participants believed that some critical questions remained unanswered. I will not go into detail here, but merely recall that some concerns were expressed about whether this change would make a real difference in terms of the effectiveness of the Convention system whilst others criticised the suggested departure from the practice so far of one state, one judge. Such departure was felt to sit ill with the idea of equality of states in the Convention system and with the notion that the legal systems of all States Parties should be represented on the Court, the addition of an ad hoc national judge being regarded as insufficiently covering the need for coherence in the Court's case-law.

An interesting variant was suggested which might avoid at least some of these disadvantages, since it would involve rotation among the current judges, alternating filtering tasks and adjudication on the merits. Another idea voiced is the possibility to increase the number of judges, for example by adding judges at the expense of the states concerned, or a creative use of the ad hoc judge provision.

In any case, major structural changes, like the introduction of a judicial committee, would need to be reconsidered as part of a much broader reflection should the need for radical reform arise, including on the functioning of the Court: today and in the light of the operation of Protocol No. 14.

The proposal concerning advisory opinions received mitigated support. While many thought it intellectually sound, the main objections raised against it were that it would not necessarily reduce the workload of the Court (rather the opposite), that it might be difficult to reconcile with the Court’s contentious role and with the responsibility of the national judge under the Convention.

Some other proposals of the Wise Persons were largely welcomed as useful avenues for further work, which could start soon.

First, the proposal to make it easier to adapt the Convention machinery received broad support. Making this possible however would require an amendment to the Convention empowering the Committee of Ministers to do so and would be without prejudice to the power of the Court to adopt its own rules of procedure. It was recognised that this proposal did not receive sufficient attention during the drafting of Protocol No. 14 simply for lack of time.

Second, several participants expressed support for the proposal to adopt a new Council of Europe Convention containing obligations for member states as regards the availability, functioning and effectiveness of domestic remedies, in particular concerning excessive length of proceeding cases. The relevant Committee of Ministers’ Recommendation could serve as a starting point for this work.

There is no reason why these last two proposals could not already now be studied in greater detail by the Steering Committee for Human Rights.

Ladies and Gentlemen,

This Colloquy is part of a much broader process, triggered off by the Wise Persons’ Report. Without prejudging the decisions to be taken by the Committee of Ministers, the next steps in this process will probably include preliminary discussions among governmental experts in the Steering Committee for Human Rights next month and, a month later, the 117th Ministerial Session of the Committee of Ministers of the Council of Europe. On that occasion, decisions will undoubtedly have to be taken to set the framework for future follow-up to the Wise Persons’ Report, a process which I trust will be open to all the ideas expressed during these two days and give a rightful place to all relevant stakeholders:
governments, the Secretary General, the Parliamentary Assembly, the Human Rights Commissioner, the NGOs, and national structures, and, last but not least, the Court itself.

I trust that the San Marino Colloquy will mark a new phase in the reflection on measures to secure the long-term effectiveness of the Court and, as such, give a fresh impetus to the whole process. I should like to thank and congratulate our hosts, the government of San Marino, not only for their excellent initiative to organise this Colloquy but also for the warm hospitality they have extended to all of us, which witnesses, once more, the excellent way in which your country chaired the Committee of Ministers of the Council of Europe.

Grazie a tutti e grazie a San Marino.
Closing Address

Mr Guido Bellatti Ceccoli

Ambassador, Chairman of the Ministers’ Deputies

President of the European Court of Human Rights, Deputy Secretary General, President of the Wise Persons’ Group, Representative of the Parliamentary Assembly, Commissioner for Human Rights, Excellencies, colleagues, ladies and gentlemen,

Let me first of all express, on behalf of Mr Fiorenzo Stolfi, Minister for Foreign and Political Affairs and Chairman of the Committee of Ministers, the satisfaction we feel at your presence in our country and the most important contribution you have all made to this debate, which concerns a matter of key priority for the San Marino Chairmanship and a major challenge to our Organisation.

We are touched by the thanks which you have kindly expressed to my Minister and my authorities for the initiative we have taken in organising this Colloquy. Now it is my turn to return the compliment: my Minister, my authorities, thank you – all of you – because you have helped us win our bet.

Let me explain: you will remember that the Colloquy programme says that the colloquy is expected to give rise to useful reflections and suggestions for the preparation of the 117th Ministerial Session in May 2007, at which the Committee of Ministers will take its first decisions regarding the follow-up to be given to the Wise Persons’ Report by the relevant institutions of the Council of Europe.

This result could not be counted on: we might have taken part in two days of platitudes uttered by speakers already wedded to fixed positions and second-hand thinking.

But the reality was something quite different: a debate of a high quality conducted by people united around the single ambition to take forward the process of which the Wise Persons’ Report is the latest stage: the process of adapting our system of human rights protection to present and future circumstances.

This is why I, in turn, thank you for the dynamism, the freedom and the intellectual professionalism of your discussions and your commitment to the protection of human rights.

Madam Deputy Secretary General, dear Maud, you have just given your synthesis of our debates – a faithful and accurate one, I would add – and in so doing you have identified many guidelines which will enable us to go back to Strasbourg with a clearer idea of what we have to do.

In this synthesis I note a certain number of findings which I think are very important. For example, in the framework of our discussion on the proposal to create a judicial committee as a filtering mechanism, many speakers maintained that we must keep to the status quo, i.e. that the Court is composed of one judge per member state. Even solutions based, for example, on rotating the judges or recourse to ad hoc judges should be considered with caution, it was said, because of implications of various kinds.

Likewise, few speakers saw unalloyed advantages in the proposal to have the amount of just satisfaction determined by national bodies, as even if this function were to be exercised under the Court’s supervision, some thought it might give rise to additional applications and thus frustrate the aim of the exercise.

On the other hand, I noted widespread support for the idea of facilitating the adaptation of the Convention’s procedures.

There are two other central points: first, the absolute necessity for Protocol No. 14 to enter into force. We all hope that the State Duma will make it possible to realise this
objective by ratifying the Protocol as soon as possible.

Secondly, the question of effective domestic remedies deserves our full attention. In the light of what has been said here, we affirm that it is essential that respect for human rights is ensured first and foremost at national level, as the Commissioner for Human Rights underlined this morning when outlining what he is doing and what he proposes to do in this crucial area.

Clearly, any individual or collective action taken with this in mind is of the highest importance. We must find means of ensuring effective monitoring whilst reaffirming the principle of subsidiarity in the communal exercise of respect for fundamental rights.

Human rights education is also fundamental and I hope that the follow-up given to the Wise Persons’ Report will incorporate an in-depth commitment in favour of propagating knowledge of human rights amongst Europeans, in line with the decisions adopted by our ministers in May 2004.

We have been reminded of the importance of the complementary roles of the other Council of Europe bodies: the Commissioner for Human Rights, of course, but also the Committee for the Prevention of Torture, the European Commission against Racism and Intolerance, the Advisory Committee of the Framework Convention for the protection of national minorities.

The last point I would like to underline is something that was said by the Secretary General: an observation which he obviously and quite rightly considered sufficiently important to repeat at our ceremonial session before the Captains Regent. What Terry Davis said – essentially – was this: you cannotlegitimately solve the problem of the Court by closing the doors which give access to it. On the contrary, those doors have to be opened as wide as possible so that anyone believing their rights to have been violated may have unfettered access confident in the belief that their complaint will be dealt with effectively and justly. I invite you all to keep that thought in mind because in my view it is closely linked with the central position of the Court – the sun was mentioned earlier in our discussions – in the Council of Europe system.

San Marino’s task as Chair of the Committee of Ministers is now to inform my colleagues in Strasbourg of what has taken place here so as to prepare concrete decisions with a view to the ministerial meeting on 11 May. In carrying out this task I shall rely on the much-appreciated help of my colleagues who have taken part in this Colloquy as group chairs or as national representatives.

The Wise Persons have done a remarkable job considering the vastness of the challenge before them. We pay tribute to President Rodríguez Iglesias and his colleagues. Reform is in any event unavoidable and the Report provides strong foundations for the edifice. I underline that all the observations made were constructive and positive in spirit, which can only be helpful for the next stages. Thus the Wise Persons’ Report is and will remain a milestone along the way which we must travel. I agree with President Costa when he said just now that the Report is not to be buried.

My dear colleagues, let me re-open the chapter of thanks and on behalf of us all express our appreciation of all who contributed to this colloquy. I would first mention our acting Chair, Philippe Boillat, who directed our work with such admirable efficiency and flexibility. I would also like to thank Alfonso de Salas, the secretary to the CDDH, who was both architect and site foreman. I would not like to forget my own colleagues in the Ministry for Foreign Affairs, not least the members of my team at the Strasbourg mission including my deputies who have been here for some days, Eros Gasperoni and Michela Bovi, both of whom contributed greatly to the organisation of the colloquy. And finally thank you to everyone who has over the last two days worked, visibly or less visibly to make them – and I say it again with satisfaction – a total success.

To those who are returning home now, I wish “Bon voyage” and to those who are staying on for a little to enjoy our country, I wish you a pleasant stay.
THE ROLE OF SUPREME COURTS IN THE DOMESTIC IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Regional conference organised by the Directorate General of Human Rights and Legal Affairs and the Supreme Court of Serbia in the framework of Serbia’s Chairmanship of the Committee of Ministers of the Council of Europe

Belgrade, 20-21 September 2007

Proceedings
Introduction

The initiative to hold a regional conference to discuss the role of Supreme Courts in the domestic implementation of the European Convention on Human Rights, was taken by the Serbian Chairmanship of the Committee of Ministers of the Council of Europe.

The conference, organised by the Directorate General of Human Rights and Legal Affairs, in co-operation with the Supreme Court of Serbia, the Serbian Ministry for Foreign Affairs and the Council of Europe office in Belgrade, gave rise to an in-depth exchange of views on national experiences, the progress made and the challenges still to be faced with regard to an effective implementation of European human rights standards within Council of Europe member states.

The role of the case-law of the European Court of Human Rights as a guiding tool for Supreme Courts and national judicial systems was highlighted.

The subsidiary character of the European Convention on Human Rights was emphasised during the conference, along with the role of national judges in making the protection of human rights a reality at national level. Finally, the participants also stressed the need for an independent and qualified judiciary.
Opening of the Conference

Ms Vida Petrović-Škero

President of the Supreme Court of Serbia

Esteemed judges, ladies and gentlemen, dear guests, good day and welcome.

The Supreme Court of Serbia is honoured to have organised this conference, together with the Council of Europe, as part of Serbia’s activities relating to its chairmanship of the Committee of Ministers of the Council of Europe. We expect this meeting to contribute to the development and improvement of co-operation between the countries and Supreme Courts of the region and to the achievement of European goals: respect for human rights, the establishment of the rule of law and the development of democracy. By organising a meeting of this significance, the judiciary of our country has proved its commitment to the fundamental values, standards and norms of the Council of Europe and confirmed its willingness to contribute to their full observance at the national, regional and international levels.

Member states are striving to define the frameworks, methods and contents of their mutual co-operation and European integration within the framework of the Council of Europe and on the basis of equality and mutual respect. We expect that during the conference the participants will exchange experiences and views on certain legal topics, problems and their possible solutions and that they will make arrangements for their further co-operation.

The Republic of Serbia, as a signatory to the Convention on Human Rights, has pledged to ensure respect for the rights and freedoms laid down in the Convention. These values form the basis of democracy in any society and constitute the foundations of justice and peace in the world. A greater unity among the members of the Council of Europe and better co-operation at the regional level will ensure greater efficiency in the implementation of the provisions of the Convention. In each individual country as well as at the regional and European levels, the judiciary plays the most important role in promoting the implementation of the Convention on Human Rights. The Supreme Court of every country has the role to encourage other courts to reach an adequate level of human rights protection and provide them with guidelines for the implementation of the provisions of the Convention. In order for the judiciary to be able to carry out this task, it is necessary for the state to ensure conditions for continuing education, for raising the level of skills and expertise of judges for the implementation of the Convention and the case-law of the European Court of Human Rights.

Countries in transition are faced with a serious task with regard to harmonising their domestic practices with international and European standards in all areas, including the improvement of human rights protection. If all three branches of government do everything they can within their purview to ensure conditions for the implementation of a mechanism for the effective protection of the rights of citizens in judicial proceedings, the results and progress will be assured. A good assessment of obstacles to the effective implementation of the European Convention on Human Rights and correctly selected mechanisms for overcoming those obstacles will also improve the quality of the protection of the rights of citizens and the trust they place in the courts.

Continuing co-operation with European institutions, notably the Council of Europe, will help us too to overcome the difficulties we are facing at the moment and to fulfil our obligation to adopt and implement European standards as best we can.

The Supreme Court of Serbia and the judiciary of our country are ready to increase the
effectiveness of implementation of the Convention on the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights. At the same time, we will try to ensure the greatest possible efficiency of domestic courts and to provide citizens with effective protection of their rights at the national level.

The responsibility assumed by the Supreme Court of Serbia in respect of the organisation of this conference is great, and that is why I hope that its participants will confirm the importance and usefulness of an exchange of experiences, co-operation and joint debate about topics concerning the implementation of European standards in human rights protection.

I would like to thank the participants in the conference for accepting the invitation of the Supreme Court of Serbia and the Council of Europe and I wish you all success in your work.

Mr Philippe Boillat

Director General of Human Rights and Legal Affairs, Council of Europe

Madam President, Minister, Your Excellencies, ladies and gentlemen,

It is an honour and a real pleasure for me to be opening this regional conference, and I should like to welcome you warmly. I am most grateful to the Supreme Court of Serbia for taking the initiative of holding such a conference under the Serbian Chairmanship of the Council of Europe Committee of Ministers. My profound thanks also go to the Serbian Ministry of Foreign Affairs and all those involved in organising this important event for their excellent preparatory work.

I am particularly pleased that the Serbian authorities, the Supreme Courts of thirteen of our member states and the Council of Europe are so broadly represented, and at such a high level. The Council of Europe is represented, in particular, by the President of the European Court of Human Rights, Mr Jean-Paul Costa, whom I should like to welcome and warmly thank for consenting to share the views of the European Court of Human Rights with us. His presence, and that of Mr Popović, the judge elected to the Court in respect of Serbia, bear witness to the importance the Court attaches to the issue we are going to discuss today and tomorrow.

The main purpose of this event, indeed its very raison d'être, is to enable Supreme Courts to share their experience of the implementation of the European Convention on Human Rights and discuss the role that they play in their domestic judicial systems in ensuring that the Convention is effectively implemented.

I would remind you that, under Article 1 of the European Convention on Human Rights, it is primarily the responsibility of the national authorities, and hence the domestic courts, to safeguard the rights and freedoms set out in the Convention. This is essential if the fundamental principle underlying the Convention’s entire supervision machinery, the principle of subsidiarity, is to be fully respected. The European Court of Human Rights should be called on to intervene only secondarily.

All the States Parties to the Convention have incorporated the Convention into their domestic legal systems, and it is therefore directly enforceable in the 47 States Parties. This does not, however, mean that in practice the Convention is applied in the same way as a source of domestic law. Some states are, if you will forgive the expression, “dragging their feet” and, as a result, thousands of applications are pending in Strasbourg, even though the Court has well-established precedents in respect of the issues in dispute. In actual fact, over half the applications to Strasbourg would not have been lodged if the domestic courts had applied the Court’s case-law. A solution
The role of Supreme Courts in the domestic implementation of the ECHR

A comparative approach strikes me as essential if we are to discuss problems that are common to several of your courts and try to come up with solutions. The experience of states that have already introduced reforms in order to forestall the submission of applications to the Court is vitally important. They will tell us what domestic procedural means they use to examine complaints in the light of the Convention and, if necessary, ascertain that there has been a violation and remedy the situation. I am delighted that you will be sharing this experience not only with your colleagues from other countries but also with representatives of the Court and the Council of Europe. In particular, we shall have the pleasure of hearing Mr Paul Lemmens, member of the Belgian Conseil d’Etat, and Mr Jeremy McBride, Barrister and Visiting Professor at the Central European University, who will share their experience with us.

Madam President, Your Excellencies, ladies and gentlemen,

It is primarily your Supreme Courts that have the privilege of protecting the fundamental rights of over 800 million Europeans. I am therefore convinced that our discussions will have beneficial results that will be of interest to the Supreme Courts in all the States Parties to the Convention. I wish you all an excellent conference. ✭

could – and should – therefore have been found at national level.

Supreme Courts should therefore set an example to lower courts in this respect. It is up to them, in the first instance, to lead the way in applying the Convention and the Court’s case-law direct. Moreover, every Supreme Court judge can, and indeed should, by virtue of his or her status, knowledge and experience, make a significant contribution to the protection of the human rights of his or her fellow citizens.

In a presentation I shall give later this morning, I shall point out that the basis of any genuine democracy and of the rule of law is an independent judiciary. Without an independent judiciary, not only can there be no effective protection for human rights, but democracy and the rule of law are in serious jeopardy.

The purpose of this conference is therefore to discuss, together, effective means of enabling your domestic courts to take account of the case-law of the European Court of Human Rights in their decisions, to remedy situations where proceedings are excessively long, and to ensure that judges have the knowledge and expertise needed to implement the European Convention on Human Rights in their daily work. I particularly welcome those of you who are going to describe the situation in your respective countries in these respects and with regard to the issues raised during the conference, and I should like to thank you here and now.
Mr Radojko Bogojević

State Secretary of the Ministry of Foreign Affairs of the Republic of Serbia

Mr Minister of Justice, Madam President of the Supreme Court of Serbia, Mr President of the European Court of Human Rights, Honourable Judge Petrović, Esteemed guests, ladies and gentlemen,

I would like to welcome you on behalf of the Serbian Foreign Minister, Vuk Jeremić, chair of the Committee of Ministers of the Council of Europe, who, unfortunately, is unable to address you here today due to prior commitments. Please allow me to read you his message:

“Dear Europeans – dear friends,

It is an honour and a pleasure for me that the Regional Conference on the Role of Supreme Courts in the Domestic Implementation of the European Convention on Human Rights is being held in Belgrade as part of Serbia’s chairmanship of the Committee of Ministers of the Council of Europe, and I regret not being able to address you personally.

The importance of this event is also highlighted by the presence of our distinguished guests – Jean-Paul Costa, President of the European Court of Human Rights, and Dr Dragoljub Popović, judge of the European Court of Human Rights for Serbia.

The European Court of Human Rights is a particularly important institution within the Council of Europe system. Its significance with regard to the protection of human rights and the rule of law is invaluable for Europe as a whole. The European Convention on Human Rights and the European Court of Human Rights therefore occupy a prominent place in the priorities of Serbia’s chairmanship of the Committee of Ministers of the Council of Europe.

As you know, Serbia is chairing the Committee of Ministers of the Council of Europe from May until November this year, only four years after becoming a member of the Council of Europe. The foremost priority of our chairmanship, which we presented at the 117th Ministerial Session of the Committee of Ministers of the Council of Europe on 11 May this year, is to continue to foster the fundamental values of the Council of Europe, that is human rights, the rule of law, and democracy. Within the framework of this priority, Serbia advocates a further strengthening of the mechanism for implementing, and monitoring the implementation, of the Convention. In accordance with the decisions of the Third Summit of the Council of Europe, we will focus on promoting efficiency in the implementation of the Convention on the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights, as the true pillars of the European system of protection of human rights and fundamental freedoms.

Furthermore, Serbia, as the country currently holding the chairmanship, attaches a special importance to the activities aimed at increasing efficiency in the implementation of the Convention at national and European levels.

As you know, a conference on the role of government agents before the European Court of Human Rights was held in Belgrade in June this year, and today Belgrade is the host of rep-
representatives of supreme courts of the countries of the region.

At this point, allow me to make a slight digression and mention another priority of our chairmanship. I am referring to the regional component of our chairmanship: Serbia, as chair of the Committee of Ministers of the Council of Europe, endeavours to contribute to the improvement of the European prospects by strengthening good-neighbourhood relations and reaching the standards and goals of the Council of Europe in South-East Europe.

We are also trying to help the Council of Europe make its presence more strongly felt in the region, which will help promote democracy, the rule of law and human rights protection in this part of Europe, which – I am certain you will share my opinion – is particularly important in the light of our efforts towards European integration and for overcoming the difficult legacy of the recent past.

The entering into force of Protocol No. 14 to this Convention is of essential importance for enhancing the efficiency of the system of the European Convention on Human Rights. At the same time, it is necessary to improve and strengthen the national mechanism for its implementation. Hence the special significance of today’s meeting.

Topics such as the acquisition of essential knowledge and skills by judges for the implementation of the Convention, the assessment of obstacles to its effective implementation by national courts, and the provision of legal remedies in cases of lengthy judicial proceedings, as well as current problems and possible solutions with regard to the independence of the judiciary, make for a substantial and constructive debate. I am convinced that such topics, in their own right, require more than a single two-day conference, but I am also convinced that you will use the time available for an invaluable exchange of experiences and practices.

Finally, I would particularly like to say how pleased I am that in addition to this distinguished meeting, the European Heritage Days and European Flag Day celebrations are being held in Belgrade right now. Under this flag, Serbia, as a Council of Europe member state, is striving to make a full contribution to the strengthening of the role of our organisation and multilateral dialogue between states and nations, a dialogue whose purpose is to build a joint Europe without dividing lines. This endeavour is underlined by the motto of Serbia’s chairmanship – ONE EUROPE, OUR EUROPE.

I am convinced that our joint beliefs and goals and our concerted activities aimed at safeguarding human rights, democracy and the rule of law are important for every individual European and that each European can wholeheartedly say: ‘One Europe, my Europe.’

I wish you success in your work, and, once again, I regret being unable to attend this important meeting in person.” ★
THE AUTHORITY OF THE JURISPRUDENCE OF THE ECTHR

Mr Jean-Paul Costa

President of the European Court of Human Rights

Madam President of the Supreme Court, Mr Minister of Justice, Mr Director-General, ladies and gentlemen,

First of all my very sincere thanks to the authorities of the Republic of Serbia for the warmth and generosity of their welcome, which is in keeping with their age-old reputation for hospitality.

It is a particular pleasure to be back in Belgrade because I made a lengthy tour of your country on completing my university studies, which, as you will realise, was not exactly yesterday!

Serbia has for four months held the chairmanship of the Council of Europe Committee of Ministers. This regional conference on the role of Supreme Courts in implementation of the European Convention on Human Rights is one of the highlights of the Serbian chairmanship, and congratulations are due to the Council of Europe Directorate-General of Human Rights and Legal Affairs and the Supreme Court of Serbia for organising it.

On 2 July I also had the honour of welcoming to the European Court the President of Serbia, Boris Tadić, whose visit demonstrated his commitment to the Strasbourg human rights protection machinery.

The priorities of the Serbian chairmanship, as presented at its outset, are ample evidence of Serbia’s desire to focus its action on protection of human rights. As President of the Court, which is the keystone of the European system, I am very pleased about that.

This conference seeks to bring out how the Strasbourg Court and Supreme Courts interact in applying the Convention and I am pleased to see representatives among you of the highest courts of many of our member states.

How is the authority of the European Court of Human Rights exercised? That is the question which I shall attempt to answer today, and in doing so I shall draw a distinction between the authority of the Court’s judgments, which is secured by a series of mechanisms, and the authority of the case-law, which to my mind must be construed more widely. But the word authority (auctoritas in Latin) should not mislead you. Authority does not mean authoritarianism, still less does it mean arbitrariness. Authority is indissociably linked with reason, credibility and ultimately the power to convince, rather than with the right to impose anything.

The European Convention on Human Rights, as a multilateral treaty between states, is an integral part of international law, whose primacy over domestic law was asserted as far back the nineteenth century, and has since been confirmed on many occasions, notably in an important opinion delivered by the International Court of Justice in 1988.

The Court’s case-law is clear in that regard: it states that “[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part”.

At the same time the Court has often emphasised “the special character of the Convention as a treaty for the collective enforcement of human rights”, the fact that it is an “instrument of European public order (ordre public) for the protection of individual human beings”, which means that the Court has
The role of Supreme Courts in the domestic implementation of the ECHR

A Work in progress 289

Responsibility for ensuring effectiveness of the Convention by interpreting it accordingly.

The Convention, which is binding on the forty-seven states that have ratified it, contains a number of provisions which reinforce its authority and the Court’s.

First of all, Article 1 provides that “The High Contracting Parties shall secure to every one within their jurisdiction the rights and freedoms defined in Section I of the Convention.” That essential provision confers on each individual the right to invoke the Convention before the domestic courts. It is therefore a provision which is as important for the European Court as for the domestic courts.

Article 1 is supplemented by Article 19, which establishes the Court in order that it may “ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”. The Strasbourg court thus plays a distinctive role and has special authority.

Last, Article 46 states that the High Contracting Parties “undertake to abide by the final judgment of the Court in any case to which they are parties”. Hence what is known as authority of judgments, authority which, under the second paragraph of Article 46, is exercised under the supervision of the Council of Europe Committee of Ministers.

As I have said, authority of judgments must be distinguished from authority of case-law, and I shall deal with those two aspects of the matter in turn, though before doing so I should like to make three brief observations:

First of all, the Court’s case-law does not form a uniform whole. It is made up not only of judgments finding either a violation or a non-violation of the Convention, but also of inadmissibility decisions, which are sometimes as important as a judgment. In a moment I shall refer to the inadmissibility decision delivered by the Grand Chamber of the Court in the case of von Maltzan and Others v. Germany, which although not a judgment is none the less very important.

My second preliminary observation is that the Court’s case-law is not laid down once and for all. In many areas it has evolved and indeed is constantly evolving (an example of this is the United Kingdom cases concerning transsexuals). In other words, while observing the force of precedents, our Court applies the “stare decisis” rule flexibly; since its earliest judgments, moreover, it has treated the Convention as a living instrument which must be interpreted in the light of present-day conditions.

Last, the Court is clearly not infallible. In addition, some of its judgments and decisions are not adopted unanimously, hence the value of the separate opinions of minority judges provided for in Article 45. They indicate the variety of possible approaches and unquestionably have an important role in informing legal opinion, even though, naturally, res judicata attaches to what was decided by the majority.

I turn to the authority of the judgments. That authority has the consequence that a state which is found to have violated the Convention must execute the decision of the Court. Where the Court so decides, that state will have to pay a sum of money to the applicant. This is what is known, in Convention terminology, as “just satisfaction”. In certain cases execution of the judgment means restitutio in integrum, where that is possible, and sometimes that may also entail a change in domestic law or domestic case-law. It is quite common for a state to be required to amend its domestic legal system in order to comply with a judgment of the Court and avoid repeating the human-rights violation found by the Court.

However, the authority of the judgments has limits: the Court’s judgments are binding only on the parties and not generally binding. Thus, in law at least, only states found to have violated the Convention are bound by the Court’s decision.

Sometimes, however, the law of other states is similar to the law which gave rise to the finding against the state concerned. In the absence of generally binding effect, states not directly concerned by judgments are under no obligation to comply with them, and one possible consequence of this is that after the Court has found against a state and that state has amended its system, among States Parties to
the Convention there will be those which change their law on that basis and those which continue to apply provisions of a system which the Court has held to be contrary to the Convention.

I shall give a few examples, if I may.

France might have learnt the lesson of the *Malone v. the United Kingdom* judgment and enacted necessary laws on telephone tapping which it then lacked, instead of which it waited to be itself found in breach of the Convention in the *Kruslin and Huvig* cases before enacting telephone-tapping legislation that was compatible with the Convention.

On the subject of my own country, which has not always been the best of pupils in this area, I might also mention inheritance law which discriminated against children born out of wedlock. France might have known that it risked a violation finding, given judgments concerning other countries, in particular *Marckx v. Belgium* and *Inze v. Austria*. It would certainly have done well to take the initiative, like the Netherlands, whose law on the subject, inherited from the *Code Napoléon*, was the same as France’s. In the event it was more than ten years after the *Markx v. Belgium* case that the violation finding against France in the *Mazurek* case prompted the French legislature to tackle the matter.

I should add that countries increasingly seek to forestall never-welcome Strasbourg violation findings, with the result that, at least *de facto*, the Court’s judgments carry some force even with countries which are not parties to the particular dispute.

That authority is reinforced, moreover, by the role which the Committee of Ministers plays in ensuring the execution of judgments. It is the Committee of Ministers, not the Court, which the Convention has always entrusted with that task, a task which, although the number of judgments delivered by the Court has very significantly increased, the Committee of Ministers has discharged very well, to its great credit.

I should also like to mention the new directions or orders the Court gives, which reinforce the authority of its judgments. An example is *Assanidze v. Georgia*, where the Court, after concluding that the applicant had been detained arbitrarily in breach of Article 5(1) of the Convention, held for the first time in the actual judgment that the respondent state must ensure that the applicant was released without delay, as was done the very next day in a signal confirmation of the Court’s authority.

Pilot judgments, as used in a number of Polish cases, are another example and in my view have helped lend reinforced authority to the Court’s judgments, but I leave it to my colleague and friend Judge Popović to speak about this in greater detail tomorrow. Where the Court finds that there has been what is known as a structural violation, it may, in a pilot judgment, request the respondent state to make good the injury to all potential applicants by adopting general measures, rather than itself ruling on each individual case.

Use of pilot judgments was in fact welcomed and encouraged by the Wise Men in their report and the Court is therefore keen to develop it.

What about the authority of the case-law, which is my second topic and which, to my mind, is further-reaching than the authority of the judgments? It is real and extends beyond the specific case.

I have mentioned the Netherlands in connection with children conceived outside marriage. Horizontal application of the Court’s judgments is increasing: there is a tendency for states not been found to have violated the Commission to align themselves nevertheless on the Court’s case-law. The situation has therefore changed for the better and it is really possible to speak of the case-law as having authority.

In France, for instance, in matters of respect for private and family life (Article 8 of the Convention), the courts and parliament have taken into account the Court’s case-law on the law relating to aliens, with the Council of State basing its position on Court case-law which protects the rights of aliens forcibly removed from national territory. (In the light of the 1988 *Moustaquim v. Belgium* judgment, the French Council of State amended its case-law on the deportation of aliens in 1991.)

This horizontal application of the Court’s case-law means that states have to pay close
attention to the case-law in order to see how it might apply to them.

However, there is an important time dimension to the Court’s case-law as well.

The courts of the member states, and here I give all due credit to the Supreme Courts, are now anticipating developments in the Strasbourg case-law, even in matters on which the Court has yet to deliver a ruling. Again, the domestic courts, proceeding by analogy, are taking pointers from the Court’s general case-law in developing their own case-law. Examples of this are broad construction of what constitutes assets to take in enforceable claims and even legitimate expectation of possessing an asset, or recognition that the principle of freedom of expression prevails over the exceptions provided for in paragraph 2 of Article 10, or the understanding of judicial impartiality and procedural fairness.

This close interest in the case-law is natural, as the domestic courts have the right and the duty to ensure primacy of the Convention. In most member states the Convention is daily invoked before the Supreme Courts (and indeed the ordinary ones) and applied by them irrespective of whether there is established Strasbourg case-law in the relevant area.

To take an example, in the United Kingdom, where the Convention has been directly applicable only since 2000, the year the Human Rights Act was passed, the House of Lords anticipates the Court’s case-law in the context of anti-terrorist measures.

The corollary of the domestic courts’ readiness to accommodate the Court’s case-law is the fact that the Court itself sometimes draws on domestic decisions.

The Von Maltzan and Others v. Germany decision, to which I have already referred, concerned compensation for persons whose property had been expropriated either between 1945 and 1949 in the Soviet Occupied Zone in Germany following the agrarian reform or after 1949 in the German Democratic Republic (GDR). In that case the Court clearly and expressly relied on the case-law of the Karlsruhe Constitutional Court, which placed emphasis on the wide discretion enjoyed by Parliament for purposes of arriving at comprehensive solutions to consequences of German reunification.

The Court in Strasbourg has no hesitation in following to the letter, where appropriate, the reasoning applied by a national court, as in Thivet v. France, a case which is of legal and historical interest because it had to do with the Russian bonds issued by the Tsarist regime which were not repaid after the 1917 revolution. In declaring that application inadmissible, the Court reproduced the decision of the French Constitutional Council approving the compensation arrangements. So while a large number of national courts rely on the Court’s case-law, the Court also refers to theirs; thus we often speak the same language.

I shall conclude this series of examples by citing, again, the recent Russian Conservative Party of Entrepreneurs v. Russia judgment, which concerned the right of a party to stand for election. The Court held that there had been a violation of Article 3 of Protocol No. 1 and ruled that disqualification of the applicant party and a candidate in the elections for the reasons stated by the authorities was disproportionate to the legitimate aims pursued. The Court made it clear in the grounds of the judgment that the Constitutional Court of the Russian Federation shared that view.

The authority of the case-law is therefore an established fact. How can it be reinforced?

That unquestionably depends on the member states and domestic courts being better informed. Here, the Court’s HUDOC information system, which is constantly being improved, plays a major part. So do the Court’s Internet broadcasts of hearings, which began in July 2007. The opportunity this gives everyone, wherever they are, of following a hearing of the Court virtually live should bring the Convention machinery closer to the public and to national judges.

Case-law authority is assisted by the judicial dialogue which results from judges’ many visits to the Strasbourg Court. It is a great pleasure to receive delegations from national courts and arrange for them to attend our hearings and meet judges and staff of the registry. In 2006 the Court had visits from more than ninety delegations of judges from all the
member states, and the figure increases annually by 15%.

Another means of ensuring dialogue is bilateral and multilateral colloquiums like this one, which are extremely constructive. The Council of Europe performs a vital role in organising them, and the Director General, my friend Mr Philippe Boillat, knows that he can rely on the Court to take part.

Every day, in the domestic courts of our member states, the European Convention on Human Rights is invoked by lawyers and cited and applied by the judges. That, in my view, is the most significant advance of these forty five years’ case-law: law which not long ago was regarded as external has penetrated judicial thinking to such an extent as now to have a key bearing on courts’ decisions.

A genuine dialogue between national judge and European judge has come about. That dialogue is indispensable, and the international judges are often former national judges, of course. It is the national courts that are primarily responsible for interpreting and applying a treaty such as the European Convention on Human Rights: it must not be forgotten that the Court in Strasbourg is careful to observe the principle of subsidiarity, which, as Philippe Boillat pointed out, is crucial to the system of human-rights protection.

However, it does ultimately fall to the Court to perform European-level review. That role firstly operates with regard to the domestic courts. Although we must not set ourselves up as a fourth instance rehearing what has already been heard in the domestic courts, we do have a duty to oversee the requirements of fair trial as guaranteed by Article 6 of the Convention. In that context I cannot overstate the need for independence and impartiality of the national courts. Without competent judges, without independent judges, there cannot be any respect for procedural fairness or, ultimately, proper respect for human rights. My distinguished predecessor, René Cassin, was fond of saying that Article 6 occupied a central place in the Convention as the absence of fair trial rendered domestic protection of human rights illusory. The Court also has a review function vis-à-vis national legislatures, and that role is essential if we are to maintain and develop a Europe based on human rights. The Convention and the protocols to it as applied and interpreted by the Court should be regarded by states as establishing minimum standards. It is worth pointing out that, in the light of Article 53 of the Convention, there is clearly nothing to prevent member states from exceeding those standards and providing even greater protection for Convention rights.

I am quite sure that the fruitful discussions which we are going to have will make our meeting in Belgrade a contribution to reinforcing inter-court dialogue and thus the authority of the Court’s case-law.

Thank you.
The role of Supreme Courts in the domestic implementation of the ECHR

The role of the Supreme Court of Albania in the domestic implementation of the ECHR

Mr Perikli Zaharia

Judge of the Supreme Court of Albania

National report

The Supreme Court of Albania is the highest instance of the Judiciary for the interpretation and the implementation of laws (statutes) through its judgments.

There is also a Constitutional Court, which is not included in the Judiciary and has as specific task to examine the constitutionality of laws and their conformity with international obligations. It cannot be considered as a superior instance, as to the general review of the decisions of the Supreme and ordinary courts, but as a specialised court.

The Supreme Court is composed of 17 justices.

The Supreme Court is organised in two Divisions, Civil and Criminal Division. There are five justices on the panel during hearing a case. The unified interpretation of laws are finalised by Joint Panels. The Supreme Court aims specifically to provide a dynamic and unifying interpretation of law, having regard in particular the requirements of the European Convention on Human Rights.

Exercising judicial control on a national level, the Supreme Court ensures the direct application of the above-mentioned Convention and the interpretation of laws in the light of that one, in order to guarantee the individuals’ rights and freedoms which is the self-evident role of the Judiciary in a state governed by the rule of law.

Article 5 of the Constitution of Albania provides that: The Republic of Albania applies international law that is binding upon it.

The Treaty Law is part of domestic law in Albania; the primacy of Treaty Law over ordinary legislation is insured in the Constitution.

Article 116 of the Constitution of Albania provides that:

Normative acts that are effective in the entire territory of the Republic of Albania are:

a. the Constitution;
b. ratified international agreements;
c. the laws;
d. normative acts of the Council of Ministers.

The relationship between international and domestic law is regulated in a monistic way by the Constitution of Albania.

Article 122 of the Constitution of Albania provides that:

1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law.

2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it.

Article 131 of the Constitution of Albania provides that:

The Constitution Court decides on:

a. the compatibility of a law with the Constitution or the international agreements as provided in Article 122;
b. the compatibility of international agreements with the Constitution, prior to their ratification;

As to the European Convention on Human Rights (the Convention), it possesses the status of constitution law in Albania and enjoys a superior rank in the Albanian hierarchy of law in particular in relation to Albanian ordinary legislation and international treaties. The Convention is directly applicable in the legal system of Albania and takes priority over incompatible legislation.

The case-law of the European Court of Human Rights is considered practically an integral part of the Convention. On the other hand, Albanian constitutional provisions on human rights evoke the Convention wherever restrictions by law on those rights are mentioned.

Under Article 17 of the Constitution of Albania, limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it.

These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

If the European Court of Human Rights holds that certain provisions of Albanian legislation violate the Convention, the courts of Albania are not permitted to apply those provisions.

The Supreme Court of Albania evokes a relevant judgment of the European Court of Human Rights during considering a case, wherever restrictions by law on individuals’ rights and freedoms are claimed for.

So, considering Cuni v. Shkodra Regional Police Directorate case (No. 31, 14 April 2003) as for dismissal from employment, the Supreme Court of Albania decided in Joint Panels based on Pellegrin v. France (28541/95, 8 December 1999) (Article 6/1 of the ECHR) judgment issued from the European Court of Human Rights.

The Supreme Court (Civil Division) affirmed Mirdita District Court Judgment on Beleshi v. Prisons General Directorate (No. 928, 19 December 2006), (as for redress because of degrading treatment), that was based on Kalashnikov v. Russia (No. 47095/99, 15 July 2002) and Peers v. Greece (No. 28524/95, 19 April 2001) (Article 3 of ECHR) judgments of European Court of Human Rights.

In the same way, the Supreme Court (Civil Division) affirmed Tirana Court of Appeal Judgment on Daka v. Kore (No. 443, 17 April 2007), that was based on Mikulic v. Croatia (No. 53176/99, 7 February 2002 (Articles 6 and 8 of the ECHR) judgment of the European Court of Human Rights.

The Supreme Court of Albania takes into consideration that Albanian judges have the relevant skills and knowledge to apply the Convention and the case-law of European Court of Human Rights.

The initial training schemes run for judges on the European Convention on Human Rights and the case-law of the European Court of Human Rights. Judges are provided with initial training in such areas during the academic year.

The academic program on “Human Rights” contains an important part of the initial training of judges. The instruments to achieve the objectives of this program are mainly: theoretical lectures; organisation of work-shops, which include the presentation and interpretation of cases by judges; eventual visits to the European Court of Human Rights.

Subjects on Human Rights dealt with over the previous years focus mainly on the basic principles of the international law on Human Rights, the European system on the protection of Human Rights and fundamental freedoms, and interpretation techniques of the Convention by the European Court of Human Rights.

Apart from the execution of European Court of Human Rights judgments by the government, Albanian courts have the authority to prescribe their own measures implementing the European Court of Human Rights decision, wherever there is a claim based on the relevant obligations derived from it.

Nevertheless, there is not yet such a case to be considered by the courts of Albania.

Where legislation violating provisions of the Convention has been applied in legal proceedings concluded by a final, non-appealable
The role of Supreme Courts in the domestic implementation of the ECHR

decision, a direct application for reopening of
the proceedings and lodging of a claim for
compensation are available in Albania, before a
possible application to the Court in Stras-
bourg. Under Article 131/f of the Constitution
of Albania, the Constitution Court decides on
the final adjudication of the complaints of indi-
viduals for the violation of their constitutional
rights to due process of law, after all legal rem-
dies for the protection of those rights have
been exhausted.

Since the Convention possesses the status
of constitutional law in Albania, the judgments
of the European Court of Human Rights are
given the same authority as “self-executing”
provisions of the Convention.

If an Albanian judge were to ignore estab-
lished case-law of the Strasbourg Court – and
bearing in mind that the Convention has been
incorporated into domestic law, its judgment
might be annulled on the basis that the law had
been applied in a “manifestly wrong manner”,
contrary to the Convention.

Judges work on the presumption that,
when there appears to exist a blank space or a
missing part in domestic law, the clarification
of an uncertainty is needed, or when faced with
a doubtful or controversial point of law, they
will interpret legislation in such a manner as to
avoid conflict with international obligations.

Judges periodically receive information on
legislation and case-law at European level.

The only document which is sent directly
to each judge by the national authorities in
Albania is the official gazette, which can
include recent legislation at the European and
international levels and judgments of the Euro-
pean Court of Human Rights on cases where
the legal action is brought against Albania.
Such information is available on paper and will
be provided soon in electronic form (CD-
ROM).

On the other hand, all judges periodically
receive information on case-law of the Euro-
pean Court of Human Rights through a legal
bulletin in Albanian language called “Human
Rights in Europe”. This bulletin is funded by
the European Commission and the Council of
Europe and is produced by the AIRE Centre in
London and European Centre in Tirana. So it is
still necessary for them to perform their own
research in these matters.

There is no information in Albanian on
recent case-law of the European Court of
Human Rights provided in electronic form.

A principal question might be: is there the
possibility of introducing review proceeding at
national level following a finding of a Conven-
tion violation?

So, a Strasbourg Court judgment might
considered as a new circumstance vis-à-vis the
res judicata rule.

Although domestic courts in Albania have
not so far had any occasions to determine their
case-law on this question, there appears to be
no provisions in Albanian domestic law which
would allow a victim of a violation of the Con-
vention to request revision of a final domestic
court decision on the sole ground that the
Court of Strasbourg has found such a violation.

Though there is no a case yet addressed to
the Supreme Court of Albania, it is possible,
however, that the review of a court decision
could be requested by the person concerned,
when the European Court of Human Rights
has found a violation of the Convention and
review of proceedings are the only means of
providing reparation.

Although there is no specific provisions in
Albania concerning review proceedings
[aimed at reopening (revision) of a domestic
court decision, which has been concluded by a
court judgment that is final and has binding
effect], following a judgment of the European
Court, it is possible to include among the rec-
ognised grounds for review, a decision given by
Court of Strasbourg. It is accepted that the
judgments of the European Court are given
direct legal force within domestic legal orders
of Albania.

Albanian domestic law does not offer
apparently the possibility of having a case
reviewed in the event of a finding of a violation
of the Convention, but we think that it is not
impossible for the person concerned to
request review, based on the interpretation of
the Constitution.

So, since the reasoning behind the rule is to
ensure compliance with international obliga-
tions, it might also be argued that such a deci-

A WORK IN PROGRESS

295
sion could likewise be a valid ground for review. ★
The independence of the judiciary: current problems and possible solutions

Mr Philippe Boillat

Director General of Human Rights and Legal Affairs, Council of Europe

Introduction

Madam President of the Supreme Court, Your Excellencies, ladies and gentlemen,

The Council of Europe is our common European home, based on the three pillars of human rights, the rule of law and pluralist democracy. It is therefore the Council's quite natural duty to stay in the forefront of the defence and promotion of independent and impartial justice. In my opening address for the Conference this morning I mentioned the need for all democratic states respecting human rights and the rule of law to have an independent judiciary. Such independence must go hand in hand with an efficient and transparent judicial organisation.

In today's Europe judicial independence must be primarily understood as a right pertaining to the citizens; this is a highly topical area for debate in Europe. The independence and impartiality of the courts take on their full meaning where they are conceived and put into practice as a component of public policy: justice serving the community.

The European Convention on Human Rights and particularly Articles 5 and 6 form the prescriptive foundation upon which Europe has built up and consolidated the basic principle of an independent judiciary, under the uncompromising supervision of the European Court of Human Rights, which has developed clear, consistent case-law in this field over several decades.

Other organs and bodies of the Council of Europe, viz. the Committee of Ministers, the Parliamentary Assembly, the Commissioner for Human Rights and the Enlarged Agreement for the Development of Democracy through Law, better known as the Venice Commission, have also made judicial independence one of the cornerstones of their work on developing a European body of legal standards, supporting institutional and legislative reforms in the member states and, last but not least, monitoring compliance with the commitments entered into by these states on joining the family of European democracies.

As I say, one of the major features of a country that respects the rule of law and human rights is efficient and transparent judicial organisation. The proper functioning of the courts and their capacity for administering justice are currently being sorely tested: courts must efficiently settle disputes between citizens and guarantee the suppression of crimes and offences, and they are often also called upon to verify the lawfulness of government action.

Furthermore, the courts must guarantee high-quality work despite any political fluctuations which, as we know, depend on both the outcome of elections and the increasing demands of the general public.

European judges today are up against many major challenges. If they are to meet these challenges courts must have a solid legal framework to fall back on. They must also have sufficient human and other resources. I would remind you here that the European Court of Human Rights is constantly repeating that lack
of resources is no excuse for a state to flout the provisions of the Convention, particularly Article 6.161 This means that the competent authorities must take the requisite steps to ensure that courts operate efficiently.

The independence of the judiciary, a subject into which I will now go in greater depth, is one of the key elements in the requisite legal framework for judge and their work in order to guarantee their authority.

The independence of judges goes hand-in-hand with jurisdiction. Only an independent, proficient judge can discharge his or her duties with the requisite equanimity. This requires excellent initial training and further training throughout the judicial career. This vital issue is one of the themes we will be discussing this afternoon.

Judicial independence must also be affirmed vis-à-vis the legislature, the executive and the parties to proceedings. It necessitates genuine decision-making powers on the part of the court.162 The Court has noted in the past that in individual cases independence is often confused with impartiality.163

According to European Court case-law, in order to ascertain whether a court can be described as “independent” for the purposes of Article 6, paragraph 1, regard must be had to the mode of appointment and terms of office of its members, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.164

On this latter point, the Court notes that public trust largely depends on the judiciary being organised in such a way as to avert any suspicion of lack of judicial independence or impartiality. This gives maximum weight to the Court’s famous maxim, “Justice must not only be done but must also be seen to be done”.

**Judicial terms of office**

One of the fundamental aspects of independence concerns the method of appointing judges. In many countries judges are appointed by government or parliament. The Court holds that governmental or parliamentary political influence over the judicial appointment process is problematical unless there are other safeguards to ensure the independence of judges.

In order to guarantee independence, many countries have established High Judicial Councils responsible for appointments and discipline. Independence in this context should be seen in the light of the powers and make-up of these High Judicial Councils. Obviously, real judicial independence requires proper representation of the judiciary on such Councils.

The length of judicial terms of office is not decisive per se in the Court’s case-law. Very short terms have been deemed sufficient provided the judge’s independence is otherwise guaranteed. Nevertheless, the length of the term of office is a major consideration in evaluating the court’s independence where the period so stipulated is combined with other factors, for example, the revocability of the term of office or protection from undue pressure.

Virtually all European states enshrine the principle of security of judicial office in their Constitutions as one of the most basic safeguards on the independence of the judiciary. This principle obviously does not preclude the removal of specific judges for disciplinary reasons, following an appropriate procedure. In some states, including a number of Balkan countries, the question has arisen whether it would be justified, further to a change of political system and the adoption of a new Constitution, to subject judges to a verification or lustration procedure in order to remove, or refrain from re-appointing, judges who have either compromised themselves under the old regime or been involved in corruption. Although it would be difficult a priori to challenge the legitimacy of such procedures fol-

allowing the transition from an authoritarian to a democratic system, for instance, or in countries whose judiciary is steeped in corruption, such procedures cannot fail to pose serious risks to judicial independence. Such procedures are therefore only acceptable if accompanied by appropriate safeguards on their objectivity and openness, if the challenged judges’ rights are protected and, lastly, if the risk of political interference in judicial matters during proceedings can be eliminated. The European Court of Human Rights has in fact declared Article 6 of the Convention applicable to lustration procedures.\footnote{165} So great caution is required if we venture into this area.

**Independence from the executive**

The European Court of Human Rights has singled out various facets of the separation of the judiciary and the executive.\footnote{166} The Court’s case-law comprises fairly few situations of an objective challenge to the independence of the judges from the executive. The main problems usually involve outward appearances, especially in criminal-law and administrative-law cases.

The Court has held that there must be no hierarchical link between the representatives of the state and the judges in any given case, because where the membership of a court includes an individual subordinate in functions and services to one of the parties, litigants can justifiably doubt his or her independence. The Court holds that such a situation seriously affects the confidence which the courts must inspire in a democratic society.\footnote{167}

The Court has stressed the sensitivity of outward appearances by finding a violation of the independence of the Turkish National Security Courts because one such court comprised a military judge. The Court considered that the applicant might legitimately fear that the presence of a military judge as a member of the National Security Court would allow the latter to be unduly influenced by considerations that had nothing to do with his case.\footnote{168}

Similarly, the fair trial requirement set out in the Convention prohibits the executive from enjoying special privileges in the administration of justice, whether such privileges are afforded generally by law or specifically in individual cases.\footnote{169}

Independence from the executive can also be challenged in civil proceedings, whether the state is party to them or not. Interference by the executive in a specific case involving private individuals with a view to influencing the outcome cannot be tolerated under any circumstances.\footnote{170}

**Independence vis-à-vis other judges**

The appearance of independence can also prohibit judges themselves from playing different roles during proceedings. This prohibition, or rather incompatibility, is particularly important in criminal-law matters. For instance, judges who have taken decisions on matters having a direct bearing on the defendant’s guilt during the investigatory stage of proceedings cannot subsequently adjudicate on the merits of the case.\footnote{171} On the other hand, if the preliminary decision did not actually involve specific consideration of the defendants’ guilt, the judge who took it cannot be subsequently excluded from the trial stages. Similar problems may arise where members of the legal service are allowed to alternate the functions of prosecutor and judge.\footnote{172}

That having been said, the Court has agreed that higher-level courts can issue

\begin{footnotes}
\item[165] Matyjek v. Poland, 24 April 2007 (criminal law), and Ťurek v. Slovakia, 14 February 2006 (civil law).
\item[167] Sramek v. Austria, 22 October 1984.
\item[168] Incal v. Turkey, 9 June 1998.
\item[169] Bönisch v. Austria, 6 May 1985, Stoimenov v. "the former Yugoslav Republic of Macedonia".
\item[172] Huber v. Switzerland, 23 October 1990.
\end{footnotes}
instructions to lower-level courts, especially in appeal proceedings. Mr Paul Lemmens will presently be speaking to us about the guiding role played by Supreme Courts in the context of the implementation of the Convention by lower-level courts, so I shall not dwell on this point here.

173. Yourtayev v. Ukraine.

Independence of judges vis-à-vis the parties

Judicial independence vis-à-vis the parties to proceedings sometimes raises complex structural problems, particularly in the so-called *tribunaux paritaires* ("equalisation courts"). Independence is ensured within the meaning of the Convention where the parties represented in court actually reflect all the various interests at stake. On the other hand, if all the representatives in court have interests opposed to those of the applicant, judicial independence cannot be guaranteed. However, we can see that despite this major restriction, many states have nonetheless opted for such systems, notably in the field of labour law. Various "tricks" have been used to settle difficult cases, e.g. providing a special appeal facility before the ordinary courts.

As I said before, in some cases the judges' independence is confused with their impartiality. Independence vis-à-vis the parties to proceedings must therefore also be appraised in the light of outward appearances. Where there are apparent links between a judge and certain advantages secured by one of the parties, the Strasbourg Court would say that the applicant can legitimately fear that the domestic court lacked impartiality.

Lastly, the physical or material structure of courts can also cause suspicion of lack of independence on the judge's part. Where access to the judge's office is completely open there may be legitimate doubts as to whether one of the parties or the prosecutor has engaged in confidential discussions with the judge. The same applies to hearings in the judge's office.


Judicial independence from the legislature

The independence of judges vis-à-vis the legislature is seldom the subject of disputes before the European Court of Human Rights. Independence here means that the legislature must not interfere in the processing of individual cases in order to influence the outcome of litigation. Such interference on the part of the legislature would constitute a violation of the principle of the rule of law and the right to a fair trial as set out in Article 6 of the Convention. Where the importance of outward appearances is concerned, judges must not be involved as advisers in formulating legislation which they will be responsible for implementing.


Other facets of judicial independence

The Court holds that the state cannot prevent the press from discussing an issue that is before the courts. The Court, moreover, agrees that judicial decisions can be criticised, even in harsh, exaggerated terms, but on the other hand it insists that judges must be protected against personal defamatory attacks.


Other European standards

Having outlined a number of specific features of the Court’s case-law on the independence of the courts, I would now like to draw your attention to other Council of Europe bodies and other major European standards in this field.

The Consultative Council of European Judges also ensures respect for the principles of judicial independence and impartiality and has detailed the procedure for implementing these principles in a number of Opinions. Its Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges stipulates that the said principles are a prerequisite for law-based states that respect the right to a fair trial.

The Council of Europe has also been organising several specific co-operation programmes over the last fifteen or so years, geared to consolidating the independence of the judiciary, particularly in the new central and eastern European democracies. These programmes, which highlight the Court’s case-law and the other Council of Europe standards, have been implemented in most of your countries.

Even though the theme of my presentation is, strictly speaking, judicial independence, I should also specify that to judge independently is not necessarily to judge well. This is why the European Convention on Human Rights does not confine itself to requiring contracting states to guarantee the independence and impartiality of courts of law. The administration of justice must also comply with a whole series of other requirements. For instance, the Convention requires states to organise their judicial systems in such a way that everyone can have his/her case heard “within a reasonable time”. This requirement, which is a prerequisite for a fair trial, has been fleshed out under the Court’s case-law and specified and complemented by several Committee of Ministers recommendations to member states, on procedures, access to the courts, the functioning of the courts and the role of the professionals involved in the judicial system.

I should like to draw your attention here to the fact that the Consultative Council of European Judges has also defined the principles governing the financing of courts, the accountability of judges, the expedition of proceedings and relations between justice and society.

Alongside the Consultative Council of European Judges we should also mention the European Commission for the Efficiency of Justice (CEPEJ), which was set up in 2002 and which is endeavouring to reduce the workload of the European Court of Human Rights in line with the principle that prevention is better than cure. By providing public decision-makers with effective solutions to improving the functioning of national judicial systems, the Commission works to reduce the number of breaches of the right to a fair hearing within a reasonable time and therefore of applications to the Strasbourg Court.

It has therefore been clearly established that no proper justice, however independent, is possible unless it is citizen-oriented. Independent, efficient and accessible judicial systems underpin and reinforce the rule of law on which European democracies are based.

182. Recommendation Rec (84) 5 on the principles of civil procedure designed to improve the functioning of justice
- Recommendation Rec (87) 18 concerning the simplification of criminal justice
- Recommendation Rec (95) 5 concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases
- Recommendation Rec (2003) 16 on the execution of administrative and judicial decisions in the field of administrative law
183. Resolution Res (76) 5 on legal aid in civil, commercial and administrative matters
- Resolution Res (78) 8 on legal aid and advice
- Recommendation Rec (81) 7 on measures facilitating access to justice
- Recommendation on effective access to the law and to justice for the very poor
- Recommendation Rec (98) 1 on family mediation
- Recommendation Rec (99) 19 concerning mediation in penal matters
- Recommendation Rec (2001) 9 on alternatives to litigation between administrative authorities and private parties
The independence of the judiciary raises many problems with which you have no doubt been personally confronted. Such independence provides the very basis for the courts’ authority. It is a highly sensitive field in which outward appearances should not be overlooked, as they can help ensure public trust in the courts. The practical organisation of judges’ work concerning the distribution of cases, inter-party contacts and the practical organisation of proceedings can go a long way towards preventing suspicion of high-handedness or lack of independence. Appropriate initial and further training for judges will help reinforce their confidence and ensure with the requisite equanimity and independence.

Only independent courts can efficiently perform the task of protecting fundamental rights at the domestic level and thus fully guarantee the subsidiarity of the supervision system established by the Convention.

The Convention has very rightly been declared the ultimate binding instrument to safeguard public order in Europe. The Convention and the Court’s case-law constitute the cement binding all the European states together.

186. CCJE Opinion for the attention of the Committee of Ministers of the Council of Europe No. 2 (2001) on the funding and management of courts, Opinion No. 3 (2002) on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality, Opinion No. 6 (2004) on fair trial within a reasonable time and judges’ role in trials; Opinion No. 7 (2005) on “Justice and Society”.


The role of Supreme Courts in the domestic implementation of the ECHR

comply with European standards is a matter for all States Parties to the Convention. The concept of *res judicata* is thus complemented with that of *res interpretata*.

Constant consideration of the effectiveness of the implementation of the Convention at the domestic level is therefore vital if the subsidiarity principle is to become a reality. The Supreme Courts can actively support this endeavour by expanding their own case-law.

In this connection I would remind you that the Council of Europe has adopted five recommendations on this subject since 2000 in order to help the authorities, including the courts, to continue their deliberations on this issue.\(^{189}\) I hope that our meeting today and tomorrow will also contribute to this end. ⭐

189. Recommendation Rec (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights;
GUIDANCE BY SUPREME COURTS TO LOWER COURTS ON THE REQUIREMENTS OF THE ECHR

Mr Paul Lemmens

Conseiller d’Etat, State Council of Belgium

In this contribution I would like to share some thoughts on an issue that is crucial for a correct and complete implementation of the European Convention on Human Rights (ECHR) in the domestic legal orders. I will indeed look at the relationship between Supreme Courts and lower courts, from the specific point of view of the guidance that can be given by the former to the latter.

My presentation will draw heavily on the case-law of the Supreme Courts of three countries with which I am reasonably familiar: France, the Netherlands and Belgium. Each of these countries has already a quite long relationship with the ECHR. The case-law of their Supreme Courts can therefore offer striking examples of how a Supreme Court can influence the implementation process, both in a positive or a negative sense.

I deliberately have not looked at the case-law of the constitutional courts existing in two of the said countries (France and Belgium). Such courts occupy a very special place in the jurisdictional order, and their relationship with the other courts is usually not typically one of a Supreme Court vis-à-vis a lower court. As far as the supreme administrative courts (Councils of State) in the three countries are concerned, their case-law has not been examined systematically, but there are a few references to relevant decisions.

This contribution will consist of two parts. In a short first part I will say something about the position of Supreme Courts in the domestic judicial organisation and how their position is affected by the ECHR system. In a longer second part I will then try to explain, on the basis of some concrete examples, how Supreme Courts can and sometimes should deal with the ECHR, thus promoting an effective application of the ECHR.

I. Supreme courts within the domestic and the European legal orders

A. Various types of Supreme Court

Although this conference is focusing on the role of “Supreme Courts” in general, it is clear that there is no uniform model for such courts. Quite to the contrary: each country has its own legal system and its own system of courts, and each Supreme Court has its share of national peculiarities. One may add, paraphrasing what the European Court of Human Rights has said with respect to the non-adjudicatory powers of the Dutch Council of State (supreme administrative court), that the ECHR does not require the application of any particular doctrine of procedural law to the position of a Supreme Court vis-à-vis the...
lower courts, provided of course that the independence and the impartiality of the Supreme Court is fully guaranteed.\textsuperscript{191}

Nevertheless, there are some common characteristics too. In 1998, the International Association for Procedural Law held its annual meeting on the role of the Supreme Courts at the national and international level. The general reporter, Jolowicz, identified – broadly speaking – three different models: the cassation model, the revision model and the appeal model. Supreme courts belonging to the cassation model deal only with the law, not with the facts. They do not decide afresh the cases that come before them. They can only either reject an appeal, or quash the decision of the lower court and remit the case for a fresh determination elsewhere.\textsuperscript{192} Courts of revision also deal only with the law, not with the facts. However, if it is possible for them to dispose of the case without having to gather new facts, they will do so; only if new findings of fact are required will the case be remitted for a fresh decision to the court from which it came.\textsuperscript{193} Finally, in the appeal model, a Supreme Court can entertain questions of fact as well as questions of law. The appellate court has the same powers as the court from which the appeal has come.\textsuperscript{194} Its judgment replaces the judgment of the lower court, and there is no place for a remittal of the case to any other court.\textsuperscript{195}

In the rest of this contribution I will not attach a particular importance to these different models. It is necessary, however, to keep in mind that these models exist, as the issues might present themselves in a somewhat different light according to the model to which a given Supreme Court belongs.\textsuperscript{196}

\begin{itemize}
\item[192.] J.A. Jolowicz, "The role of the Supreme Court at the national and international level", in P. Yessioulfaltsi (ed.), \textit{The role of the Supreme Courts at the national and international level}, Thessaloniki, 1998, (37), 52.
\item[193.] Ibid., p. 54.
\item[194.] Ibid., p. 51.
\item[195.] Ibid., p. 54.
\item[196.] It is perhaps useful to state that the Supreme Courts of France, the Netherlands and Belgium all belong to the cassation model.
\end{itemize}

\section*{B. Role of the Supreme Court in the domestic legal order}

A Supreme Court is in the first place, like the lower courts, a court. That means that it is playing a role in the adjudication of individual cases. To that extent Supreme Courts have what Jolowicz called a "private purpose": the purpose of "achieving, to the maximum possible extent, the application of justice according to law to the parties to the litigation before the (court)."\textsuperscript{197} Making bodies. It should be underlined that this is so, even if there is no system of binding precedents. The authority vested in the Supreme Court as the court that reviews the legality of the decisions of the lower courts will indeed entail that the lower courts will normally follow the precedents of the Supreme Court.

In this contribution, we are more interested in what Jolowicz called the "public purpose" served by Supreme Courts. These courts are at the top of the court hierarchy, and one may expect from them that they clarify the law, assure its uniform application, and adapt it to changing circumstances.\textsuperscript{198} This function is one of the features that distinguish Supreme Courts from lower courts. Because of this role, Supreme Courts have to be considered as law-making bodies. It should be underlined that this is so, even if there is no system of binding precedents. The authority vested in the Supreme Court as the court that reviews the legality of the decisions of the lower courts will indeed entail that the lower courts will normally follow the precedents of the Supreme Court.

As long as the state’s legal order was confined to norms created within the borders of the country, a Supreme Court enjoyed a certain “sovereignty” within that legal order. However, as has been noticed by Guy Canivet, First President of the French Court of Cassation, Supreme Courts have lost part of their sovereignty since their decisions have become subject themselves to control by a supranational court, such as the European Court of Human Rights.\textsuperscript{199} The right of individual petition has indeed changed the role of the Supreme Courts. This development deserves a closer look.

\begin{itemize}
\item[197.] J.A. Jolowicz, op. cit.
\item[198.] Consult J.A. Jolowicz, op.cit.
\item[199.] Consult J.A. Jolowicz, op.cit.
\end{itemize}
C. Role of the Supreme Court in the European legal order

Supreme courts still are very “supreme” as far as the interpretation and the application of ordinary law is concerned. But when it comes to issues relating to fundamental rights—often very sensitive issues—they do not necessarily have the last word, as their decisions can become the object of an application to the European Court of Human Rights. This means that, in human rights matters, Supreme Courts act as a kind of “bridge” between their country and Strasbourg. They continue to play their traditional role vis-à-vis the lower courts, but they also have to make sure that their own decisions will be able to pass the review by the European Court.

However, the relationship between a Supreme Court and the European Court is not only one of control of the former by the latter. As the European Court has often underlined, the machinery of protection set up by the ECHR is subsidiary to the national systems safeguarding human rights. It is indeed in the first place for the domestic authorities to assure the implementation of the ECHR, and for the domestic courts, in particular the Supreme Courts, to check whether this is done and whether it is done properly. The ECHR recognises and underlines this role of the domestic courts as “guardians” of the Convention. Article 13 provides that, where an individual claims to be a victim of a violation of his or her fundamental rights, he or she has the right to bring a complaint before a “national authority”, normally a court, which should be able to offer him or her an “effective remedy”.

Offering an effective remedy to victims of violations of human rights is a responsibility of all national courts. But since the Supreme Court is at the top of the judicial architecture and at the same time also constitutes the “last gate” before a victim can leave his or her domestic system for Strasbourg, it is at the level of the Supreme Court that questions will be concentrated of whether a person’s human rights have been violated and, if so, which remedy is to be granted.

The responsibility to ensure that human rights are effectively respected and protected obliges the Supreme Court to take a double action vis-à-vis the lower courts.

In the first place, the Supreme Court will have to exercise an effective control over the decisions of the lower courts. The term “effective” is used here in the sense of effectiveness from the point of view of the ECHR. There is a link with the requirement that domestic remedies have to be exhausted, in order for an application to the European Court to be admissible (Article 35, § 1, ECHR). On the one hand, where the Supreme Court can and does exercise an effective control, the European Court will insist on the need for victims to go to the Supreme Court and thus to give the state concerned the opportunity to prevent the violation complained of or to repair for the damages caused by it. This is illustrated by the judgment of the European Court in the Civet case, relating to the admissibility of a complaint based on the length of a pre-trial detention. Even if the French Court of Cassation can only deal with matters of law and is bound by the findings of fact of the lower court, “the Court of Cassation nonetheless has the task of checking that the facts found by the tribunals of fact support the conclusions reached by them on the basis of those findings”. The Court of Cassation is thus “in a position to assess, on the basis of its exam-


200. See, e.g., European Court of Human Rights [GC], 14 December 2006, Markovic v. Italy, No. 1398/03, ECHR, 2006-XIV, § 109. The subsidiary character of the supervision mechanism set up by the ECHR and the fact that the rights and freedoms guaranteed by the ECHR are to be protected in the first place at national level, have also been underlined by other organs of the Council of Europe. See, e.g., the preamble of Recommendation Rec (2004) 6 of the Committee of Ministers of 12 May 2004 on the improvement of domestic remedies.
The role of Supreme Courts in the domestic implementation of the ECHR

A Work in progress 307

in the proceedings, whether the judicial authorities have complied with the “reasonable time” requirement ...”\(^1\) The control is effective, and therefore an appeal to the Court of Cassation is a remedy normally to be exhausted. On the other hand, where there would be a clear indication that, in a given area, the Supreme Court does not review decisions of lower courts according to the relevant ECHR standards, the European Court will normally hold that the remedy offered by such appeal is not an effective one. The practical effect would then be that the victim can bring a complaint directly before the European Court, with no need to proceed first through the Supreme Court. An example of such a situation is given by the Scordino case. An appeal to the Italian Court of Cassation was not considered a remedy to be exhausted, since it resulted from an analysis of the judgments of that court that, with respect to compensation to be awarded in the case of an excessive delay

\(^{201}\) European Court of Human Rights [GC], 28 September 1999, Civet v. France, No. 29 340/95, ECHR, 1999-VI, § 43. In the same sense, with respect to appeals against decisions imposing exclusion orders on non-nationals, European Court of Human Rights, dec. 6 March 2001, Hamaidi v. France, No. 39 291/98, ECHR, 2001-V.

\(^{202}\) European Court of Human Rights [GC], 29 March 2006, Scordino v. Italy (No. 1), No. 36 813/97, ECHR, 2006-V, §§ 140-149.

\(^{203}\) The European Court noted that meanwhile there had been a departure from precedent, and it explicitly welcomed the Court of Cassation’s efforts to bring its decisions into line with European case-law (§ 147).

Control by the Supreme Court over the lower courts is one thing. But it seems that there can hardly be any sustainable improvement without an effective guidance by the Supreme Court to the lower courts. This will be the subject of the second part of this contribution. The question to be examined is how the Supreme Court, through its decisions and more generally its attitude vis-à-vis the European Court, can bring the lower courts to apply the ECHR, fully and correctly, whenever that is relevant.

II. Promoting an effective application of the European Convention on Human Rights

For the ECHR to be effectively applied at the domestic level, it is very important that the Supreme Court conveys the message to the lower courts that the ECHR is an instrument to be taken seriously. Such message will result from the way the Supreme Court deals itself with the ECHR.

A positive attitude of the Supreme Court is not self-evident. Especially in the first years, maybe even the first decades after the ratification of the ECHR, lawyers may not be very familiar with the ECHR and the case-law of the European Court, which may result in invoking the ECHR in an irritating way, without any real chance of success. This in turn can understandably create negative feelings among judges who are called upon to read and listen to the arguments and to give reasons for dismissing them.\(^{204}\)

As for the application of the ECHR by the Supreme Court, I will follow the distinction made by Canivet when he discussed the creative role of the French Court of Cassation. There is, on the one hand, the regular, “spontaneous” application of the ECHR at the initiative of the Supreme Court, and on the other hand, the “forced” application in order to conform to the judgments of the European Court.\(^{205}\) Both situations are very different.


\(^{205}\) Ibid., 262.
A. The regular application of the European Convention on Human Rights

In a presentation at the “Dialogue between judges”, organised by the European Court of Human Rights in 2006, Egidijus Kūris, President of the Constitutional Court of Lithuania, distinguished between two types of (indirect) application of the ECHR by his court:

“Firstly, the Constitutional Court, when it finds it necessary, interprets the Constitution along the lines already drawn in the case-law of the (European Court) —it, in a sense, “imports” the case-law of the Strasbourg Court. Secondly, in some cases the Constitutional Court, in anticipation of the forthcoming case-law of the (European Court) in cases against Lithuania, quashes certain pieces of Lithuanian legislation with, however, few references (if at all) to the existing case-law of the (European Court).”

A similar kind of distinction can be made when we look at the work of Supreme Courts. I will now look at some “good” and “not so good” (or even flatly “bad”) examples of the way the Supreme Courts in France, the Netherlands and Belgium have dealt with the ECHR.

1. Reliance on the case-law of the European Court of Human Rights

Very often, when a domestic court is confronted with a human rights problem, guidance as to the interpretation and the application of the relevant provisions of the ECHR can be found in the case-law of the European Court of Human Rights.

For the moment I will leave aside the specific situation of the follow-up to a Strasbourg judgment handed down against the state concerned. At this point, I would like to look at the relevance of the European Court’s case-law generally, i.e. the impact of the thousands of judgments and decisions handed down by the European Court against any State Party to the ECHR.

At the outset, one point has to be acknowledged. There can be no impact of the Strasbourg case-law if that case-law is not known. It is a fact that it is not easy to get a good insight in this case-law, especially not in countries where English and French, the languages in which the judgments and decisions are written, are not generally spoken by judges and lawyers. And even for those who do have a good understanding of English or French, it is becoming increasingly difficult to see the forest through the trees, to distinguish between the more important cases and the more routine cases. But I dare think that if there is somewhere in the judiciary of a given country to be the possibility to have access and to study the Strasbourg case-law, it must be at the level of the constitutional court and the Supreme Court. I will therefore assume that it is possible for Supreme Courts to find the relevant European precedents for a case that is adjudicated at the domestic level.

From the point of view of principles, it is clear that the interpretations given by the European Court are inherently linked to the provisions of the ECHR, and therefore are as binding as these provisions themselves. The Belgian Court of Cassation has explicitly acknowledged the special authority of the interpretations given by the European Court, resulting from the fact that Belgium has ratified the ECHR and thereby has recognised the interpretation mission of that Court.

It does therefore not come as a surprise that Supreme Courts regularly respond adequately to developments in the case-law of the European Court, by adapting their own case-law. Sometimes this may even go as far as overruling a vested case-law. Two examples may illustrate this. They belong to the success stories of the ECHR:

- In 1979 the European Court held in the *Marckx* case that a difference in treatment...
between legitimate and illegitimate children constituted a discrimination, contrary to Article 14 ECHR. The Supreme Court of the Netherlands reacted in 1980 by holding that a provision of the Dutch Civil Code, which referred to “descendants” and which until then was interpreted as referring to legitimate descendants only, had to be interpreted in the sense that it covered both legitimate and illegitimate descendants. 209

In 1996 the European Court held in the Goodwin case that the confidentiality of the sources of a journalist was an essential aspect of freedom of expression, guaranteed by Article 10 ECHR. A few weeks later the Supreme Court of the Netherlands relied on this judgment to overrule its case-law and to hold that non-disclosure of a source was the principle and forced disclosure the exception. 210

Notwithstanding the fact that there is an expectation that courts follow the interpretations given by the European Court, there have also been instances where Supreme Courts tried to maintain their own case-law against an emerging case-law of the European Court.

Sometimes Supreme Courts do so by trying to distinguish the situation that has been the object of the European Court’s ruling from the situation that they are examining. Sometimes the rebellion is an open one, and the Supreme Court simply refuses to transpose to their own legal order the solution adopted by the European Court with respect to another country. 211

An example of the first kind of reaction is offered by a judgment of the French Court of Cassation of 1996, in a case in which the Civil Code provision limiting inheritance rights of illegitimate children was challenged. The Court naturally was aware of the already mentioned Marckx judgment of the European Court, which had held that the distinction between legitimate and illegitimate children was discriminatory and violated Article 14 ECHR (prohibition of discrimination), read in combination with Article 8 (right to respect for private life and family life). Rather than pursuing the reasoning of the European Court, the Court of Cassation chose to distinguish the case before it from the Marckx case: it held that the right to inherit was not covered by the right to respect for private life and family life, and that therefore the Articles 8 and 14 ECHR did not apply. 212 Some years later it became clear that the Court of Cassation could have been better inspired. The plaintiff in the French proceedings filed an application with the European Court, and in 2000 that Court held that the facts could in any event be examined from the point of view of Article 1 of Protocol No. 1 to the ECHR (right of property). The European Court further held that the distinction based on birth could not be justified and that there had therefore been a violation of Article 14 ECHR, read in combination with Article 1 of Protocol No. 1. 213 In retrospect, one can say that the French Court missed the opportunity to prevent a condemnation of France by the European Court.

An example of the second kind of reaction can be found in the one adopted by the French Council of State against a series of judgments of the European Court with respect to the position of the “advocate general” at the cassation courts of a number of European countries. The advocate general is a member of the “ministère public” attached to the cassation court, but his or her role is limited to giving independent opinions to the court on the pleas of cassation. According to the European Court’s case-law, which originated in the Borgers judgment (1991), the adversarial character of the proceedings nevertheless obliged the cassation...
courts to allow the parties to reply to the opinion of the advocate general. Moreover, the fairness of the procedure was violated if, after having given an opinion, the advocate general would have the opportunity to assist at the deliberation of the judges. The French Council of State does not know the institution of the advocate general, but it has a very comparable institution: the "commissaire du gouvernement" ("government commissioner"). Unlike his title may suggest, he is also an independent adviser to the Council. Rather than to draw the conclusions from the European Court's case-law, and to allow the parties to reply to the commissioner's opinion, the Council of State started a long and painful battle against the European Court, refusing to change its practice and explaining in its judgments why the reasoning of the European Court could not be applied to the government commissioner, notwithstanding the similarity between his functions and those of an advocate general.214 When a few years later the European Court had to examine the role played by the government commissioner in the proceedings before the French Council of State, it quite naturally subjected him to the same principles as the advocate general, thus rejecting the argument invoked by the government, which was based on the differences between the two functions. It held that some kind of reply to the commissioner's government was necessary, but in a conciliatory way found that the existing possibility for the parties to send a written memorandum for the deliberation was sufficient. As for the commissioner's presence during the deliberation, it considered that it violated the right to a fair trial.215

The two examples show that it may be better for a Supreme Court not to defer the adaptation of its case-law or its practices. Refusing to draw the obvious conclusions only aggravates the violation that is likely to be found some years later.

2. Application of the European Convention on Human Rights in the absence of precedents from the European Court

It would be too easy to think that for every problem that arises before the domestic courts, there is a clear solution in the case-law of the European Court. Sometimes there is simply no such guidance from Strasbourg. It is then for the Supreme Court to “wet its hands,” and to try to find a solution that is in line with the principles that result from the European Court’s case-law. Or to put it differently: the Supreme Court will have to try to act in the way the European Court would act.216

In such a situation the judgments of the European Court become tools in the hands of the Supreme Courts. It may be noted, incidentally, that this idea corresponds to the views of the Committee of Ministers as expressed in Recommendation Rec (2004) 6 of 12 May 2004 on the improvement of domestic remedies. The Committee, among other things, invited the national authorities, when applying national law, “to take into account the requirements of the Convention and particularly those resulting from judgments of the Court concerning their state”. Aware of the practical difficulty to follow such a suggestion, the Committee continued that “this notably means improving the publication and dissemination of the Court’s case-law (where necessary by translating it into the national language(s) of the state concerned) and the training, with regard to these requirements, of judges and other state officials”.217

An examination of the European Court’s case-law may lead the Supreme Court to the conclusion that it has to increase the existing level of human rights protection. But the result may also be the opposite one. There are examples, albeit rare ones, of judgments of Supreme Courts that have lowered the levels of protection, after having ascertained that the existing higher level did not appear to be required under the ECHR.

214. See in particular French Council of State, 29 July 1998, Esclatine, with opinion “commissaire du gouvernement” Chauvaux, Recueil, 1998, 320. This judgment was handed down right after the European Court had criticised the role of the advocate general with the Court of Cassation of France, in the case of Reinhardt and Slimane Kaïd (1998).
A first example is given by the case-law of the Supreme Court of the Netherlands, with respect to the possibility for an accused who does not appear at the trial to be defended by a lawyer. After a condemnation of the Netherlands by the European Court, the legislator intervened and made representation by a lawyer possibility. The law provided, however, that the lawyer had to prove that he had received a mandate from his client. A number of lower courts questioned that condition, and decided to give the floor to the lawyer, even if he or she could not produce a power of attorney. The Supreme Court intervened on (at least) two occasions. It insisted that, apart from exceptional circumstances, the statutory condition had to be respected. In the opinion of the court, that condition was not incompatible with Article 6 ECHR, as interpreted by the European Court.

This opinion of the Dutch court does not seem to have given rise to a later condemnation by the European Court.

The case-law of the Supreme Court of the Netherlands offers a second example of lowering the standards in the light of the case-law of the European Court, this time even at the expense of the own precedents. The issue concerns the interpretation of the notion of “family life” (Article 8 ECHR). In two judgments of 1985 the Supreme Court had held that, according to its analysis of the European Court’s case-law, the mere existence of a biological relation between a natural father and his child was sufficient to create a “family life” between the two and thus to trigger the application of Article 8 ECHR. In 1989 the question arose again before the Supreme Court. The Court then noted that the European Court had in the mean time handed down a judgment in the Berrehab case (1988), in which it had considered that a child born of a union between two married persons was ipso facto part of their relationship and the bond between him and his parents amounted to “family life”. Considering that it had over-stretched the notion of “family life” in its 1985 judgments, the Supreme Court held that a mere biological relationship between a father and his child was not enough to establish the existence of a “family life” between them. This statement was perhaps a risky one, but the opinion of the Supreme Court seems to find confirmation in the later case-law of the European Court, in particular its Keegan judgment (1994).

A last example comes from the Belgian Court of Cassation. For many years the view had been that evidence unlawfully obtained could not be used in a criminal trial. This view came under pressure, not in the least because public opinion did not understand how suspects could escape conviction merely because of procedural irregularities. In 2003 the Court of Cassation reversed its case-law, and made it possible that the evidence be used, except where such use would affect the fairness of the trial. It results from the opinion of the advocate general that the decision to reverse the case-law was taken after the Court of Cassation had convinced itself that the European Court did not require the exclusion of illegally obtained evidence in all circumstances (Schenk and Kahn cases of 1988, viz. 2000).

Setting a step back is as such not incompatible with the ECHR, but there is no obligation under the ECHR to adapt national standards to the lower standards of the ECHR. To the contrary, Article 53 ECHR provides that “nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”, thus favouring the continuing application of the highest level of protection.

I would like to conclude this part of my contribution by pointing to the “educational” role of Supreme Courts.

The case-law of the European Court may be very complex, or at least appear to be so.


Supreme courts can significantly facilitate the implementation of the ECHR by the lower courts, if they explain in their judgments what the implications are of the ECHR, as interpreted by the European Court, on a given point. Two examples of such a “constructive” approach can be mentioned here.

In 1998 the French Court of Cassation, in two judgments handed down on the same day by the full Court, explained to what extent a judge, who in a civil case had taken a decision in summary proceedings, could subsequently decide on the merits of the case. The Court thus explained the scope of the impartiality of the judge, guaranteed by Article 6, § 1, ECHR. The Court clearly seized the opportunity to take a decision in two cases, involving two different factual settings, in order to make clear what the ECHR required and what it did not require.221

The other example is taken from the case-law of the Supreme Court of the Netherlands.222

———

221. French Court of Cassation, 6 November 1998, Bulletin, 1998, Assemblée plénière, No. 4, p. 6, and No. 5, p. 7. The cases concerned, on the one hand, a judge who in his initial decision had only taken a conservatory measure and not touched upon the merits (could decide on the merits), and on the other hand, a judge who had based his initial decision on a superficial appreciation of the strength of the claim (could not decide on the merits).

222. Supreme Court of the Netherlands, 3 October 2000, Nederlandse Jurisprudentie, 2000, No. 721.


B. The execution of judgments of the European Court of Human Rights

A very specific situation is the one where the Supreme Court is confronted with a judgment of the European Court, holding that a violation of the ECHR has taken place in the own country. Such a situation can present itself, e.g., where the European Court has found that a general norm constitutes an unjustifiable interference with the human rights of the applicant, and where that norm has also been applied in other cases. That norm might perhaps even be the source of a systemic problem that the European Court has identified. To what extent should the Supreme Court then play an active part in the execution of the said judgment? Should it, where possible, change its own case-law or practice?

I will not enter into the discussion of this subject, since the execution of judgments of the European Court will be the object of a specific contribution. However, it is important to note that this is also an area in which Supreme Courts can and should give guidance to lower courts. Especially when a norm or a practice has been declared incompatible with the ECHR, a legal gap may be the consequence of the European Court’s finding. Lower courts will then be in need of guidelines from the Supreme Court.

I will limit myself to two further observations.

First, the execution of judgments of the European Court is a responsibility of all the organs of the state concerned, each within its sphere of competence. It is therefore also a responsibility of the courts, to the extent that they can take measures relevant for a proper execution of the Court’s judgment. If they can do something about a situation that continues
to be a violation, they should not wait for the legislator to set things straight, at least not wait any longer after a certain period of time. The history of the implementation of the Marckx judgment (1979) shows that a timid reaction by a Supreme Court is not always the best solution. As has been said already a few times, the European Court held in that judgment that the Belgian Civil Code discriminated against illegitimate children. The government was in favour of addressing the problem in a serious way, and announced that it would undertake a major review of the provisions of the Civil Code on filiation. This work was done so thoroughly that it took eight years, until 1987, before an amending act was adopted by the legislator. In the mean time, illegitimate children had brought all kinds of new cases before the courts, mainly in order to claim parts of inheritances. The Supreme Court dismissed all these claims, on the basis that in so far as Articles 8 and 14 ECHR imposed positive obligations on the state (in casu: the obligation to set up a system allowing for a proper filiation status for illegitimate children), they did not have a so-called "direct effect". To put it more simply: the Supreme Court was of the opinion that it was for the legislator, not the courts, to solve the problem. Until the law would be amended, the courts were to apply the old provisions, thus repeating the discrimination each time. One of the post-Marckx cases would give rise to the judgment of the European Court in the Vermeire case (1991). The Court severely criticised the courts, and in particular the Court of Cassation, for their passivity in this matter:

“25. The Marckx judgment held that the total lack of inheritance rights on intestacy, based only on the "illegitimate" nature of the affiliation, was discriminatory [...] This finding related to facts which were so close to those of the instant case that it applies equally to the succession in issue, which took place after its delivery. It cannot be seen what could have prevented the Brussels Court of Appeal and the Court of Cassation from complying with the findings of the Marckx judgment, as the Court of First Instance had done. There was nothing imprecise or incomplete about the rule which prohibited discrimination against Astrid Vermeire compared with her cousins Francine and Michel, on the grounds of the "illegitimate" nature of the kinship between her and the deceased.

26. An overall revision of the legislation, with the aim of carrying out a thoroughgoing and consistent amendment of the whole of the law on affiliation and inheritance on intestacy, was not necessary at all as an essential preliminary to compliance with the Convention as interpreted by the Court in the Marckx case. The freedom of choice allowed to a state as to the means of fulfilling its obligation under Article 53 (now Article 46) cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed, to the extent of compelling the Court to reject in 1991, with respect to a succession which took effect on 22 July 1980, complaints identical to those which it upheld on 13 June 1979.”

Second, one can imagine that a Supreme Court has some or even great difficulty with a judgment of the European Court that has the effect of forcing the Supreme Court to adopt a new position on a given issue. It would, however, be extremely unhelpful if the Supreme Court would refuse to comply with a judgment of the European Court only because it holds a different opinion. Not only does the court then jeopardise the international responsibility of the state concerned, it also creates a climate of distrust vis-à-vis the European Court, which undoubtedly will be picked up by the lower courts. Moreover, if the Supreme Court would hope that, by resisting to the European Court’s holding, it may bring that Court to other ideas, it will most probably be disappointed. The record of the European Court shows that it is much more likely that the Court will stick to its initial point of view. This is not to say that, if a Supreme Court really believes that the Euro-

224. See, e.g., Belgian Court of Cassation, 10 May 1985, Pasicrisie, 1985, I, No. 542.

pean Court was wrong, it should not try to obtain a change of the Court's case-law. However, as this should be the exception rather than the rule, it seems that the Supreme Court can best explain in some detail why it is not convinced by the case-law of the European Court.226

III. Final remarks

I have tried to highlight the role of the Supreme Courts as bridges between the lower courts and the Strasbourg Court. Supreme courts should “translate” the principles of the ECHR, as interpreted by the European Court, into workable principles of national law. They should also avoid conflicts with the European Court, by applying the ECHR in the way the European Court would do it and by explaining the European Court’s case-law to the lower courts.

This role is a challenge, as some of the examples from the case-law of the Supreme Courts in France, the Netherlands and Belgium have made clear. This is all the more so in countries where there is no easy access to the case-law of the European Court.

Fulfilling the role of a bridge requires judicial and other skills. For that reason too, it is important that the Supreme Courts, composed of experienced and qualified judges, take up this responsibility.

The role of Supreme Courts in the domestic implementation of the ECHR

PROVIDING REMEDIES FOR JUDICIAL DELAYS IN CRIMINAL PROCEEDINGS – THE EXPERIENCE OF BULGARIA

Ms Bilyana Chocheva
Judge of the Supreme Court of Cassation, Bulgaria

Introduction

For over decade the Bulgarian system of justice, and particularly the courts, have been intolerably overloaded as a result of the increased volume of criminal prosecutions. Insufficiency of resources in order to deal with criminal cases, malpractices on the part of the police and the investigation authorities (mainly in securing sufficient and reliable evidence admissible at the trial stage within due time-limits while respecting the needs of the defence), improperly scrutinised by the prosecution, coupled with the lack of appropriate procedural devices to encourage the parties to dispose of the case by means other than contested trials, have resulted in an enormous case-load and significant delays in the conduct of trial proceedings.

Bound to comply with the principles of the adversarial trial (since only this mode of trial provides the necessary safeguards against miscarriages of justice) and to restore the imbalance of rights occurring at the pre-trial stage, as well as to secure maximum precision in the fact-finding process, the younger generation of judges have hardly been able to reconcile the due process requirements with the need for efficiency and speediness. As a result, the latter factor has come to be considered as the lesser evil that could be undermined for the sake of the protection of other procedural values secured by the formality and complexity of the trial process. However, this is equally undesirable as all aspects of the right guaranteed by Article 6 of the European Convention on Human Rights ("the Convention") deserve equal protection and the contracting states are expected to strike a proper balance between the competing interests underlying the administration of justice.

Since its entry into force in September 1992, and pursuant to the Bulgarian Constitution the provisions of the Convention have been directly applicable and should, in case of any conflict with domestic legislation, prevail. Proper implementation, however, requires genuine efforts on the part of the authorities. Furthermore the duty of the state under Article 13 of the Convention to guarantee the availability at national level of remedies to enforce the substance of the Convention rights and freedoms entails the taking of serious steps not only to find inconsistencies and provide forms of redress but also to identify the causes that have brought about these consequences. It is not the main objective of this presentation to assess whether Bulgaria has succeeded in this task with reference to the reasonable time requirement laid down in Article 6 (1) but rather to explain what sort of arrangements/remedies have been introduced and how they operate.

Prior to exploring this issue, however, it is worth drawing your attention to the basic guidelines elaborated by the Strasbourg organs on this particular matter as respect for the authority of the case-law is of crucial importance for the consistent implementation of the Convention.
The case-law of the European Court of Human Rights – basic guidelines and recent developments

The case-law of the European Court of Human Rights (“the European Court”) on the reasonableness of the length of criminal proceedings under Article 6 (1) in relation to the nature and scope of Article 13 as interpreted after the significant breakthrough made with the judgment in Kudla v. Poland tends to suggest, though in expressive terms, a number of principles which must be followed by the contracting states if they truly aspire to achieve high standards in the implementation of this provision.

Firstly, in order to afford full enjoyment of the rights guaranteed by Article 6 (1), the contracting states are under obligation to organise their system of justice in such a way as to enable the courts to comply with all of its various requirements, including to conduct the criminal proceedings aimed at the determination of a criminal charge within a reasonable time, which means without excessive delays. The mode of assessing the reasonableness of the length of the proceedings is well established and consistently followed, that is in the light of the circumstances of the particular case and with reference to the complexity of the case, the conduct of the applicant and the relevant authorities, and certainly to the importance of what was at stake for the applicant. A chronic backlog of cases is not accepted as a valid explanation for excessive delays.

Secondly, the new interpretation of Article 13 in relation to the time/delay factor under Article 6 (1) suggests that where the judicial system is deficient in this respect (i.e., it is in constant failure to comply with the reasonable-time requirement), and in accordance with the subsidiary principle, it falls primarily to the state to provide for an effective remedy capable of redressing the alleged violation. In practical terms, the state is under duty to provide the individuals with an effective remedy either to expedite the proceeding (at the relevant stage in so far such course of action is likely to produce a significant positive impact on the whole length of the proceedings) or to grant him/her an adequate redress for the delays that have already occurred. The effect of Article 13 is thus to require a provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief.

Thirdly, in order to fulfil adequately the aforementioned obligations the contracting states are afforded some discretion as to the manner in which they provide the remedy which should comply with the general standard of being effective, sufficient and accessible. However, if the remedy inferred from the reading of Article 13 in relation to the reasonable time requirement under Article 6 (1) is to be considered effective in practice, as well as in law, it needs to provide for a procedure (not necessarily before a judicial authority), enabling the individual to challenge the reasonableness of the length of the proceedings (to have an arguable claim on this ground) with the effect of speeding them up (which may mean to expedite a decision by the relevant authority dealing with the case), thus preventing a violation of Article 6 (1) or its continuation or to provide the individual with adequate redress for the delays that have already occurred.

It is worth noting, though, that the European Court appears to encourage states to implement preventive remedies – by designing procedural arrangements capable of preventing possible violation or to help the process of its discontinuation rather than to depend merely on compensatory mechanisms, although sometimes the combination of the two types of remedy – one designed to expedite the proceedings and other to afford compensation might satisfy the effective domestic remedy rule.\footnote{Scordino v. Italy, paras 183 and 186 and Surmeli v. Germany, Judgment of 8 June 2006, 75529/01 [2006] ECHR 607.} In any case, if prevention is no longer applicable, the redress should cover compensatory remedies.

Fourthly, the effectiveness of the redress is to be tested on the basis of its characteristics. In these terms and with regard to the reasonable time requirement the effectiveness of the particular remedy depends on whether it has a practical and significant impact on the whole length of the proceedings.\footnote{Donner v. Austria, para. 44, and Surmeli v. Germany, para. 110.} On this point some of the most important conclusions drawn from the case-law, developed in the recent years, suggest that hierarchical complaints are regarded as ineffective as long as they do not give a personal right of the individual to compel the state to exercise its supervisory power.\footnote{Surmeli v. Germany, para. 109.} Unwritten remedy with variable admissibility criteria can also be considered ineffective.\footnote{Ibid., para. 110.} Special complaints alleging inaction need to have a statutory basis and if judicial procedure is employed in this respect, the content of the court’s order is of significant importance. It needs in particular to contain indications as to the way of speeding up the proceedings or to have a competence to deliver decision in place of the lower court.\footnote{Ibid.}


In a number of cases brought to the European Court it is recognised that, if the national authority have acknowledged, either expressly or in substance the breach of the Convention and afforded redress, the individual can no longer claim to be a victim of a violation complained of\footnote{Donner v. Austria, para. 27.} With respect to criminal proceedings a sentence discount (mitigation of the sentence) on the ground of excessive length of the criminal proceedings does not deprive the individual concerned from his status as a victim within the meaning of Article 34 of the Convention. The only exception to this general rule is, however, where the national authorities have acknowledged in sufficiently clear way the failure to observe the reasonable time requirement and have afforded redress by reducing the sentence in an expressive and measurable manner. This mode of action could be considered as an effective remedy provided the courts have clearly stated in their reasoning that the time delay element stood out as being the primary mitigating factor which had a decisive impact on the reduction of the sentence.\footnote{Mostacciuolo Giusepe v. Italy, (No. 1), 64705/01 [2006] ECHR 271, para. 96.}

However, if the compensatory remedy provided is of the ordinary type – by bringing a civil action for pecuniary or non-pecuniary damages against the state – the proceedings in question would be considered effective, sufficient and accessible remedy as long as do not entail unreasonable restriction on the basis of cost, they are speedy, reasoned and executed very quickly.\footnote{Mostacciuolo Giusepe v. Italy, (No. 1), 64705/01 [2006] ECHR 271, para. 96.} Also, the effectiveness might depend on the level of compensation which needs to be well balanced with the facts of the particular case, the nature and scope of the rights affected by the delay and the availability of other remedies or their characteristics and effectiveness.
The situation in Bulgaria

Considering these guiding principles and looking at the way they are reflected in our domestic legal order (with particular reference to the procedural arrangements provided in the new Code of Criminal Procedure, adopted in April 2006, and the relevant judicial practice plus some of the measures introduced in the new Judiciary Act, adopted in August 2007) it appears that the Bulgarian approach is represented by a combination of preventive and compensatory remedies.

Application of the principle for designing preventive measures

The state, being aware of the constant failure of the authorities dealing with criminal cases to comply with the reasonable time requirement and strongly committed to handle the problem on domestic level, under the new reform, has employed variety of preventive measures operating on different levels.

Sufficiency of resources

Insufficiency of resources has long been a factor contributing to delays in the administration of justice. With the recent reforms this situation seems to have been corrected to a certain extent by raising the number of people involved in investigation of crime at the pre-trial stage. This has been effected by a structural reform of the investigation which at present is conducted for the majority of offences in the form of a police inquiry by legally educated detectives. The number of prosecutors, judges, as well as of administrative personal in the criminal courts has also been raised although in relatively small proportion.

Better use of resources. Enlarging the scope of alternative case-settlement procedures available at the pre-trial and trial stages.

The idea of making better use of resources and lifting the burden on the courts to conduct contested and time consuming trials in the majority of cases as used to be the situation in the near past appears to have been effected by enlarging the scope of the case settlement procedures available at the two stages of the proceedings.

Thus under the new Code of Criminal Procedure (‘the Code’) at least 3 alternative to contested trial procedures have been provided. Two of them, the “bargaining procedure”\(^\text{241}\) and the “summary proceedings on proposal of the prosecution for imposition of an administrative in exchange of a criminal penalty”\(^\text{242}\), supervised and approved by the court with their variations available at the trial stage have existed in the former Code. However, under the new Code the classification of offences for which these proceedings is applicable has been enlarged.

The third “Short trial procedure”\(^\text{243}\) is entirely new although its roots can well be found in the English system. Under this procedure once the indictment is registered in court, the trial judge may decide on his own volition or on request of the defendant to conduct a preliminary hearing. In the course of this type of hearing (very similar but not identical to the English pre-trial reviews used to facilitate guilty pleas), the defendant may declare that he admits the facts disclosed in the indictment and consents to no evidence being collected in an adversarial manner in support of these facts. In this case the trial judge is under duty to approve his waiver of rights, provided the corroboration of confession requirement has been satisfied, and to proceed to conviction/or acquittal. The penalty is to be imposed under the prescribed minimum. There is also another variation of this procedure, the effect of which is only to streamline the case by focusing on issues of contestation and dispensing with the possibility of hearing evidence for

---

which the defendant consents not to be collected at the trial stage.

The common feature of all of these procedures (except the latter), is that the fact-finding process which can turn to be complex and time consuming is dispensed with on the basis of the admission of facts on the part of the defendants in exchange for the benefit of imposition of a more lenient penalty. Since its incorporation the “Short trial procedure” has become quite popular and over the past year many defendants have opted to use it.

For cases in which proof of facts is relatively easy and require less time and effort, two other procedures are available; “the speedy procedure” and “the immediate procedure” which normally apply to minor offences. Although they are designed as adversarial in nature at some point of the proceedings it falls within the competence of the Supreme Court of Cassation to review virtually all lower court decisions on requests filed either by the relevant prosecution authority or the defendant within 6 month time as of the final decision. The appellate courts are competent to decide on reopening of the proceedings only where administrative sanction have been imposed.

244. Article 356-361 of the Code.

Time limiting of judicial work

(a) Pre-trial stage. Time-limits for conducting of the investigation.

According to Article 22 (2) of the Code the prosecution and investigation authorities are under duty to secure the conduct of the criminal proceedings within the prescribed time-limits. Thus, at present in ordinary criminal proceedings the investigation at the pre-trial stage is to be concluded within 2 months. In cases raising difficulties on point of fact and law and subject to the approval of the prosecutor’s authority of higher level, this time-limit may be extended for up to 6 months. Moreover in cases of exceptional complexity the General Prosecutor is vested with the power to grant further extension of unspecified length. However, an important procedural safeguard aimed at preventing abuse of the prescribed time-limits is provided in the form of the exclusionary rule remedy under which evidence collected outside of the time-limits is to be considered inadmissible in court.

(b) Trial stage. Time-limits for listing of cases and of delivery of judgments.

According to Article 22 (1) of the Code the court is under duty to hear and decide cases in reasonable time. However, there are express provisions relating to the terms within which the cases should be listed and the court’s decisions delivered. Thus, once the indictment is registered in the court and the case is assigned to the particular trial judge, he/she is under obligation to list the date of the hearing in 1 month time (unless procedural errors of significant importance have been discovered in which case the indictment is to be reversed to the relevant prosecutor for correcting them). If the case discloses difficulties on point of law and fact this period may be extended up to 2 months on approval by the presiding judge of the court. The length of the trial proceedings can hardly be estimated in advance and in this respect there are no express limitations. Adjournments may well depend on the complexity of the case and the need to safeguard the interest of the defence. At the end of the proceedings at first instance the court’s decision (verdict) is to be delivered in public. The written reasoning is to be drafted within 15 days as of the date at which the verdict has been pronounced. The maximum period is 30 days if the case is of certain complexity.
The rules concerning time-limits for listing cases and delivery of judgments (also verdicts) by the appellate courts are the same. The only difference can be seen as to the Court of Cassation where the cases must be listed and heard within 2 months. The working practice at the moment is that only the presidents of the respective divisions are to list the cases. The draft judgments are to be prepared in 30 days as of the date of the hearing.

Cases concerning judicial review of detention on remand or in respect of detainees in ordinary trials are to be listed and dealt with as a priority.

The time-limits for conducting the investigation, listing cases for trial and delivering of the judgments in summary trials are much shorter. Thus, under the “Speedy procedure” the investigation is to be concluded within 7 days, and the prosecution is to be brought before the court within 3 days. The trial judge is required to list the case within 7 days and following the hearing to deliver the judgment within 7 days. Under the “Immediate procedure” the investigation is to be concluded within 3 days, and the prosecution is to be brought before the court immediately. The trial judge is required to hear the case the same day, and to deliver the judgments within 7 days. Under the “Bargaining procedure” in use at the pre-trial stage once the agreement on settling the case has been reached and signed by the parties, it is to be entered immediately at the court by the relevant prosecutor, and the hearing is to be listed in 7 days.

Implementing mechanisms for closer supervision on compliance with prescribed time-limits. Providing for harsher disciplinary penalties for inactivity.

It is apparently believed by the Legislature and the Executive that the most effective manner, capable of securing compliance with the reasonable time requirement set out in Article 6 (1) is if the incorporation of rigid time-limits for performing the activities of all branches of the judiciary is combined with strict supervision and imposition of harsh penalties. This concept is best expressed in the new Judiciary Act (following the amendments of the Constitution) where it is provided that the time-limits specified in the procedural codes are mandatory and their compliance is to be reviewed on regular basis or on signals by the new machinery of the Supreme Judicial Council, namely, the Inspectorate. The latter has not yet been constituted but the provisions of the Act specify that it will be a specially designed body of 22 experts with at least 5 years experience as jurists chaired by a General Inspector, all of them being appointed by the Parliament. According to the Judiciary Act these experts should, if in the course of their checking find violations of the rules relating to the time-limits in which judges should run and conclude the cases, inform the relevant presiding judge of the court who is acting as an administrative leader. They may also make proposals as to the solution of the problem and may set terms for their execution. The experts may also review compliance with the proposals they have given. Finally, the Inspectorate may propose the imposition of a disciplinary penalty on any judge who has failed to conclude the cases within the prescribed in the procedural code time-limits. This will be carried out by the Supreme Judicial Council (acting on permanent basis under the present reform) if it concerns dismissal, reduction of salary and of rank. Under the provisions of the Judiciary Act penalties can be imposed for systematic breaches of the time-limits prescribed in the procedural codes or actions of the members of the judiciary that have resulted in unjustifiable delays of the proceedings. However, under the Constitution judges can only be deprived of their irremovability and may be eventually

246. Article 12 (2) of the Judiciary Act which is in conflict with Article 22 (1) of the Code specifying that the courts are to decide cases in reasonable time the assessment of which should be consistent with the well established case-law of the European Court.
247. Article 54 (2) of the Judiciary Act.
248. Article 56 (1) of the Judiciary Act.
249. Article 55 (2) of the Judiciary Act, which means that they may review the work of judges in the higher courts where one of the preconditions for appointment is to have experience of at least 12 years.
251. Article 129 (2), 5 of the Constitution.
The role of Supreme Courts in the domestic implementation of the ECHR

A Work in progress

dismissed if they have committed grave violation or are systematically breaching their duties, or have performed actions which affect the authority of the judiciary.

It is impossible to envisage how these rules are going to operate in reality, and what the consequences for the judiciary are likely to be. What is quite plain, though, is that systematic breaches of the prescribed time-limits (the wording used in the Judiciary Act) is not equivalent to systematic breach of duties (the wording of the Constitution) and is in clear conflict with the actual content of the duties of the judiciary as to the reasonable time requirement (specified in the Code). As it was explained above, according to the principal provision of the Code the courts are under duty to hear and decide cases within a reasonable time and the criteria for assessing the reasonableness of the proceedings as established in the Convention case-law have little to do with mandatory limitation of judicial work as judges could not be expected to act as machines for producing judgments in strict time.

Time limiting is not in principal an undesirable and disproportional measure. However, by providing mandatory compliance with the time-limits set out in the Code, effected by rigorous supervision and likelihood of imposition of harsh disciplinary penalties, the Judiciary Act not only extends the limits of obligation of the judges as to the reasonable time requirement and establishes fragrant conflict both with the rule of the Code and the authority of the European Court’s case-law on this matter but it also creates serious risks of interfering with the requirements of independence and fair hearing which are not less important and should be well balanced. In this respect the pressure to bear on the judiciary in a state of still very overloaded courts may be detrimental, serving only to put more pressure on the judiciary rather than to help the process of enabling the courts to comply with the various requirements of Article 6 (1) of the Convention, which is one of the basic guidelines that the contracting state should follow.

Application of the requirement for providing a procedure for speeding up the proceedings

Trial on motion/request of the accused

This specific procedure was first introduced in 2003 by an amendment of the former Code and its main purpose was to grant the individual charged with the particular offence the possibility of being able to compel the investigation and prosecution authorities, under the supervision of the court, to take urgent measures for accelerating the proceedings that have already been delayed for various reasons, either by entering a prosecution (on indictment) in court, or to resort to some other mode of settling the case, or to drop the case. Since it proved its positive impact on speeding up the criminal proceedings at this stage (which is likely to shorten the length of the whole criminal process) this procedure was retained in the new Code. However, a few additional safeguards were introduced in order to secure proper compliance bearing in mind the obstacles associated with its application.

In substance, this procedure allows the accused to request the competent court of first instance to try his case provided that as of the date of the charge (which is interpreted in the case-law as of the initial charge) 2 years have expired if it concerns a serious offence, and 1 year has expired for any other type of offences. This precondition is closely related to the deadlines established for the execution of all preventive measures imposed on the individual and associated with his standing as an accused in the criminal proceedings at the pre-trial stage (detention on remand, bail, restriction on movement including travelling abroad or removal from work) which are to be terminated by the relevant prosecutor at the expiry of 2 years in cases involving charges for

252. Article 22 (1) of the Code.

253. Article 239a of the former Code; at present incorporated in Article 369 of the new Code.

254. Article 234 (7-10) of the Code.
serious offences (assuming penalty of more than 5 years), and at the expiry of 1 year in any other type of cases. In this respect, the procedure in question appears to reflect both the idea of the desirable acknowledgement by the state of a violation of the reasonable time requirement at this stage (once the period of two years and one year, respectively, have expired, although the length of the proceedings may well have become unreasonable long before), and of the specific way it tends to discharge its obligation arising under Article 13 to provide for a remedy enabling the individual to complain of the unreasonable length of the proceedings (to have an arguable claim on this ground) with the effect of speeding them up thus preventing a violation of Article 6 (1) or its continuation.

Following the request of the accused the court’s task is to review the case and verify that the prescribed time-limits have expired. If this precondition is satisfied, the court is under obligation to issue an order to the relevant prosecution authority indicating that in 2 months time it needs to dispose of the case either by way of bringing prosecution on indictment before the court, or by entering a proposal for conducting a summary trial (leading to imposition of an administrative sanction in exchange for a criminal), or by entering an agreement signed by the parties for settling the case, or to drop the case/to discontinue the criminal proceedings. Notwithstanding which one of these steps the prosecutor is likely to choose, the court needs to be properly informed.

If the prosecutor fails to perform the duties indicated in the order within the prescribed 2 months period or the court does not approve the case-settlement agreement, the court is under obligation to discontinue the criminal proceedings. If the prosecutor performs the duties indicated in the order, but the trial judge finds out that in the course of the proceedings significant procedural errors have occurred, he/she is under obligation to discontinue the trial and remit the case to the prosecutor to correct them within 1 month. If the prosecutor fails to comply with the prescribed additional time-limit or even if he does but the trial judge is not satisfied that the significant procedural errors have been corrected or even other errors of the same nature have occurred following the reversal, the trial judge is empowered to order termination of the criminal proceedings with reference to the particular charge.

The whole procedure is closed and performed in chamber by a single judge. The final court’s orders leading to termination of the criminal proceedings are not subject to appeal. However, under the provisions for reopening of cases/proceedings (which is to be held before the Supreme Court of Cassation), this type of court’s orders may be challenged within 6 months, provided that some of the evidence on which the court’s reasoning was based proved to be untrue, or the judge/respectively the prosecutor/or a member of the investigation authority has committed a crime in relation of his/her participation in the procedure, or by way of investigation evidence of significant importance but unavailable to the court while ruling on the case has been discovered.

As to the effectiveness of the procedure available to the accused at the pre-trial stage, a very important safeguard was introduced in the new Code following the obstacles met during its application. Thus, at present if the single judge while dealing with the request of the accused has failed to calculate properly the time-limits relevant to the ruling on determination of the proceedings, or the relevant judge of first instance court where the indictment has been filed has also missed to consider this issue and has proceed to conviction, the latter is due to be quashed on appeal and the duty of the appellate court is to order discontinuation of the criminal proceedings. This type of order by the appellate courts may be appealed before the Supreme Court of Cassation under the ordinary procedure for reviewing lower courts decisions. In the instant case, however, it may uphold or overturn the order and it may also discontinue the criminal proceedings if such course of action is “prescribed by law”. Taking into consideration the fact that the procedure in question has a statutory basis and that the appellate courts are under duty to terminate the proceedings if the first instance court has failed to do that, it appears that the correct interpretation of this provision is that it

255. Article 419 (2) of the new Code.
empowers the Supreme Court of Cassation to uphold such orders. Moreover, if the same problem is identified in cases where conviction has been passed, under the same provision the Supreme Court of Cassation should be deemed competent to quash the conviction and rule on the termination of the criminal proceedings.

**Application of the sentence discount principle (mitigation of sentence) as a compensatory remedy**

Sentence discount on the ground of excessive length of the criminal process is not expressly defined in the statutory basis as a factor requiring mitigation of sentence. However, the established case-law both of the lower courts, and the Supreme Court of Cassation suggests that the length factor (the time/delay element) may be considered not only as one of a number of mitigating circumstances requiring imposition of a more lenient penalty, normally below the prescribed minimum, but it may also be viewed as an extraordinary factor permitting a reduction in the penalty. It is worth noting, though, that the court’s reasoning should correspond to the guidelines developed in the *Donner* case. Poor reasoning of the lower courts, however, may well be corrected on appeal, including by the Supreme Court of Cassation.

**Civil actions against the state**

This type of remedy is available provided the individual has been wrongfully detained and/or convicted. On this basis it is not impossible for him/her to argue on the detrimental effect of the length of the proceedings and to request awarding of compensation. Since numerous cases have been brought to the European Court against Bulgaria for breaching the reasonable time requirement in civil proceedings, it is impossible to argue successfully that this type of remedy is effective, thus capable of redressing properly the violation occurred with respect to the length of the criminal proceedings.

**Conclusions**

As the European Court’s case-law suggests, combination of different arrangements of preventive and compensatory nature may serve the purpose of redressing violations on the reasonable time requirement. Whether this will be the case with Bulgaria following the reform it is yet to be seen. However, if the process of designing preventive measures is to be successful it should be based on extensive research and identification of the causes that have led to the consequences which necessitate redress at present. This requires genuine efforts, knowledge and perseverance.
PROVIDING REMEDIES FOR JUDICIAL DELAYS – THE EXPERIENCE OF SLOVENIA

Mr Franc Testen

President of the Supreme Court of Slovenia

1. Introduction

The struggle of the Slovene judicial system with the excessive length of judicial proceedings has its roots in the general reform of the organisation of courts in 1994. Another important reason for the extension of the reasonable time, in which the parties could expect the solution of their cases, were the fundamental changes in the legislation that reflected the political and economic changes in the country.

It was in June 1994 that Slovenia adhered to the European Convention for the Protection of Human Rights and Fundamental Freedoms, but it was not until 2005 and 2006 that the cases against the Republic of Slovenia in front of the European Court of Human Rights as well as the domestic cases urged the government to prepare specific legislation, that would tackle the length of proceedings and give parties effective remedies.

2. Right to trial without undue delay as a human right

The first paragraph of Article 23 of the Constitution of the Republic of Slovenia (right to judicial protection) determines:

“Everyone shall have the right to have his rights, duties and any charges brought against him to be decided upon without undue delay by an independent, impartial court established by statute.”

On the other hand, the European Convention on Human Rights specifies in the first sentence of the first paragraph of Article 6 (right to a fair trial):

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Leaving aside the theoretical differences in the expressions “undue delay” and “reasonable time”, it is clear that under both acts the state is obliged to ensure prompt judicial action. Justice delayed is justice denied.

The right to trial within a reasonable time is connected with the right to an effective remedy, specified in Article 13 of the Convention and Article 25 of the Slovenian Constitution, since it is only with an effective remedy that parties can enforce their right to a trial without undue delay.

What was the situation in Slovenia before the introduction of the Protection of the Right to a Trial without Undue Delay Act in 2006?


257. Official Gazette RS, No. 33/91-I, 42/97, 66/00, 24/03, 69/04 and 68/06.

What were the legal instruments a party could use? Were they effective?

3. The situation before the adoption of the Act

Parties and participants in court proceedings had four different legal remedies, for which the government in the proceedings before the European Court of Human Rights argued that were effective. They were the following: an administrative action, a tort claim, a request for supervision and a constitutional appeal. Apart from those, a complained could be filed in Strasbourg, alleging the violation of the right to fair trial and the right to effective remedy. It was following such complaints that the European Court of Human Rights in the precedent case of Lukenda v. Slovenia\(^\text{259}\) in October 2005 decided, that "the government have failed to establish that an administrative action, a tort claim, a request for supervision or a constitutional appeal can be regarded as effective remedies."\(^\text{260}\) Finally, the Court also concluded, that "the aggregate of legal remedies in the circumstances of these case is not an effective remedy."\(^\text{261}\)

The European Court of Human Rights therefore decided that the first paragraph of Article 6 (right to a fair trial) and Article 13 (right to effective legal remedy) of the European Convention on Human Rights have been violated. It awarded compensation for non-pecuniary damage at a level of 3 200 euros for "court delay" in relation to the court proceedings that lasted five years, three months and nine days, of which the procedure at first instance lasted a whole four years and one day.

This judgment of the European Court of Human Rights was followed by a series of judgments against the Republic of Slovenia because of the violation of the right to trial within a reasonable time.\(^\text{262}\)

Interestingly, in September 2005, before this judgment of the European Court of Human Rights was issued, the Constitutional Court of the Republic of Slovenia adopted a similar Decision\(^\text{263}\) in which it decided that the Administrative Dispute Act\(^\text{264}\) of the Republic of Slovenia of 1997 is unconstitutional in respect of some of its provisions, which do not contain an effective legal remedy against violations of the right to a trial within a reasonable time in cases in which a violation has already ceased and does not contain special provisions that would enable the claimant to claim just satisfaction in such events. The Constitutional Court consequently held that remedying of these unconstitutional situations requires more complex legislative regulation.

The aforementioned decisions of the European Court of Human Rights and the Constitutional Court of the Republic of Slovenia were among the basic reasons for the adoption of the Protection of the Right to Trial without Undue Delay Act.

4. Adoption of the Protection of the Right to Trial without Undue Delay Act

The legislative model for the Act cannot be exactly specified. Some influences certainly came from the Organisation of Courts Act of the Republic of Austria and the Italian “legge Pinto” of 2001, but most importantly the Act is fairly similar to the Polish Act of 2004 and the amendments to the Czech Courts and Judges Act of 2004, primarily because of the similar legislative tradition and similar judicial organ-
isation of the circle of Central European countries.

The European Court of Human Rights now requires a specific, formalised and fast procedure of deciding on the right to trial in a reasonable time and very precisely analyses national case-law under such internal legislation. In drafting the Act Slovenia followed the reasoning, evident from the case-law of the Court, notably the case of Scordino v. Italy (No. 1), where the Court stressed that “individual countries such as Austria, Croatia, Spain, Poland and Slovakia had perfectly understood the situation in relation to protection of the right to trial in a reasonable time and had chosen a combination of two types of legal remedy: one that is specified for acceleration of court proceeding and the other which is specified for awarding damages.”

5. Main provisions of the Act

The Act entered into force in May 2006 and is applied from the 1 January 2007. It is applicable in all courts of general jurisdiction and specialised courts, yet not in the procedures before the Constitutional Court.

The party that has the right to a trial or decision without undue delay is defined in quite a wide way, since the Act gives the right to use the remedies to any party in court proceedings as well as to injured parties in criminal proceedings.

Acknowledging the guidelines of the case-law of the European Court of Human Rights, the Act offers two general types of legal remedy – accelerating remedies and a specific request for just satisfaction.

The circumstances of each particular case that should be taken into account when deciding on the legal remedies are the following:

5.1. Supervisory appeal

A supervisory appeal is the legal remedy given to a party that considers that the decision-making of the court is unduly delayed. It has to be filed at the court that is dealing with the case. When deciding on it the president of the same court is bound by the procedural provisions of the Act as well as by the mutatis mutandis application of provisions of the General Administrative Procedure Act, since it is a matter of court management. After receiving a report from the judge, to whom the case has been assigned, in which the possible reasons for the delay have been analysed and an expected deadline for the solution of the case has been given, the president can reject the appeal as unfounded or use one of the following mechanisms to accelerate the proceedings:

- order a deadline for performing certain procedural acts (in no longer than six months);
- order that the case be resolved as a priority due to the circumstances of the case;
- order that the case be reassigned to another (lawfully appointed) judge.

A new supervisory appeal cannot be filed within the time limits set in the decision of the president or within six months from the decision on the previous appeal.


5.2. Motion for a deadline

A motion for deadline as the second accelerating remedy is somehow an appeal against the decision about the supervisory appeal. It can be filed when the latter has been rejected or when no decision has been taken about it within two months. While the supervisory appeal is dealt with inside the court, where the dealing with the case is supposedly unreasonably delayed, the motion for deadline is a revolutionary legal remedy, for jurisdiction over it is with the president of the superior, i.e. higher by instance court. A motion for deadline is thus a legal remedy that simultaneously contains elements of judicial protection and elements of legal remedy. The measures that the president of the superior court has are the same as the ones applicable in the supervisory appeal procedure; however, the Civil Procedure Act is applied. There is no appeal against the rejection of the motion for a deadline, although a constitutional complaint can be filed.

None of the measures that the president of the court has at his disposal to prevent the unreasonable delays in court proceedings infringes the constitutional and conventional principle of independence of the judges. Similarly, none of the assisting competencies, assigned under the Act to the Ministry of Justice, gives the executive branch of power the right to decide on the right to trial without undue delay.

5.3. Just satisfaction

The accelerating legal remedies that a party can file are a procedural precondition for deciding on just satisfaction. This means that in order to be able to demand just satisfaction, the supervisory appeal had to have been granted or a motion for deadline had to have been filed. When deciding on just satisfaction, the state attorney and the civil court are not bound by the president’s ruling on the accelerating legal remedies.

The main form of just satisfaction is monetary compensation for non-pecuniary damage, caused by a violation of the right to a trial without undue delay. The Republic of Slovenia is strictly held liable for the caused damage. The Act specifically limits the amount this compensation can reach, ranging from 300 up to 5,000 euros. Regarding pecuniary damage, the provisions of the Obligations Code apply. The essential reason for specifying limits to compensation is the standpoint that the purpose of the constitutional right is primarily ensuring fast judicial proceedings and determining legal remedies that should ensure this, and not monetary compensation for non-pecuniary damage.

The two other forms of just satisfaction provided in the Act are a written statement by the State Attorneys’ Office, indicating that a violation of the right to a trial without undue delay occurred and the publication of the judgment with the aforementioned content that can accompany the monetary compensation.

Before demanding monetary compensation in court, the claimant is obliged to file a motion for settlement at the State Attorneys’ Office with a view to reaching an agreement on the type or amount of just satisfaction. Only in the case when no settlement has been reached within the time period of three months can an action be brought before the competent court. State bodies, bodies of self-governing local communities, public enterprises, public funds and public agencies may not be afforded just satisfaction by way of payment of monetary compensation for damage caused by a violation of the right to a trial without undue delay.

6. Current situation

In spring of this year the European Court of Human Rights issued the first two judgments on the Protection of the Right to Trial without Undue Delay Act of the Republic of Slovenia in relation to the question of whether Slovenia has an effective legal remedy for the
Some difficulties have already arisen in the handling of accelerating legal remedies. Firstly, additional human and financial resources had to be granted. Secondly, the hybrid nature of the procedural provisions (combining administrative and civil procedure rules) causes some uncertainties. Most importantly, accelerating remedies have little or no value in the case of the ‘systematic backlogs’. When the delays in court proceedings cannot be attributed to the conduct of the court, the use of acceleration remedies could unjustly favour the active parties that file such remedies. In so far, the position of the judiciary on this issue has been strict – remedies should be rejected as unfounded, although the time frame of the proceedings could clearly be qualified as unreasonable. I am confident that answers to current problems should come from the future application of the Act in practice – Legum corrector usus.


7. Conclusion

It has to be underlined, that the purpose of this Act was not a reduction of court backlogs. For this purpose the Republic of Slovenia has set a special project – the Lukenda project of reducing court backlogs until 2010, including measures such as hiring additional judges and professional court assistants. Other steps that include amending procedural legislation as well as the material provisions of the laws should be taken. The purpose of the Act is to provide effective legal remedies for the protection of the right of a party to a trial without undue delay and give clear indication of the circumstances that should influence the decision on whether this right has been violated.

An effective and conscientious application of the Act is therefore a commitment of the Republic of Slovenia, above all the judiciary and State Attorneys’ Service. However, this is not a commitment only to the European Court of Human Rights or the European Convention on Human Rights but mainly to the Constitution of the Republic of Slovenia itself and to parties in judicial proceedings, whose right is of little or no benefit, if it is delayed. ★
Securing of legal remedies for court delays

Mr Vladimir Babunski
Judge of the Supreme Court of “the former Yugoslav Republic of Macedonia”

I.

Like in any other contemporary democratic society, in the Republic of Macedonia the fundamental values are the basic freedoms and rights of the individual and citizen. According to their meaning, they are defined in the basic provisions of the Constitution of the Republic of Macedonia, Article 8, paragraph 1, alinea 1, worded as follows: “The fundamental values of the constitutional order of the Republic of Macedonia are the basic freedoms and rights of the individual and citizen, recognised in international law and set down in the Constitution.”

For the purpose of providing and materialisation of these values, Article 118 appearing in the normative part of the Constitution specifies that the international agreements ratified in accordance with the Constitution are part of the internal legal order and may not be changed by law. Consequent with the determination that the basic freedoms and rights of the individual and citizen are the fundamental value of the constitutional order of the Republic of Macedonia, for the purpose of their being secured, the framer of the Constitution has specified explicitly in amendment XXV of the Constitution of the Republic of Macedonia that the courts exercise the judicial authority, that they are independent, and that they try on the basis of the Constitution and the Laws and the international agreements ratified in accordance with the Constitution.

The European Convention for protection of human rights and basic freedoms as an international agreement was signed by the Republic of Macedonia and ratified in accordance with its Constitution, and came into force on 10 April 1997. As of this date, in accordance with Article 1 of the Convention, the Republic of Macedonia is obliged to secure to all persons under its jurisdiction fulfilment of the rights and freedoms defined in part 1 thereof.

Article 13 of the Convention provides that “anyone whose rights and freedoms defined by the Convention are violated shall have an effective remedy before the domestic authorities, irrespective of whether the violation has been committed by persons who have performed official duty.”

Regarding the substance, meaning and scope of Article 13 of the Convention, the European Court of Human Rights (“the Court”) has declared in several verdicts, and by reason of limited space, on this occasion we are quoting only the verdict Asenov and Others v. Bulgaria dated 28 October 1998, item 117. The Court points out that “Article 13 guarantees the existence of domestic legal remedy that exercises the substance of the rights and freedoms specified in the Convention, irrespective of the form in which it protects the domestic law. Therefore, the purpose of this Article is to ask for securing of a domestic legal remedy that enables the domestic authorities to deal with the substance of the complaint in connection with the Convention and to allow an appropriate remedy, although the contracting countries are allowed a certain flexibility in respect of the manner in which they adhere to their obligation related to this provision.” Furthermore, the Court points out that “one may not refer separately to the provisions of Article 13 of the Convention; rather, one may do so only if the main objection is within the...
II.

The question of court delays arises when an applicant to the Court points out that the trial before the domestic court has lasted too long and has not satisfied the requirement from paragraph 1 of Article 6 of the Convention stating that “everyone, when his/her civil rights and obligations are determined, or when criminal charges are brought against him/her, has the right to fair and public trial within a reasonable period before an independent and impartial tribunal founded by law.”

The experience that the Republic of Macedonia has as a defendant sued by its citizens before the Court for violence of the rights and freedoms defined in the Convention, through the passed verdicts, shows unambiguously that most of the verdicts have established violation of the right to trial within a reasonable period specified in paragraph 1 Article 6 of the Convention (concerning length of the proceeding).

Out of 35 Court final verdicts, in 18 cases violation of the right to trial within a “reasonable period” has been established.

The analysis of the 18 verdicts establishing violation of the right to trial within a “reasonable period” leads to the discovery of some very important facts. The first fact is that in 15 cases the proceeding has been conducted according to the rules for contentious procedure with various legal bases: ownership, title, indemnity, cancellation of agreements, claim for money, termination of employment, etc. In one case, the proceeding was conducted according to the rules of the Law on Executive Procedure, and in two cases an administrative procedure was conducted with participation of the Supreme Court of the Republic of Macedonia in an administrative dispute. The second fact is that the total duration of the procedures including the time within the competence of the European Court of Human Rights – 10 April 1997 is from at least 6 years up to 20 years. The third fact is that the procedures before the first instance and the second instance courts took the longest time, and those before the Supreme Court of the Republic of Macedonia took the least time, except in four cases, where the duration in three cases was 3 years, and in one case 2 years and 7 months. The explanation of the Government of the Republic of Macedonia concerning these four cases was that the Supreme Court had too many cases, which for the ECHR was irrelevant and unacceptable in view of its position taken on a great number of decisions that the contracting state has to organise its legal system in a manner that will enable anyone to acquire his/her right to final decision within a reasonable period, in a dispute for his/her civil rights and obligations.

It is important to point out that in two cases out of the analysed 18 verdicts, in which the proceeding lasted 14 years and 6 months – for execution, and in which no final decision was passed (verdict in the case of Atanasovik and Others), and 20 years – for determination of the right to ownership, in which a final decision was passed (verdict in the case of Kostovska), the Court, in addition to the violation of Article 6, paragraph 1 for long duration of the proceedings, also established violation of Article 13 of the Convention for the right to effective legal remedy.

III.

According to the practice of the European Court of Human Rights, “every contracting state is free to decide on how it will organise its legal system in order to ensure the exercise of the rights and freedoms guaranteed by the Convention and by the protocols as its integral part.” Experience shows that this target cannot be achieved with one, two or more legal remedies incorporated in the domestic legal system. Rather, it can be achieved with a multitude of
The role of Supreme Courts in the domestic implementation of the ECHR

legal enactments that will govern thoroughly and comprehensively the matters of formal and legal nature in a way that will ensure finalisation of proceedings before courts and other state authorities within a “reasonable period.”

Proceeding from such experience, the Republic of Macedonia decided (one may say with a delay) to pass new process laws (the amendments and supplements to the old ones did not achieve the desired effect) that will substantially eliminate old legal solutions.

These laws are: The Law on Contentious Procedure (Official Gazette of the Republic of Macedonia No. 79/2005), which has been in force since 29 December 2005 and the Law on Execution (Official Gazette of the Republic of Macedonia No. 35/2005), in force since 25 May 2006.

III/1.

The current Law on Contentious Procedure focuses on the hearing principle for account of the investigation principle (Article 7). Namely, the activity of the parties in the proceeding is dominant, as the parties are obliged to state the facts of importance for decision making and to propose proofs to establish such facts, and the court is under no obligation to establish at all cost the relevant facts and to determine presentation of proofs that the parties have not proposed. There is an exception to this rule in one case only, i.e. when the parties want to dispose of the claims that are contrary to the compulsory regulations, contrary to the provisions of the international agreements ratified in accordance with the Constitution of the Republic of Macedonia and contrary to the ethics, in which case the court is also authorised to establish facts and present proofs that the parties have not stated and proposed. This is for a single purpose of the court to prevent non-allowed disposal by the parties.

Such basic determination of the Law for the active role of the parties, and consequently, for the responsibility for their possible passive conduct resulting in negative consequences for them in respect of the outcome of the dispute, is maintained in all phases of the proceeding. Thus, the claimant is obliged to state in his/her claim the facts on which his/her claim is based and to propose proofs establishing these facts (Article 176, paragraph 1), and the defendant, if he/she disputes the claim, is obliged to state in his/her written answer that he/she is bound to give within at least 15 up to not more than 30 days (Article 269, paragraph 1), the facts on which his/her allegations and the proofs by which such facts are established. The failure of submission of rejoinder by the defendant results in passing a verdict by which the court accepts the claim if the other conditions provided in Article 319 – “verdict due to non-submission of rejoinder” are also fulfilled. If the conditions for passing a verdict referred to in the preceding Article are not fulfilled, the parties may state the facts and propose proofs only and right at the preparatory audience, if such audience is held, and if not held, at the first audience for general hearing (Article 271, paragraph 3 and Article 384, paragraphs 1 and 3). As an exception, the parties may during the general hearing state new facts and propose new proofs only if they make it likely that they were not able to state them without their fault, i.e. to propose them at the first appearance for general hearing.

The failure by the parties to state the facts and to propose proofs in the previous phase of the proceeding, leads to the consequence that they may not state in their complaint new facts and proofs except that they relate to substantial violation of the provisions from the contentious procedure due to which the party may lodge a complaint. In this context and for the same purpose – acceleration of the proceeding, is the impossibility to state in the complaint an objection for expiration of the claim as well as another substantial legal or process legal objection to which the first instance court pays no attention ex officio (Article 341, paragraph 2). For the purpose of a more expeditious and more efficient finalisation of legal proceedings, very significant is the solution specified in the Law, contained in the provision from Article 351, paragraph 3 worded – “when the council meeting establishes that the verdict against which a complaint has been lodged is based on a substantial violation of the provisions of the contentious procedure or on an erroneously and incompletely established factual state, and the verdict has once been
repealed, the second instance court will schedule a hearing and decide relevantly.”

The improper service of process produced by the previous Law on Contentious Procedure from 1998 had a great impact on the long duration of legal proceedings. The current Law, with its solutions, reduced to a great extent the adverse impact of the old law. First, it enriched the circle of persons authorised to serve process – with notaries public and other persons defined by law (executors etc.). Second, it extended the time for service of process – every day from 6 a.m. to 9 a.m., not only on working days. Third, extended to the maximum the place to which the process is served – in every place where the person to whom the process is to be served will be found. Fourth, the deliverer may ask to identify the person, and, if necessary, the deliverer is authorised to ask for assistance from the police. And fifth, maybe the most important is the provision in the Law that the party that is duly invited to attend an audience or has been informed of taking a specific action does not appear at the court, the court is under no further obligation to invite him/her (Articles 125, 126 and 135).

Not less important for acceleration of legal proceedings is the legislator’s solution stated in the current Law to exclude whole institute that have been contained in the old law such as: adjournment of the proceeding, request for protection of legality from the Public Prosecutor and participation of third parties in the trial – the Ombudsman and the Public Prosecutor. A direct acquisition from the non-existence of the institute “adjournment of the proceeding” for its prompt finalisation, are the legal solutions in Article 277 and 280, paragraph 1, according to which, if the claimant, although duly invited, fails to appear at the preparatory audience, and/or at the first audience for general hearing as well as at any later audience, and fails to excuse the absence, the claim will be considered as withdrawn, if the defendant agrees thereto (orally in the minutes or by written submission).

Also, very important for acceleration of the proceeding at the court is the solution contained in the provision from Article 367 obligating the council chairman and/or the judge upon receipt of the second instance court’s decision to schedule an audience for general hearing within 8 days, and then hold the audience within 45 days from the date of receipt of the second instance court’s decision. The method of “determination of short terms” for taking trial actions by the court for the purpose of accelerating the proceeding was also selected by the legislator in the provisions from Article 405, paragraphs 4 and 5 of the Law, where he has prescribed that in the case of a procedure in employment disputes, the proceeding before the first instance court must be finalised within 6 months from the date of submission of the claim and/or the second instance court is obliged to pass a decision under a complaint lodged against the first-instance court’s decision within 30 days from the date complaint was received, i.e. within 2 months if a hearing is held at the second-instance court.

For any abuse of the rights pertaining to the parties and intermediaries, the legislator has opted for the method of “pecuniary punishment” for the same purpose – acceleration of proceeding – with a fine of 50 to 500 euros for natural persons and the responsible person in a legal entity, and for the legal entity with a fine of 250 to 2 500 euros, in the denar equivalent. No separate complaint is permitted against the ruling on the pronounced penalty, and it is executed compulsorily ex officio (Article 9, paragraphs 2, 5 and 6).

III/2.

The Law on Execution provides abandonment of the system of court execution of enforceable court decisions and court settlements, executive decisions and settlements in administrative procedure, if they are intended for pecuniary obligations, and other documents provided by law as enforceable documents, and establishes a system of execution by private executors vested with public powers and appointed by the Minister of Justice based on open competition.

In addition to the above-mentioned decisions and settlements the Law defines as executive documents implemented by the executors the executive notarial document and the
conclusion for execution costs drawn up by the executor and, naturally, decision passed by a foreign court, if the decision meets the assumptions on recognition prescribed by law or international agreement ratified in accordance with the Constitution of the Republic of Macedonia.

Regarding private executors it is worth mentioning that before their being appointed for a particular region of a Basic Court, they should fulfil specific conditions provided for by the Law (citizen of the Republic of Macedonia, graduate jurist with 5 and/or 3 years working experience depending on whether he/she has worked on legal operations or on executive operations and other usual conditions), and, naturally, pass an examination for executors before an examining panel made up of five members appointed by the Minister of Justice. The executors and the executors’ association are regularly supervised once a year and extraordinarily at any time by the Ministry of Justice.

With this system of execution the solutions given in the Law on Executive Procedure applicable prior to the application of the Law on Execution that decelerated and complicated the procedure are wholly abandoned, notably: the execution proposal of the creditor by designation of the means and subject of execution, the permission for execution together with a decision passed by the court, the complaint against the execution decision, lodging of complaints after expiration of the time limit, objection by a third party, and other solutions causing long duration of the proceeding.

According to the Law on Execution, the party holding an execution document applies orally or in writing in the form of record to the executor for compulsory execution, and, if the executor assesses that the executive document is provided with a certificate of enforceability and eligible for execution, simply issues an order for execution determining the means and subject of execution (if a pecuniary claim is concerned), and/or an appropriate order on the manner of execution applicable for non-pecuniary execution.

The orders, conclusions and other documents issued by the executor must in form and substance be prescribed by the Ministry of Justice, otherwise they are void.

The executors are obliged to act in accordance with the Law on Execution, otherwise they face disciplinary procedures and measures, and the most serious measure is their discharge. The executor’s job is subject to legal control through objections made by the parties or the participants for irregularities committed by the executor during implementation of the execution. The objection for elimination of the irregularities is filed to the president of the basic court in whose region the execution is implemented within 3 days as of the date of realisation of the irregularity, but not later than 15 days as from the date of finalisation of the execution.

The president of the court is obliged to decide on the objection upon a held audience or without audience within 72 hours.

The Law did not permit a complaint against the decision of the president of the court in accordance with paragraph 7 of Article 77, however, by decision passed by the Constitutional Court of the Republic of Macedonia U. No. 175/2006-0-0 dated 17 January 2007 this provision was repealed and removed from the legal order. In the meantime, although no law on amendment and supplement to the Law on Execution (which is in governmental procedure) has been enacted, the discontent parties use the right to lodge a complaint against the decision of the president of the court by referring to direct application of the provision from Article 15 of the Constitution of the Republic of Macedonia that guarantees the right to appeal against individual legal acts issued in a first instance proceeding by court, administrative body or organisation or other institutions performing public mandates, and the second instance courts decide on lodged complaints.

In the Republic of Macedonia 49 executors work with their deputies and other supporting staff. The experiences from the one-year work of the private executors are positive and optimistic as their efficiency in execution is approximately 35%, settled cases unlike the efficiency of the courts that ranged between 10% and 15% settled cases at an annual level.
The appointment of new executors, which is necessary and justifiable in accordance with the sub-law Rules passed by the Minister of Justice determining the number of executors, and the development and acquisition of experience of the existing executors, and in view of the initial success is expected to overcome the problem of execution inefficiency in the future, thus satisfying the requirement from Article 6, paragraph 1 for trial within a “reasonable period.”

III/3.

The Republic of Macedonia, aware that the right to trial within a reasonable period cannot be provided completely with the adoption and implementation of the above-mentioned process laws, however good and efficient they are, without the existence of a separate legal remedy pursuant to Article 13 of the Convention, which is its obligation, which, according to the practice of the ECHR “is efficient if used for the purpose of accelerating the passing of a decision by the court acting upon the case, or providing to the party an appropriate compensation for delays that have occurred” decided to incorporate in its legal system a “separate legal remedy.” It did it in the Law on Courts (Official Gazette of the Republic of Macedonia No. 58/2006) that has been applied since 1 January 2007. First of all, the basic principles of the law, Article 6, paragraph 2 that has practically been taken from the provision in Article 6, paragraph 1 of the European Convention on Human Rights, define that “when deciding on civil rights and obligations and when deciding on criminal responsibility, everyone has the right to fair and public trial within a reasonable period before an independent and unbiased court founded by law.”

The implementation of this provision is specified in Article 35, paragraph 1, item 6 of the Law defining the competence of the Supreme Court of the Republic of Macedonia. This paragraph provides that the Supreme Court of the Republic of Macedonia is competent to decide upon request of the parties and other participants involved in any proceeding for violation of the right to trial within a reasonable period before the courts of the Republic of Macedonia, in a procedure specified by law.

The next provision of Article 36 working out this legal remedy contains the following:

According to paragraph 1, the party that considers that the competent court has violated the right to trial within a reasonable period, has the right to submit a request for protection of the right to trial within a reasonable period to the directly higher court. According to paragraph 2, the directly higher court acts upon the request within 6 months from its submission and decides whether the lower instance court has violated the right to trial within a reasonable period. According to paragraph 3, if the higher instance court establishes violation of the right to trial within a reasonable period, it will adjudge a just compensation for the applicant. According to paragraph 4, the pecuniary compensation is to be borne by the court budget.

Although Article 35, paragraph 1, item 6 of the Law specifies explicitly that the request of the party and the other participants in the proceeding for violation of the right to trial within a “reasonable period” will be decided on “in a procedure defined by law”, such law in the Republic of Macedonia has not been enacted so far.

Due to non-enactment of the law on the procedure in which the violation of the right to trial within a reasonable period in the Republic of Macedonia will be decided on, the “separate legal remedy” provided in the Law on Courts is not applied in practice.

The general meeting of the Supreme Court of the Republic of Macedonia held on 16 July 2007, discussing the possibility of application of Article 35, paragraph 1, item 6 and Article 36 of the Law on Courts adopted a legal opinion that these provisions are inapplicable without their amendment and supplement.

Such legal opinion was immediately submitted to the Ministry of Justice of the Republic of Macedonia, which informed us that such opinion has been accepted and that legislative measures have been taken for amendment and supplement to the subject legal provisions.
ACQUISITION BY JUDGES OF SKILLS AND EXPERTISE ESSENTIAL FOR THE APPLICATION OF THE ECHR AND THE CASE-LAW OF THE ECtHR

Ms Vida Petrović-Škero

President of the Constitutional Court of Serbia

The acquisition by judges of expertise essential for the implementation of the European Convention on Human Rights and the implementation of the case-law of the European Court of Human Rights as well as the acquisition of essential skills by the judges of national courts is an unquestionable guarantee of the independence and impartiality of judges in accordance with the terms of the Convention. In order for that guarantee to be effective, a national programme must be drawn up to define the competences of judges. Judges must, above all, be unbiased, capable, ethical, professional, conscientious, broad-minded and highly educated. Only those judges with the necessary expertise and skills will be able to acquire the necessary competences.

Serbia’s place in light of these obligations and needs

The Law on the Training of Judges, Public Prosecutors, Deputy Public Prosecutors and Assistants to Judges and Prosecutors was passed in June 2006, and it governs, among other things, the method for acquiring expertise and skills for the implementation of the European Convention on Human Rights and the direct application of the case-law of the European Court of Human Rights. Under this Law, the future judges will undergo initial training, an important segment of which will be the acquisition of expertise for the implementation of the European Convention and case-law, and this training will be mandatory.

There will also be voluntary continuing training. This type of training, associated with such specific expertise and skills, is provided through a Training Centre, established by the Association of Judges of Serbia and the Ministry of Justice of Serbia as institutions responsible for the training of judges and prosecutors. The body responsible for the implementation of this Law is the High Judicial Council. The High Judicial Councils has set up a Commission that has drawn up a programme of initial training. However the funds required for this training have not yet been earmarked in the state budget.

The case-law of the International Court has given rise to autonomous concepts and calls for a human rights protection mechanism that must be effective within the national
system. Therefore, the priority for the Training Centre and Supreme Court of any country, including Serbia, is to ensure a mechanism for the direct implementation of the European Convention and provide information about the Court’s case-law and its direct application by national courts.

With regard to continuing education, communication has been established between the Training Centre and judges at all levels as the target group. However, the number of trainers in the country is still inadequate. At present, there are nine national human rights trainers in Serbia. Their own training was made possible by the Council of Europe.

The problem is that the employment status of the judge-lecturers has not yet been regulated in order to allow them to work as trainers only for a period of time. It is therefore necessary to pass legislation that will make this possible. In addition, the necessary and adequate funds have not yet been earmarked in the national budget, so that we have to rely on donors in our work. We receive most of the assistance from the Council of Europe, the Belgrade Human Rights Centre and the ER Centre, which, along with the assistance of the British Government, helps judges obtain information about the direct implementation of the European Convention and the case-law of the European Court in proceedings conducted before national courts. This training is still inadequate and unsystematic.

In order to ensure the desired effects of this training, it is necessary to develop a good methodology and provide specific levels of training for judges at different levels and with varying degrees of experience. It is necessary to define the quality of the lecturers in the institution. Work on ensuring these conditions is constantly in progress.

In addition to the issue of institutional training, which calls for the creation of special budgets for these purposes, the most important thing is for judges themselves to want to gain knowledge and receive advanced training in this important area.

They should be encouraged to do so through legislation, which must make the election and promotion of judges conditional on their advanced training. This will only be possible once there are adequate funds for a programme of sustainable training, which should not be limited to substantive and procedural law but should also comprise communication techniques and skills (hearing witnesses, establishing contact with special categories of participants in proceedings etc.) Judges must be trained to use computers that will give them very easy access to the case-law of the European Court of Human Rights and to the website of the Supreme Court of Serbia, which already features the most important published judgments of the International Court and decisions handed down against Serbia. It is important to achieve the main goal, the creation of a judiciary with a good understanding of proportionality in the exercise of the right to a legal remedy and the importance of the actual protection of rights compared to the observance of form. A judicial system that fails to ensure this can create greater problems for citizens who seek human rights protection from the courts. A court must exist not for its own sake but for the protection of the rights of citizens seeking such protection. The fact that legal norms are not harmonised with the provisions of the Convention must not be a problem for the courts given the possibility of a direct application of the International Convention made possible by the Constitution. The Supreme Court should assume leadership in this area on account of its expertise.

It is for these very reasons that the continuing training of judges must be of paramount importance in shaping the personnel policies of the courts and must be an integral component of every judge’s career.

In defining the method for acquiring expertise and skills it should be noted that some of the conclusions from Opinion No. 4 of the Consultative Council of European Judges of 27 November 2003 indicate that training is necessary for a judiciary to be held in high regard. The law, as the legal framework for the acquisition of this type of expertise, should not deal with the minutiae of training, and the drawing up of training plans should be entrusted to a special body, which will modify the plans in accordance with specific needs. The state has the duty to raise funds for this training because the continuing acquisition of knowledge by judges is a matter of general
importance for the state. Training must primarily be provided by judges and experts in each specific area, and it must always be related to practice.

The main purpose of all training is to raise the awareness of judges that they are “European judges” and that they must be familiar with European standards and international instruments, particularly the Convention.

If we are to achieve the desired goal, many segments of the state must be reformed. The first step is to intensify the studies of European law at the university. The next step is definitely the initial training, an important part of which is the acquisition of knowledge regarding the application of the European Convention on Human Rights and the direct implementation of the case-law of the European Court. Continuing education must be provided given that the Convention is a living instrument, which must ensure the protection against new forms of violations of rights.

It is with regard to the decision of the International Court handed down against other countries with similar problems and a similar legal system that it is necessary to ensure all the conditions for the continuing monitoring of case-law and methods of rights protection in order to overcome problems of the same type faced by national courts.

Judges in Serbia receive the Bulletin with summaries of the important decision of the Court in Strasbourg in view of our legal system and the mentality of our people.

Decisions against Serbia and other important decisions of the International Court are published on the Supreme Court’s website.

Numerous laws implementing the provisions of the European Convention have been amended in Serbia. Specialised judges responsible for the acquisition of special expertise and skills to guarantee the protection of human rights are to be appointed. This specialisation is required of judges in cases concerning the protection of minors, family, employment-related rights.

It is also reasonable for the Supreme Court to provide guidelines for future proceedings and interpretations of the law through its decisions and, especially, to contribute to case-law equalisation. The Supreme Court will therefore play the most important role in the implementation of international instruments, especially the European Convention on Human Rights. It will provide guidelines for trials to be held within the domestic legal system in accordance with the already established case-law of the European Court. It is crucial to prepare a quick reference guide for applying precedents in order to help courts of lower instances. This has been done for Articles 5 and 6 of the European Convention on Human Rights in connection with national legislation and the existing case-law of European and domestic courts, as well as for Article 1, paragraph 1, of the Protocol. The entire system of training must be streamlined by carrying out an optimum reform in keeping with national capabilities. The passage of legislation that is not implemented or is not suited to specific possibilities and needs will do little to help judges acquire skills and expertise.

The knowledge gained must also facilitate preventive and corrective measures for the very purpose of safeguarding the rights of citizens and justifying the *raison d’être* of judicial institutions. ★
ENSURING THAT JUDGES HAVE THE SKILLS AND KNOWLEDGE TO APPLY THE ECHR AND THE CASE-LAW OF THE ECtHR

Mr Gabor Szeplaki-Nagy
Judge of the Supreme Court of Hungary

Madam President, ladies and gentlemen,

I sincerely thank the organisers for giving me the opportunity to present our experience in fostering knowledge of Strasbourg case-law for the benefit of Hungarian judges.

If I may, I shall begin my statement with a brief historical recapitulation.

After the collapse of the Soviet bloc, Hungary took the path of democratic reform. One of the milestones was 6 November 1990 when our country joined the Council of Europe. Hungary was the first country of the former Soviet bloc to do so, in becoming the 24th member state.

Hungary’s accession was preceded, from 8 June 1989 onwards, by a period during which we enjoyed the special guest status created by the Parliamentary Assembly in order to forge closer links with the parliaments of Central and Eastern European countries progressing towards democracy.

The objective was the promotion of human rights in these countries. So it was that, thanks to the hastening of the process of reform and democratisation, Hungary ratified the European Convention on Human Rights on 5 November 1992.

After that date, an acquaintance with the practice of the European Court of Human Rights was indispensable for Hungarian judges too, as our national judges were to apply the provisions of the Convention while upholding the Court’s interpretation of it. Although Article 7 of our Constitution provides that Hungary undertakes to harmonise its international obligations with its domestic law, this provision does not mention in express terms the judgments of international courts.

Thus the influence of the case-law was becoming increasingly significant. Concurrently, certain obstacles arose, in particular our judges’ unfamiliarity with foreign languages. At that time, the Ministry of Justice was still responsible for supervising the judicial professions and therefore organised seminars and colloquies for judges to familiarise them more with the Convention and with Court precedent. Unfortunately the judgments were not translated into Hungarian.

As from October 1992, the Supreme Court began to publish summaries of the Strasbourg Court’s important and telling judgments, in the Bulletin of court judgments in the section: “Judgments of the European Court of Human Rights”. I have in my hands the first edition from the year 1992, and the latest from August this year, showing that publication of the Bulletin has not lapsed since that time.

The Bulletin, issued by the Supreme Court, provides Hungarian jurists with first-class information on the case-law of the Hungarian courts. This publication comes out each month, with a print run of 12 000 copies. Not only judges but also lawyers and legal advisers can consult it. This ensures access to the case-law of the Strasbourg organs for Hungarian judges not commanding either of the Council of Europe official languages.
Since the promulgation of the European Convention on Human Rights in Hungary by Law No. XXI of 1993, the Supreme Court has closely followed the activity of the Strasbourg organs, given that its constitutional function is to guarantee consistency in the case-law of the Hungarian courts. Moreover, it relies on the case-law of the European Court of Human Rights in its decisions.

The then President of the Supreme Court, Mr Pál Solt, decided to set up within the Court a bureau whose principal activity was to make the case-law of the European Court and of the European Commission known to Hungarian judges.

The Human Rights Bureau operated starting from April 1994 with three permanent assistants. I was appointed director of the Bureau, and my team was made up of an assistant, a retired judge who spoke English very well and had advanced knowledge in the field of European Court of Human Rights case-law, and a secretary.

To support the Supreme Court in its function of ensuring consistency in the case-law, one of the Bureau’s tasks has been to keep abreast of the European Court’s jurisprudential development and to compare it with the judgments delivered by the Supreme Court.

If the Bureau found a judgment to be incompatible with the judgments of the European Court of Human Rights, it reported the fact to the President of the relevant chamber of the Supreme Court.

Meanwhile the number of translations of judgments has also grown in the Bulletin. The translators are mainly legal specialists with a thorough knowledge of English or French, and about the legal system of the country concerned in the judgment. This has made it possible to ensure the quality of the translation from a linguistic and legal standpoint.

After 1995, we broadened the publication of Strasbourg case-law. We began to produce a quarterly appendix to the Bulletin called the Human Rights Review, in which not only summaries of judgments but also studies dealing with the various articles of the Convention were published. The first Review appeared in 1997 and the latest in 2002.

In this collection, studies on Article 5 – Right to liberty and security, Article 6 – Right to a fair trial, Article 8 – Right to respect for private and family life, Article 9 – Freedom of thought, conscience and religion, Article 10 – Freedom of expression and Article 11 – Freedom of assembly and association have been prepared. We have also published a study on the fight against corruption and organised crime, and on protection of witnesses. These studies have drawn upon the case-law of the Strasbourg supervisory bodies and on the legal instruments of the Council of Europe, such as the recommendations on these subjects.

I can assure you that the outcome of our work is significant, because more and more references to the case-law of the European Court of Human Rights are found in the decisions of the Hungarian courts. These references occur not only in the decisions of the ordinary courts but also in those of the Constitutional Court, which cite the Review or the Bulletin as the source.

But the work done by our Bureau has not been the sole source of knowledge of the European Court’s case-law for our judges. The Council of Europe put a great deal towards this endeavour by organising seminars and colloquies up to the end of the 1990s. The National Council of Justice, the body for self-regulation of justice since 1997, in its initial training programme for judicial service entrants and in-service training for judges who have held office for years, also looks after human rights education.

Since September 2006 the judges’ training college has been responsible for the initial and in-service training of judges.

It must be acknowledged that the young judges appointed after the 1990s are in a more favourable position than their elders, because these young jurists have higher proficiency in foreign languages. Indeed, they must learn foreign languages and pass two language examinations to obtain an academic diploma. Furthermore, during their university course they have already had the chance to study fundamental rights and human rights as a subject. I myself was a lecturer for several years in the Law Faculty of Eötvös Loránd University in
Budapest, where I taught the case-law of the European Court of Human Rights.

May I end my statement with a brief presentation of the website of the Supreme Court of Hungary, carrying the page of the Human Rights Bureau. The site is accessible free of charge to the public; everyone interested in human rights can enter it. On it can be found practical instructions concerning the bringing of an application, the decisions of the European Court of Human Rights relating to Hungary, the text of the European Convention on Human Rights, the recommendations of the Council of Europe and the Court’s judgments. In addition, the recommendations and decisions of the Council of Europe organs can be retrieved using a search engine.

Thank you for your valued attention. ★
EVALUATION OF SUPPOSED OBSTACLES TO AN EFFECTIVE IMPLEMENTATION OF THE ECHR BY NATIONAL COURTS

Mr Jeremy McBride

Barrister, Monckton Chambers, London and Visiting Professor, Central European University, Budapest

Introduction

Apart from the demonstration of considerable productivity, the annual statistics of the European Court of Human Rights ("the Court") are a depressing testament to the poor level of implementation of the European Convention on Human Rights ("the Convention"). In the course of 2006 over 50 000 applications were lodged and by the end of that year the number of applications still pending had reached almost 90 000.272 Furthermore during that year over 1 500 judgments were handed down, with the majority of them entailing the finding of violations of one or more provisions of the Convention.

Of course, statistics never give the whole picture and some might say that the fact that each year between 90 and 95% of applications are found inadmissible is actually an indication of how well the Convention is being implemented. However, to take this view would be complacent. Many of the applications found inadmissible concern appalling stories and their rejection often occurs only because of the delay in bringing them to the Court or a failure to pursue a domestic remedy which allows a claim of non-exhaustion to be raised, notwithstanding that a successful outcome is far from assured. Indeed in many instances the deficiencies in such unsuccessful applications are themselves merely reflections of the failure of the Convention to be fully embraced by the legal systems of the High Contracting Parties since they are the inevitable consequence of inadequate understanding or knowledge on the part of the lawyers who are representing the applicants concerned before the Court.

Moreover, although the number of cases in which violations are found by the Court to have occurred might seem relatively small given that there are now forty-seven High Contracting Parties, they often involve many applicants and they are no more than an indicator of a more widespread problem, something confirmed not only by the subject matter of cases that do not pass the admissibility hurdle but also by reports of other intergovernmental supervisory mechanisms and of non-governmental organisations on the human rights situation in the respondent states. Furthermore these cases are often repetitive in their subject matter, whether dealing with an issue that has already been addressed in rulings against the same respondent state or against another when the implications for the current respondent state should have been obvious. The existence of so many repetitive cases, in particular, underlines the failure to achieve effective implementation of Convention rights and freedoms throughout the member states of the Council of Europe.273

The problem of implementation is not a matter of the Convention's status in domestic law as its provisions are now, through one means or another, part of the law of all High Contracting Parties.274 This was not always the

case yet the Court would then say that incorporation was not an essential requirement of the Convention for a High Contracting Party. Nonetheless this view did not deter the making of considerable efforts to implement the Convention in countries where it had not automatically become part of the law through the act of ratification. However, these tended to occur while the fact that the domestication of the Convention in one form or another has not, and still does not, prevent violations of the guaranteed rights and freedoms from occurring was often overlooked. Indeed the mere fact of formal incorporation has led to some complacency on the part of some High Contracting Parties about fulfilling the fundamental obligation undertaken by them in Article 1 of the Convention. As the Court has long recognised, the crucial issue remains not whether the Convention has been incorporated into national law but what measures are being taken to ensure that its provisions are effectively implemented in practice.

The failure to achieve full implementation of the Convention is undoubtedly first and foremost attributable to action and inaction on the part of the executive and legislative branches of government and extensive efforts to change practices and introduce new procedures to deal with this are required, notably the effective training and supervision of officials and the thorough scrutiny of legislative proposals to prevent violations from ever occurring. However, notwithstanding the primary responsibility of the executive and the legislature for non-compliance with the requirements of the Convention, the courts also contribute to the problem of their inadequate implementation. They are implicated after all by the fact that they are often the institutions which last dealt with a matter before proceedings are instituted in Strasbourg – a consequence of the obligation to exhaust domestic remedies – and, of course, some of the complaints about breaches of the Convention relate to the very functioning of the justice system.

The difficulties that are said to face courts in securing effective implementation of the Convention would seem to be threefold. Firstly the requirements of the Convention are considered not to be clear and as a consequence they cannot be properly applied. Secondly the requirements of the Convention are suggested to be not of a character that courts are always in a position to address without measures first being adopted by the legislature. Thirdly implementation is regarded as being impeded by the absence of appropriate resources for the task involved, whether in terms of personnel or access to literature and argumentation. These difficulties are, in at least some instances, interlinked and to some extent they are genuine ones. However, there is no basis for regarding them all as insurmountable and more substantial efforts to deal with them are clearly appropriate, even if this might need some collective steps on the part of Council of Europe member states and not just by acting alone.

Lack of clarity

Suggestions that the Convention is insufficiently clear to be applied by national courts have been made many times over the years since its adoption and a typical example was the comment of Lord Denning, an English judge that:

273. It has been suggested that the existence of such cases is a distraction from the Court’s “essential role”, i.e., determining the more important cases concerning the interpretation and application of the Convention (Report of the Group of Wise Persons to the Committee of Ministers, CM (2006) 203, 15 November 2006, paragraph 35), but whatever the merits of that view there is no question that the ever-growing resort to the individual application procedure under Article 34 is a reflection of the failure of High Contracting Parties through their national institutions (including courts) to take seriously their obligation under Article 1 to secure Convention rights and freedoms to everyone within their jurisdiction.

274. The most comprehensive survey of the domestic status of the Convention is to be found in R. Blackburn and J. Polakiewicz, Fundamental Rights in Europe: the ECHR and its member states (2001).


276. Neither is yet comprehensively undertaken but the position has improved, particularly as a result of programmes undertaken or assistance provided by both intergovernmental and non-governmental organisations.
"It contains wide general statements of principle. They are apt to lead to much difficulty in application because they give rise to too much uncertainty. They are not the sort of thing which we can easily digest."277

These comments were made by way of contrast to the case method of the common law, together with its highly detailed form of legislation. However, uncertainty about the Convention's requirements is not restricted to judges and lawyers in common law systems. This is hardly surprising given that it uses concepts such as "arrest" and "detention" which mean quite different things in the legal systems of High Contracting Parties. Furthermore, although other, broader concepts such as "national security" and "public safety" may be found in all the various legal systems to which the Convention is supposed to apply, these are ones that can easily be approached with quite different perspectives in them, depending on factors such as history, culture and social circumstances. In addition the Convention uses terms which have quite different resonances, depending on which of the two official language versions is used, such as "civil rights and obligations" and rights and obligations "d’un caractère civil" in Article 6.

Moreover the Convention is not a static instrument so that its evolving interpretation can lead to quite different conclusions as to the requirements of particular provisions, based on a supposedly changing consensus which might actually reflect the prevailing rather than universal view within the High Contracting Parties.278 It is also an instrument that is given a deeper meaning than a literal reading of the text might suggest so that, for example, the use of terms such as "lawful" and "prescribed by law" is not limited in its effect to requiring a formal legal basis for restricting rights and freedoms since they are to be taken as also implying that any application of a permitted restriction will not be arbitrary and will be effected pursuant to a provision that is both accessible and foreseeable.279

Perhaps even more demanding is the fact that the Convention is an instrument that must be given a purposive meaning and thus requirements such a right of access to court and a prohibition on self-incrimination must be read into the text of Article 6 which, in contrast to most others, is a provision that is quite precise in its formulation.280

The changing circumstances in which the Convention is to be applied are also challenging. Certainly it is doubtful if the drafters ever imagined that the Court would be confronted with cases relating to the recognition of gender reassignment,281 the use of voluntary euthanasia282 and the inability of two unmarried sisters to claim the same exemption from inheritance tax following the death of one of them as is enjoyed by the survivors of a marriage or civil partnerships283, to take just some of the recent matters brought before it. The handling of such cases is nonetheless evidence of the enduring relevance of the Convention since its adoption nearly 57 years ago.

Yet difficult though all these issues are, there is much less justification for invoking the problem of clarity today, even where it concerns the need to balance the competing interests in the expressly qualified rights found in Articles 8-11 and in particular to apply the variable concept of a margin of appreciation.284 This is because there is now plenty of guidance on these and many other matters in the case-law of the Court (there was hardly any case-law

277. R. v. Chief Immigration Officer, ex parte Salamat Bibi [1976] 3 AllER 843 at 847.
278. See, e.g. Sheffield and Horsham v. the United Kingdom (22985/93 and 23390/94), 30 July 1998 [GC] and Christine Goodwin v. the United Kingdom (28957/95), 11 July 2002 [GC] on the issue of recognising the effect of gender reassignment.
281. See the cases cited at n 7.
282. Such as Pretty v. the United Kingdom (2346/02), 29 April 2002.
283. Such as in the case of Burden and Burden v. the United Kingdom (13378/05), 12 December 2006, now pending before the Court’s Grand Chamber.
284. See, e.g. the approach in cases such as Lingens v. Austria (9815/82), 8 July 1986 and Muller v. Switzerland (10737/84), 24 May 1988, the former involving a restriction that affected political expression and the latter concerning efforts to protect public morality.
on the merits at the time of Lord Denning’s remarks), leaving aside for the moment the question of its accessibility.285

There will always be matters where the Court has yet to give guidance and there are undoubtedly some instances where the reasoning in cases decided by it might be considered opaque or even absent.286 However, very many of the issues relating to the Convention that will be raised before national courts will have also already been addressed by the Court, albeit on some occasions in proceedings involving another High Contracting Party. Even if a particular issue has not yet been considered by the Court, the methodology required to deal with it will generally be quite evident to those who are prepared to seek it.

This does not mean that a national court and the Court in Strasbourg cannot legitimately reach a different conclusion as to what the Convention requires in a particular situation but that can only genuinely be regarded as having occurred where due account has been taken of the relevant case-law and unfortunately this often seems to have been ignored, dismissed too readily or applied with an excessively narrow reading.287

Moreover, even if some allowance might still be made for understanding the ostensibly difficult methodology involved in applying the Convention and its case-law, the real difficulty in giving effect to the Convention’s requirements arises somewhat less in respect of the complexities of finding the right balance between competing interests – for which the progress of an issue through national courts to Strasbourg can be a useful exercise in clarifying the position under the Convention – than in dealing with what might be thought to be the more relatively straightforward provisions in Articles 5 and 6, as well as the need for a formal legal basis for any restriction on a right or freedom.

Thus the case-law has long made it abundantly clear that more than seven days before a first appearance before a judge is unacceptable for the purposes of Article 5(3) – actually even this period is well in excess of the interval that will generally be accepted – yet cases still come to Strasbourg because a delay of this magnitude has not been taken to task in an appropriate manner by national courts.288 Furthermore where there has been an appearance before a judge there are still numerous instances in which the justification for continued detention advanced by prosecutors is not subject to any scrutiny and in which no action has been taken even though it ought to have been evident that the lapse of time spent in prison between a person first being remanded in custody and being tried was unduly long.289 Similar observations could also be made about the lack of speediness of judicial review of the lawfulness of detention290 and of a sufficiently broad scrutiny of the basis for that detention,291 to say nothing of the lack of an appropriate response to procrastination in legal proceedings, whether criminal or civil, leading to unreasonable delay contrary to Article 6.292

Furthermore it is amazing that there are still cases coming to Strasbourg where national courts have never questioned the legal basis for taking of measures such as search or interception of communications but the absence of this was readily apparent to the Court, providing

285. In addition to the case-law there is also an extensive body of analytical literature. The problem of the accessibility of the case-law is discussed below.
286. E.g. the justification for including a right not to incriminate oneself within the fair hearing guarantee in Article 6 when, unlike Article 14 of the International Covenant on Civil and Political Rights, it was not specifically listed was not explained by the Court in Funke v. France (10828/84), 25 February 1993.
287. Contrariwise a full consideration of such case-law may indeed lead the Court to defer to the conclusion reached at the national level; see, e.g. Tammer v. Estonia (41205/98), 6 February 2001.
292. See, e.g. Guiraud v. France (64174/00), 29 March 2005 (10 years and 3 months for an investigation, which had taken more than 6 years and 8 months and three levels of jurisdiction) and Munari v. Switzerland (7957/02), 12 July 2005 (9 years, 11 months and 12 days for one level of jurisdiction).
the sole basis for its finding of a violation of the Convention. 293

None of these are particularly difficult issues and they are also not ones requiring a deep familiarity with the jurisprudence of the Court. Indeed one might regard them as only involving the most basic of legal tasks which one should expect any judge to be able to carry out. Such shortcomings in the application of the Convention may be mitigated through training but they are unlikely to be seriously overcome without substantial efforts to change entrenched attitudes towards the relationship between the individual and the state, as well as a stiffening of the resolve of judges so that they feel comfortable exercising the independence which the Convention and membership of the Council of Europe requires that they enjoy.

One other problem bearing on the issue of clarity concerns the quality of the translation of the text of the Convention into languages other than the two official ones. As the discrepancies between the texts in English and French demonstrate, it is not easy to render accurately a concept used in one language into another. 294 Unfortunately it is not unusual to hear judges and lawyers complaining about the poor rendering of a particular term found in the Convention into languages other than English and French. Generally this is not problematic for these persons as they are complaining because they have a good understanding of what the Convention actually requires. However, such errors or infelicities in translation can be misleading for others and there is a need for them either to be corrected or for appropriate guidance to be given by national courts that a given formulation is to be understood in the sense that the Court treats the English and French text as meaning.

Lack of competence

The problem facing national courts with regard to the implementation of the Convention is not, of course, always one of being clear about what is required. There is also the question of whether that requirement is something which is within the competence of a court to deliver. Certainly the mere fact that a treaty is part of the law of a state does not necessarily mean that this is in itself sufficient for the fulfilment of the obligation that has been accepted. Thus there is a well-recognised distinction between treaty provisions that are self-executing and those that are not self-executing, that is between those that can be applied without any further legislative intervention and those that require such an intervention before full effect can be given to a provision by a court. 295

The non-self-executing character of Convention provisions has not tended to be pleaded as an excuse before the Court by respondent states, not least because this would be given short shrift by it, given the impossibility as a matter of international law of relying on constitutional arrangements as a defence to non-performance of international obligations and thus the need for a High Contracting Party to find the necessary means whatever those arrangements may be. 296

Even where the possible non-self-executing character of a Convention provision might be a contributing feature to a violation, this has not been remarked upon by the Court itself, although some dissenting judges have done so, such as Judges Valticos and Matscher in Ciulla v. Italy 297 in respect of the right to compensation under Article 5(5) for a deprivation of liberty contrary to the Convention. In their view:


294. E.g. in Article 6 the use of “droits et obligations de caractère civil” suggests private law issues more than the English expression “civil rights and obligations”.


Proceedings

Even supposing that the domestic law incorporates the terms of the Convention, it is difficult to see how a national court could give effect to the terms of Article 5, paragraph 5 unless there were a more specific national provision giving practical expression to the content of this provision.\(^{298}\)

Of course, which provisions of the Convention are to be regarded as non-self-executing is a matter for national courts and it is thus not one that the Court can formally give guidance. In so far as national courts have expressly addressed this issue – as opposed perhaps more frequently to deciding effectively on this basis without any more specific articulation of it in the reasoning – there has often been a very conservative approach as to whether it is possible to implement a provision, particularly in the early years after ratification, with decisions by some national courts suggesting, for example, that provisions such as Articles 5, 6, 11 and 13 in their entirety are not to be regarded as self-executing, while others appear to have had no difficulty in giving full effect to them.\(^{299}\)

Undoubtedly there may be some elements of those provisions that a national court could not apply without some implementing measure but it is difficult to conceive of a provision such as Article 5(3) not being, particularly when taken with the case-law of the Court, sufficient to enable a court to find that the interval between initial apprehension of a suspect and his or her first appearance before a judge was not prompt where several days had elapsed, or to rule that a use of a detention power was arbitrary and thus unlawful when, taking account of a drunken person’s age and actual behaviour, it would have been more appropriate to take him home than take him to a police cell.\(^{300}\) Similarly it must be unreasonable to suggest that it would not be possible to rely upon the right in Article 6(3)(d) to have witnesses summoned in the absence of any specific provision in national law.

The elements of provisions that cannot be implemented without further legislative measures – it seems improbable that a provision in its entirety would not be self-executing – are particularly likely to encompass many of the positive obligations that have been found by the Court to arise from Convention rights and freedoms. Notably the fulfilment of the duty to investigate a loss of life and allegations of torture and inhuman and degrading treatment\(^{301}\) might not be practical without a specific legal basis for its performance. Similarly the need for arrangements to protect persons at risk\(^{302}\) and the obligation to have an appeal system for both the expulsion of lawfully resident aliens and persons convicted of a criminal offence – as required under Protocol No. 7 – are matters which courts could hardly give effect to in the absence of specific legislation.

However, these matters concern only the minority of Convention requirements and it does not seem tenable to pass the buck to the legislature when it comes to requests to courts to give effect to Convention rights and freedoms.

A related problem to this is the preference for relying on specific provisions of national law which, notwithstanding the requirements of the Convention, appear to run counter to the way the latter’s provisions have been interpreted by the Court because of the view that a specific national legal rule cannot be ignored.\(^{303}\) Of course, it is more comfortable to rely upon a provision of national law but to do so in isolation from the requirements of the Convention not only ignores the fact that the provisions in it are part of national law through the act of incorporation, whatever form this might take, but also involves a very narrow form of legalism. In at least some instances the conflict between the Convention and the

---

298. Para. 2 of their dissenting opinion.
300. Witold Litwa v. Poland (26629/95), 4 April 2000.
301. See, e.g., Aksoy v. Turkey (21987/93), 18 December 1996 and Salman v. Turkey (21986/93), 27 June 2000 [GC].
302. See, e.g., Osman v. the United Kingdom (23452/94), 28 October 1998 [GC] and Öner Yıldız v. Turkey (48939/99), 30 November 2004 [GC].
303. See, e.g., Enkorn v. Sweden (56529/00), 25 January 2005, which concerned reliance on legislation to keep someone infected with the HIV virus in compulsory isolation for three months when the possibility of using less severe measures was not considered.
The role of Supreme Courts in the domestic implementation of the ECHR

national legal provision only arises because of the way in which the latter has been understood and there is nothing intrinsic in the words used in it which requires that the Convention be breached. Given that the Convention is part of the law – to say nothing of the fact that most countries have constitutional provisions to similar effect – there is no justification for it not being part of the equation when determining the true meaning of the text of the law.

Furthermore, if there is a choice between an interpretation that is compatible with the requirements of the Convention and one that is not, the former should be preferred and to do so is not an objectionable disregard for the legislative provision concerned; it is simply applying it with appropriate account being taken of the full legal context. The need to take account of the Convention in giving effect to the law is something that has been specifically required in the United Kingdom by its Human Rights Act of 1998 but this really only built on an approach that was already being followed by courts in recognition of the significance of the country’s international obligations. This seems all the more appropriate in countries where there is clearly an internal legal force being given to the Convention as an automatic consequence of its ratification. Moreover, although interpreting provisions in laws to achieve compliance with the requirements of the Convention cannot overcome explicit conflicts, the latter are rarer in practice than is sometimes thought and such interpretation need not await an adverse ruling being first given by the Court. In addition it should be noted that reliance on interpretation in this way does not put the national court in the position of refusing to apply a legal provision, which may not in any event be within its competence.

It might be added that this approach could even provide a basis for reviewing the understanding of res judicata where the Court has found that there has been a violation of Article 6 and allow the provision of the most effective remedy for such a violation, namely, the reopening of proceedings. Certainly the doctrine of res judicata can stand as an impediment to proceedings being reopened in the absence of a specific legal provision allowing this to happen after a Convention violation has been established. Happily the latter is much less common than it was but an integrated approach to the application of a country’s law – drawing upon both the Convention and nationally generated provisions – would be a legitimate way of fulfilling a remedial obligation arising the Convention.

This might equally true of other remedial obligations that arise under the Convention. There is often a tendency to rely upon the provision of damages as the only way of dealing with violations, relying inappropriately upon the fact that this has been the principal response of the Court and ignoring the fact that in so doing it has been applying Article 46 – an ostensibly narrow provision – and not Article 13 when it is the latter that establishes the remedial obligation for High Contracting Parties. As the case-law in respect of Article 13 – together with that in respect of its mirror provision relating to the duty to exhaust domestic remedies in Article 35 – indicates, there are many more remedies that can and should be used to deal with violations of the Convention. Interpreting provisions in national law that already exist to deal with complaints about failure to respect Convention rights and freedoms, even if this was not their original purpose, is something that should be considered wherever possible.

304. By virtue of Section 3.
306. In some jurisdictions it may only be the constitutional court that has that competence but this need not be exercised if a Convention compliant interpretation prevents any conflict with constitutional guarantees or treaty obligations from arising.
307. Concern that this remedy is still not sufficiently available led to the Committee of Ministers of the Council of Europe to adopt its Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.
instead of leaving the matter to be resolved in Strasbourg.

**Resources**

The third obstacle to effective implementation is one of resources. This is something that also affects the executive and the legislature but the nature of the obligations under the Convention is such that they are of immediate effect and a resource difficulty, while appreciated by the Court, is not one that it can accept as an excuse for their non-fulfilment.\(^{309}\) The need is to find solutions through both a reorganisation of budget priorities and the more efficient use of available resources, as well as through the assistance of other members of the Council of Europe.

The issue of an adequate number of judges undoubtedly has a bearing on the ability to provide hearings within a reasonable time and thus comply with the requirements of Article 6(1). However, this issue is not one to dwell upon here as this is not a matter over which judges generally have any real control. Nevertheless the most effective use of judicial resources is one over which senior judges do – or should – have some say. Furthermore, although procedural rules – which can institutionalise unnecessary delays – may not be matters which judges in all systems can change by themselves, other working practices may well be ones that they do have the competence to modify.\(^{310}\) Changing such practices may only lead to modest improvements but this is an area in which any gain in time is worthwhile, both for the parties to the proceedings and for the state which might otherwise be impugned in Strasbourg.

It should also not be overlooked that some delays can be attributable to individual judges who do not pull their weight and a failure to address such a problem – whether because of embarrassment, a misguided sense of collegiality or an unwillingness to intrude on personal difficulties – will only exacerbate the situation, with damaging effects for the justice system as a whole.\(^{311}\) Furthermore where such situations do exist, a reactive approach – responding only to complaints that are made – may not be enough since not all persons who suffer from delays can be bothered to pursue the matter, particularly if there is ultimately a successful outcome in their case. A proactive approach – looking for problems before people complain about them – might be a more appropriate way of tackling the problem, hopefully with encouragement and practical assistance rather than sanctions being sufficient to get results.

The problem of resources is not just about a sufficiency of personnel, it is also concerned with them having the appropriate level of competence for the task at hand. Thus they must not only have at least an adequacy of knowledge concerning the requirements of the Convention but they must also be disposed to apply them in the appropriate manner. The former is something that concerns not only the judges of national courts but also the lawyers who appear before them, whether for claimants or respondents in civil proceedings or for suspects and prosecutors in criminal ones – as the way in which issues are raised by them, as well as the argumentation that they advance, can have a significant impact on the way a case develops, even if the judge has overall responsibility for the proper application of the law. The latter is relevant only to the judges and is a reflection of the fact that knowledge is never enough; those who judge must be prepared to embrace the requirements of the Convention in their understanding of the overall purpose of the legal enterprise.

It is understandable that in most countries knowledge about the requirements of Convention has been limited in the early years following ratification to a relatively small group of judges and lawyers. However, it is essential that education about these requirements be provided comprehensively and it is evident that

---

310. It is recognised that the practices of lawyers may also have to be modified if such changes are to prove effective.
311. This does not mean that sensitivity cannot still be shown where the delay arises from a judge's personal difficulties.
that this is still lacking, despite the efforts of the Council of Europe, other organisations and members of the judiciary and the legal profession. Unless this deficiency in knowledge is tackled there will continue to be enduring difficulties in getting effective implementation of the Convention.

However, knowledge about the Convention is not just a matter of familiarity with the fundamentals – for which training of judges and lawyers in post is the essential short-term solution – but the acquisition of the capacity to follow the development of the case-law and to understand its relevance and implications for the different issues that can arise before national courts. In the long term this can only really be achieved through a transformation of the curricula of universities and professional institutions so that these are truly permeated by an appreciation of the Convention and its case-law. Moreover it is no good just having a specialised course on human rights – even if this is important for training experts – as courses in criminal law and procedure, property and family law and even commercial law need to take account of the way in which the Convention and its case-law has a bearing on their scope and application. Furthermore the provision of continuing education for all legal professionals with respect to the Convention will be essential if judges and lawyers are to keep abreast of developments that are relevant to their field of work.

Nevertheless it is not enough to have the raw technical skills. It is also important that there be actual access to the case-law and a genuine obstacle to this for many lawyers and judges is that this is still mainly just in English and French. The Committee of Ministers of the Council of Europe has underscored the fact that it is primarily the responsibility of each member state to ensure that the case-law is translated into the language(s) used in it. Yet it remains the case that the extent of the translation of the case-law into other languages of Council of Europe member states is insufficient for the task, often being limited to some of the key judgments and also judgments involving the particular High Contracting Party. This is clearly insufficient for the task; it only allows a partial knowledge and only allows a focus on problems that have already been identified rather than an understanding of the way in which cases concerning other High Contracting Parties reveal deficiencies in one’s own country which have yet to be recognised.

It is regrettable that, unlike the position with accession to the European Union, translation of the existing case-law into the language of the acceding state is not something that is done automatically so that it is available from the moment ratification of the Convention becomes effective. Of course, the volume of material that comprises the case-law on the Convention is considerable, although it is doubtful if it exceeds the amount involved in the European Union exercise when all the regulations and directives that are translated are also taken into account. However, the cost would be substantial and meeting it is not within the budgetary capacity of the Council of Europe, even if the expenditure would be well worthwhile.

Although the member states of the Council of Europe should not shirk the responsibilities that they have collectively recognised with respect to translation of the case-law, it may be that consideration should also be given to another approach, focusing on ensuring full translation of the case-law into the core second languages that are used within Europe – including German, Russian and Spanish – as this could ensure that in the medium term at least the case-law is in practice readily available to the majority of lawyers and judges at not too prohibitive a cost, even if it is not in the native language of everyone. A collaborative approach to funding and implementing this by member states could ensure that the burden on any individual one was not too great.

Translation is not, however, the only aspect of access to the case-law that is prob-


lematic. Unfortunately many judges and lawyers still do not have sufficient computing facilities to ensure that they can have access to the case-law when it is required and the upgrading of court facilities needs to be extended, with the objective of ensuring that every judge can access the relevant databases of Convention case-law as and when this is needed. Ultimately each judge should have his or her own computer with Internet access. 314

All the emphasis on the case-law is something that can seem overwhelming to some judges and lawyers coming from the civil law tradition. Indeed it can be an obstacle to them taking seriously the importance of the case-law for the effective implementation of the Convention. When confronted with references to the case-law, some civil law judges and lawyers respond by saying that this is something alien to their tradition, that they are not common lawyers.

Undoubtedly the need to have regard to the case-law – particularly given the volume of what is involved – can be off-putting because of the supposed difference in the approach of these two legal traditions but it is a difference that is more apparent than real. Cases are not just a feature of common law systems; many civilian systems also make considerable reference to past case-law, even if this is not done in the sometimes strict precedent manner of the common lawyer. Moreover the significance of cases is that they concretise the application of relatively abstract provisions to specific situations and thus provide guidance for dealing with the same or similar situations in the future. In systems that do not rely on cases – not least because this are not always published – such guidance is often provided by special rulings on the higher courts and thus having resort to Convention case-law is not really the radical departure that it might at first seem.

It should also be borne in mind that only four of the 47 judges on the Court are from common law countries 315 and there is no sense in which the use of case-law is seen by the other 43 as an imposition by the minority (although at least one of these has had a long exposure to the common law in the United States). 316 Rather it is appreciated as the most useful tool for applying the Convention effectively. The continued reliance on the case-law by successive judges on the Court from civil law countries is indeed testament to the fact that this is something that can be readily mastered by all judges and lawyers whatever their legal tradition so long as they are given sufficient training and support for this purpose. Nonetheless this does involve some change in legal culture and some understanding for the process of transition is appropriate.

However, another cultural problem is one that possibly deserves less tolerance – one that I mentioned at the beginning – namely, that there is reluctance on the part of some judges to embrace fully the philosophy underpinning the Convention that restrictions on rights and freedoms must be closely scrutinised and should not be disproportionate. This failing is evident, for example, in the many cases concerned with the undue length of pre-trial detention. It might also be seen in the repeated favouring by some national courts of the protection of reputation of public figures over the right to freedom of expression. Such an approach may reflect a difference of values but once the general approach of the Court has become well-established it is that approach that should shape the resolution of such conflicts, even if the circumstances of individual cases will always need to be taken into account. The continued disregard of the Court’s case-law on matters where its position is clear not only results in unnecessary proceedings in Strasbourg but it can also evince a serious disregard for the law which the judges concerned have sworn to uphold. This is a matter which requires strong leadership from Supreme Courts and ultimately repeated failure to apply the Convention case-law when this is clear ought perhaps to lead to consideration of whether the judge concerned is fit to continue in post.

Consideration might, however, also be given to the adoption of a national legal provision explicitly requiring national courts to

---

314. This could also contribute to achieving greater efficiency in communication between judges and lawyers and in preparation of judgments.

315. Cyprus, Ireland, Malta and the United Kingdom.

316. Judge Zupančič from Slovenia.
have regard to the case-law of the Court when applying and interpreting Convention provisions if there is not already a well-established practice of doing so. Such a provision – which has had considerable success in the United Kingdom 317 – would underline the relevance of the case-law and provide a formal basis for considering it for those who might otherwise regard it as improper.

Conclusion

The “obstacles” which have been considered have certainly inhibited the effective implementation of the Convention but they do not always concern matters which should primarily be so characterised, particularly as they could often have been more satisfactorily addressed by courts – sometimes with the assistance of the executive and the legislature – than has in fact been the case. There may have been a fear of the unknown in the early days after the acceptance of the Convention which discouraged efforts to understand its requirements but neither that instrument nor its case-law should now be seen as the mystery which it still seems to be for some judges and lawyers. The key to overcoming this is to ensure that the link between the Convention and the case-law of the Court is not broken but is fully embraced. This may require some additional resources – particularly for translation and training – but ultimately effective implementation will only come with the cultural transformation involved in treating the Convention and its case-law as a major national source of a state’s law rather than an external one. The leadership by example of Supreme Courts will be indispensable in order for this to occur.

317. The requirement to take the case-law into account was established by the Human Rights Act 1998, s 2(1).
1. Precedential nature of European Court of Human Rights law

The European Court of Human Rights has created a pan-European system of human rights protection by implementing the European Convention on Human Rights (ECHR). ECHR law is precedent law. A person capable of reciting all the provisions of the ECHR and its protocols would still not be able to implement the provisions of the ECHR because the system of human rights protection before the European Court of Human Rights is essentially enshrined in the judgments of that court. This is mainly due to the fact that the European Court of Human Rights employs the precedent technique.

The precedent technique is commonly regarded as a product of the Anglo-Saxon legal system, but it really stems from the elementary notion of justice, which requires that those who are equal should be treated equally. If a case to be decided is found to be equal to an earlier case, it is only natural for the judge to feel bound by the earlier decision.318

However, it would be incorrect to say that the precedent technique is only employed by the Anglo-Saxon system. European continental law has largely embraced this technique, and the importance of a court judgment is much greater today even in the continental-law countries than could have been expected at the time the great codes were promulgated, when the passage of judgment was regarded as an almost mechanical procedure of applying the law. The more recent interpretations of law in France, Germany and some other countries have changed their view on the relationship between law and court judgments. Today that view is very different from the view prevailing in continental law during the period of great codification.319 France is a case in point in this regard as numerous legal branches there are to a large extent the product of case-law. Administrative law is the work of the State Council, while civil law is largely based on judgments passed by the Court of Cassation, whose creative jurisprudence has adapted the norms of the old code to modern times.

For all these reasons it is quite understandable why the European Court of Human Rights employs the precedent technique and why its judges feel bound by earlier judgments.320

2. The precedent technique in the procedure of the European Court of Human Rights

The precedent technique, as noted by a former president of the European Court of Human Rights, the Swiss Judge Wildhaber, “is best suited to the requirements of legal security and certainty, the rule of law and the effective protection of human rights”.321
An example will serve as an illustration of the precedent technique in Court procedure. Nearly every week the Court passes a judgment in cases relating to the expropriation of property in Turkey, where the state has failed to pay fair compensation for expropriated property. Equally often the Court passes judgments dismissing applications in Turkish cases of the aforementioned type if it is established that fair compensation was paid in due course. In handing down these types of judgments and decisions, the Court is guided by the precedent set by the judgment in Akkus v. Turkey. In view of the rule set forth in this underlying judgment, the court determines whether or not fair compensation has been paid in due course or whether or not there has been a violation of the ECHR.322

Furthermore, in addition to the disposition of its judgments based on the judgment in Akkus v. Turkey, the European Court of Human Rights also provides a brief statement of grounds and makes reference to the precedent. This technique makes it possible for the Court to process cases more quickly.323 By employing the technique and thereby solidifying its case-law, the court is able to decide a large number of cases in a shorter period of time. In other words, the judge feels bound by the precedent, from which he or she does not deviate, but being bound by the precedent ensures that the case will be processed quickly.

All the advantages of the precedent technique notwithstanding, the European Court of Human Rights recently found itself faced with a major problem, whose dimensions can be grasped if we say that at one point there was a dangerous possibility of a single type of case from a single country virtually doubling the number of cases the Court has to deal with. This number is huge as it is, having reached 81 000 as early as the end of 2005.324 The case that gave rise to this problem was Broniowski v. Poland.

3. Broniowski v. Poland

The problem that brought Broniowski v. Poland before the European Court of Human Rights dates back to the end of the Second World War. When Poland’s present-day borders were drawn, a large number of Poles found themselves east of the Bug river, which constitutes Poland’s eastern border. This population was repatriated, and due to their relocation to Poland, the repatriated persons had to leave behind the property they owned in the regions they were leaving. The number of repatriated persons exceeded 1 200 000. The Polish state assumed the obligation to compensate them, i.e. to allow them to acquire title to property of adequate value within the Polish borders.

While this obligation was based on the law that was in force at the time Poland ratified the ECHR, the state failed to fulfil this obligation in the decades that followed, citing its inability to keep its pledge as the reason for this failure. The earliest Polish legislation that addressed this issue was passed in 1946. It was amended over time, and there were even interventions by the Constitutional Court, which annulled some of its provisions. The legal provisions governing indemnification were also a source of a potential financial burden. The state was at risk of incurring huge budget expenses. For all these reasons, a large number of repatriated persons did not receive compensation for their abandoned property or received inadequate compensation that amounted to a fraction of the value of the property in question.

In this particular case, the applicant’s grandmother left Lavov in 1947 and, having moved to Poland, received a document confirming that she had left property including four hectares of land and a house with a farmstead 2.6 hectares in size east of the Bug river.

321. Wildhaber, 173.
324. Wildhaber, 71.
In 1968 a Polish court declared the applicant’s mother heir to his grandmother’s property. The estate also included the right to compensation for the property abandoned as a result of repatriation. In 1981 the applicant’s mother, as the heir to the estate, received 4.67 hectares of land on a perpetual lease by way of compensation. In June 2002 a government committee of experts found that the compensation in this particular case amounted to a mere 2% of the value of the repatriated person’s property, which had been abandoned as a result of that person’s relocation to Poland. In the meantime, the applicant, having inherited his mother’s property, requested full compensation in administrative and judicial proceedings, but his request was dismissed. He therefore brought an application before the European Court of Human Rights in March 1996, claiming that the provision of Article 1 of Protocol No. 1 to the ECHR, which guarantees the peaceful enjoyment of possessions, had been violated in his case.

A large number of applications of this type were filed with Polish administrative and judicial authorities, while there was not enough land to be given to the relocated persons by way of compensation. The number of people registered in Poland who claimed compensation on these grounds reached 80,000. This was the number of potential applicants before the European Court of Human Rights, which had already received more than 160 cases of this type at the time the Court passed its judgment. It was therefore obvious that the Court in Strasbourg could have faced an insoluble problem that threatened to create a deluge of cases and block the Court.

As a result of all these circumstances, the huge number of applications of the same type coming from a single country, the difficulties faced by national legislators, domestic economic circumstances as well as the effects of the large number of applications on the state budget, it was clear that the usual precedent technique would most likely be an inadequate instrument of action in the hands of the Court.

It should be noted here that the European Court of Human Rights had already anticipated the possibility of a situation such as that described above. This led to deliberations about a reform of judicial procedure, and the new element brought by the Broniowski case into the Court’s case-law can only be understood in view of debates about the reform of the European Court of Human Rights. Furthermore, the very concept of a pilot judgment under discussion here was used for the first time in this debate. It was noted that in some situations cases of the same type repeated themselves, and such cases were described as repetitive or cloned cases, and the Court held that a special procedure should apply to such cases to allow the Court to decide them within a reasonable time. All such deliberations became part of the debate about Protocol No. 14 to the ECHR, whose text has been adopted but has not yet taken effect. The Broniowski case was decided under Protocol No. 11, which is currently in effect, by introducing the pilot judgment technique as a novel device.

4. Pilot judgment as a novel device

The pilot judgment was arrived at as follows. The Committee of Ministers of the Council of Europe, which, under the ECHR, is responsible for monitoring the enforcement of European Court of Human Rights judgments, called on the Court to determine, if necessary, the existence of a structural problem causing a violation of the ECHR, especially where such a problem threatened to result in a large number of applications brought before the Court. The Committee of Ministers recommended that the Court also examine the effectiveness of


326. For the number of repetitive and potential cases cf. Lambert-Abdelgawad, 210-1.

The role of Supreme Courts in the domestic implementation of the ECHR

A Work in progress

355

legal remedies in the domestic legislation of a member state in order to prevent the creation of repetitive cases before the Court.328

The recommendations of the Committee of Ministers created the basis for the Court’s action in Broniowski v. Poland. The Grand Chamber of the European Court of Human Rights ruled on 22 June 2004 that there had been a violation of Article 1 of Protocol No. 1 to the ECHR (paragraph 187). In addition, the Court stressed in the disposition of its judgment (paragraph 3) that the “violation had originated in a systemic problem connected with the malfunctioning of Polish legislation and practice caused by the failure to set up an effective mechanism to implement the ‘right to credit’”. The Court went a step further in saying that “through appropriate remedies and administrative practices, Poland was to secure the implementation of the property right in question.”

In the disposition of its judgment, the European Court of Human Rights also postponed its decision on the compensation claim in this particular case and called on the Polish government to report to the Court in writing within six months of receipt of the judgment on its actions with regard to this case and, especially, any agreement on compensation with the applicant. Another fact should be mentioned here. It is not contained in the disposition of the judgment in question, but it will be important for further discussion. While waiting for the Polish government to introduce remedies, the European Court of Human Rights adjourned proceedings in all other cases of the same type that had been brought before the Court by the time the judgment had been passed on 22 June 2004.

This judgment and the action of the Court created a novel device. A pilot judgment was passed for the first time in the Broniowski case, which called for a definition of the very concept of an European Court of Human Rights pilot judgment. While the commentaries to date are mostly in agreement with each other, there are still slight differences between them. The commentators mainly emphasise the fact that the disposition of the pilot judgment establishes the existence of a systemic deficiency in national law and urges the respondent state to introduce remedies to eliminate that deficiency.329 However, some authors place the greatest emphasis on a fact that was not included in the disposition of the Broniowski judgment of 22 June 2004. For these authors the essential new development is the very suspension of proceedings in all repetitive cases pending appropriate remedies by the state.330

These two opinions are very close, differing in the emphasis placed on some of the properties of a pilot judgment. It could be argued that a European Court of Human Rights pilot judgment is one whereby the court establishes the existence of a systemic deficiency in the national law of the respondent state and expressly calls on that state to employ remedies of a general nature to eliminate that deficiency and adjourn proceedings in all repetitive cases pending such remedies. A fourth element, already referred to by the doctrine, may be added to those above. Pilot judgments can only be passed by the Grand Chamber of the European Court of Human Rights.331 All four factors are arguably essential for defining the concept of a pilot judgment, no matter which of them is emphasised the most by a particular author.

Each of these elements of the definition should be examined separately to understand the significance of this novel device. Even before its judgment in the Broniowski case, the European Court of Human Rights had stressed the existence of systemic problems at the level of national law that led to violations of the


329. Garlicki, 190.

330. Zagrebelsky, 533; Ducoulombier, 17-8; Breuer, 447; Lambert-Abdelgawad, 205-11; Harmsen 46.

331. Breuer, 450 (n. 65), who finds arguments for this view in Article 43 of the ECHR.
ECHR. However, the Court had not done so in the disposition of the judgments.

The Italian cases that concerned the length of proceedings before national courts provide an example of the earlier practice. In *Bottazzi v. Italy*, for instance, the European Court of Human Rights held in its judgment (paragraph 22) that it had “already delivered 65 judgments in which it has found violations of Article 6.1 in proceedings exceeding a reasonable time”. In addition, the Court held that “such breaches reflect a continuing situation that has not yet been remedied and in respect of which litigants have no domestic remedy.” This Court ruling can be regarded as a kind of recommendation or appeal addressed to national legislators for eliminating a systemic problem. Thus in the example cited above the Italian state responded by passing a special law whose provisions were aimed at ensuring compensation for the damage suffered due to the prolongation of proceedings before national courts. This is the law passed on 3 April 2001 and called Pinto’s law for short after the person who had proposed it. The new element of a pilot judgment in respect of such proceedings is that the establishment of a systemic problem in national law is included in the disposition of the judgment. It can be argued that here the European Court of Human Rights went beyond the recommendation because the stated opinion had assumed the form of an order.

This also applies, more or less, to the second element of the definition. As we have seen, in its pilot judgment the Court ordered the respondent state to resolve the systemic problem that had led to human rights violation through its own remedies of a general nature. These remedies may include the passage of legislation or changes in administrative practices. The state is by all means free to choose the remedies by which it will enforce the Court’s decision, as has always been the case. While this freedom of a member state is indisputable, there is also a view that by applying the pilot judgment technique the European Court of Human Rights has encroached upon the exclusive jurisdiction of member states. This view is all the more interesting given that it originated with the former Liechtenstein judge, Luzius Caffisch, a professor of international law, whose term of office with the European Court of Human Rights expired recently.

There is one exception in this respect that predates the judgment in the *Broniowski* case, in which the European Court of Human Rights departed from the principle of freedom for member states with regard to the choice of remedies to be employed in enforcing judgments. This exception arose from *Assanidze v. Georgia* due to the circumstances of the case that may seem like an *ultima ratio*. The Court ordered the respondent state to release a person from custody as there was no other way of ending the violation of human rights.

As for the third element of the definition of the concept of a pilot judgment, which some see as crucial, it should be noted that this point contains the greatest innovation even though it is based on the text of the judgment. Furthermore, the doctrine expresses the view that this procedure did not literally result from the text of the recommendation by the Committee of Ministers of the Council of Europe. Regardless of this objection, it must be noted that the very essence of the pilot judgment technique lies in the adjournment of proceedings in repetitive cases and that the adjournment of proceedings arises from an interpretation of the recommendation by the Committee of Ministers of the Council of Europe. After the original decision in the *Broniowski* case, the European Court of Human Rights discontinued its proceedings in all repetitive cases on 6 July 2004.

Finally, the fourth element of the definition of the concept of a pilot judgment is linked to the third element in our series. The adjournment of proceedings in all repetitive cases is also possible after a judgment is passed by a

---

332. *Bottazzi v. Italy*, Reports 1999-V.
333. cf. Garlicki, p. 183; Breuer, 446; Lambert-Abdelgawad, 222.
334. Lambert-Abdelgawad, 206.
337. Ducoulombier, 18.
seven-member chamber, but the effectiveness of this procedure is questionable because such a decision is subject to control by the Grand Chamber. It is only after a Grand Chamber judgment that the adjournment of proceedings shows an indisputable effect.

In light of this definition of the concept of a European Court of Human Rights pilot judgment and the elements of that definition, there is a certain interest in looking first into the final conclusion of the case that gave rise to this novel device and into some of the basic and substantive problems arising in connection with pilot judgments.

5. Conclusion of the Broniowski case and the further development of the practice of pilot judgments

The denouement of Broniowski v. Poland played out before the European Court of Human Rights in September 2005, when the Grand Chamber decided to remove that case from the Court register, having established that the applicant and respondent government had reached a settlement.339

It should be noted that this was preceded by a series of events. After the original European Court of Human Rights judgment in this case, Poland’s Constitutional Court declared some of the legal norms unconstitutional in December 2004. The government submitted a report to the Committee of Ministers of the Council of Europe as it had been instructed under the judgment of 22 June 2004, and the Committee of Ministers concluded it would give precedence to the enforcement of the judicial decision in this case.340

In its judgment in the Broniowski case (paragraph 173), the European Court of Human Rights concurred with the position of the Polish Constitutional Court, so that this court of second instance found it comparatively easy to agree in its subsequent decisions with the position set forth in the Strasbourg judgment. In addition, the legislature had already been presented with the draft of a new law, which was expected to resolve the problem whose existence had been highlighted by the European Court of Human Rights’ judgment.341

The Broniowski case was brought to its conclusion through these actions of various actors at the national and European levels. The applicant received fair compensation on the basis of an amicable settlement with the respondent state. In addition, the Committee of Ministers of the Council of Europe was able to monitor the enforcement of the judgment through the adoption of appropriate measures by the state, which effectively covered the fate of the remaining applications brought before the European Court of Human Rights at the time the first pilot judgment was passed. Namely, the Court found that “by amending legislation and issuing a statement on the amicable settlement, the respondent government indicated its effective commitment to using remedies to eliminate systemic deficiencies” in domestic law. The Polish government also set up a special compensation fund for compensating persons entitled to such damages.342

As the pilot judgment had become a template and a novel device in judicial proceedings suitable for bringing resolution in situations that are complex and particularly difficult for the Court, the Court also employed this technique after passing the judgment in the Broniowski case. It is interesting to note that the second pilot judgment was also passed in a Polish case. This was the judgment in Huttenczapska v. Poland, which also concerned the application of Article 1 of Protocol No. 1 to the ECHR, but the applicant claimed that he had been prevented from the peaceful enjoyment of his possessions by restrictive legal provisions relating to rent.343

The opinion that has just been set forth can only be defended if we are guided by the defi-

341. Garlicki, 190-1.
nition of the concept of a pilot judgment presented in this text. It is a judgment by the Grand Chamber of the European Court of Human Rights establishing the existence of a systemic deficiency in domestic law that gives rise to violations of human rights and urging the member state to eliminate this deficiency, with the Court simultaneously adjourning proceedings in all repetitive cases.

By contrast, the doctrine cites certain judgments that would not fall within the scope of this definition as examples of pilot judgments. Thus Caflisch cites six judgments, including that in *Hutten-Czapska v. Poland*, which rely on the judgment in *Broniowski v. Poland*. The Polish Judge Garlicki and Elisabeth Lambert-Abdelgawad are inclined to regard not only the judgment in *Hutten-Czapska* but also the judgment passed by the Grand Chamber in *Sejdovic v. Italy* as pilot judgments. However, it should be noted that both Garlicki and the Italian Judge Zagrebelsky claim that some of the judgments described by Caflisch as pilot judgments lack the characteristics of such a judgment.

An example of this may be the judgment in *Lukenda v. Slovenia*. The case concerned the length of judicial proceedings at the national level. In the disposition of this judgment the Court cited the malfunctioning of domestic legislation and ordered the state to resolve this problem through a remedy of a general nature (paragraphs 4 and 5 of the judgment). However, in his separate opinion, judge Zagrebelsky stated, referring to the judgments in the *Bottazzi* and *Broniowski* cases, that he regarded as too general the part of the disposition of the judgment ordering the introduction of a domestic novella to ensure better functioning of domestic legislation.

At the same time, it should be noted that after the judgment in the *Lukenda* case, the proceedings in repetitive cases were not adjourned, so that this judgment rather served as a precedent even though its disposition contained two elements of a pilot judgment. It should also be noted that the respondent state responded quickly to the judgment because a law ensuring guarantees of an effective trial was adopted in Slovenia in 2006.

Naturally, the number of pilot judgments to be found in the case-law of the European Court of Human Rights depends on how this concept is defined. The author believes that all four of the aforementioned elements should be taken into account and that a stricter definition of the novel device should be adhered to in order to better differentiate it from other similar devices that do not contain all the aforementioned characteristics of a pilot judgment.

Regardless of how we understand the concept of a pilot judgment, in its narrower sense proposed in this text or, perhaps, somewhat more broadly, there is still the question of the main problems that are or may be encountered in practice in connection with pilot judgments. Nearly all of these problems arise with both the narrower and broader definitions of the concept, with particular problems being more or less prominent in the presence of one definition or the other.

6. Problems arising in connection with pilot judgments

The main problems arising in connection with pilot judgments is of a theoretical nature. Whether or not any Court decision indicating the existence of a systemic problem in the domestic legislation of a member state and instructing that state to eliminate that problem will be regarded as a pilot judgment depends on the position of each author or commentator.

---

344. Caflisch, 522-3 (n. 14).
345. Lambert-Abdelgawad, 221-2; Garlicki, 186-8. However, Garlicki notes (p.188) that the judgment in the *Sejdović* case concerns a small group of applicants. This deprives the judgment of its characteristics of a pilot judgment.
and essentially does not have any practical consequences. However, we are, above all, interested in those questions that may cause difficulties in the practice of enforcement of decisions of the European Court of Human Rights. Four different problems should be pointed out in this respect. They include the question of a reasonable time for the enforcement of a Court judgment (6.1) and the question of the Court’s procedure in repetitive cases (6.2). They also include two, more complex, issues: the issue of a political problem that may arise when an novella is introduced in domestic legislation (6.3), and what some refer to as the “constitutional dimension” of the new procedure of the Court (6.4).

6.1. Reasonable time for the enforcement of a judgment

The very first commentaries on the Broniowski case included the question of the length of a reasonable time that the European Court of Human Rights can give a member state to eliminate the systemic problem in its domestic legislation. Elisabeth Lambert-Abdelgawad posited this question in very specific terms: "Six months or more?" It is clear that she takes the position of the applicant, whose interest is pre-eminent, but it seems that the question is worded in such unambiguous terms mainly in order to highlight the severity of the problem. If the systemic problem of functioning of domestic legislation concerns the large number of specific cases, it is hard to imagine that it can be resolved in only half a year. The Broniowski case is a very telling example in that respect as it concerned a situation that extended over a period of several decades. During all that time a solution was sought at the national level.

The commentators of the judgment in the Broniowski case refer to another Polish case, Kudla v. Poland, in this context as it has certain characteristics that make it more like a pilot judgment; in that case it took four years for the legislative novella to be introduced. True, there are also examples of a different kind. This happened, for instance, in Sejdovic v. Italy, where the state responded comparatively quickly. As we have already seen, the same goes for the judgment in Lukenda v. Slovenia.

The differences between states with regard to the course of action taken will certainly depend on a whole nexus of internal circumstances in each particular state. It should also be noted here that this problem can hardly be resolved in principle, and the European Court of Human Rights will most likely have to measure the length of the time it gives each state carefully in each specific case brought before the Grand Chamber. The interest of the applicants require that this time not be too long. On the other hand, the nature of the action taken by the state would require a certain degree of flexibility on the part of the Court in setting the time-frame.

6.2. Court procedure in repetitive cases after the passage of a pilot judgment

The question of how the European Court of Human Rights will deal with repetitive cases in which it has adjourned or – according to the French doctrine – frozen proceedings at the moment of the passage of the pilot judgment is definitely one of the most important ones. The general idea is that by introducing its remedy, whether of a legislative or an administrative nature, the respondent state will make it possible to decide such cases at the national level.

There is certainly a risk that the introduction of a novella in the legislation of the respondent state might create difficulties for the applicants who have already taken their case to the Court in Strasbourg. Domestic legislation may set conditions for the fulfilment of requests or result in new costs for persons concerned or exhibit some other deficiencies resulting in human rights violations, such as the slow speed of proceedings conducted by courts or administrative bodies.

In such circumstances, persons who have taken their case to the European Court of
Human Rights and whose case has fallen into the group of repetitive cases due to the passage of a pilot judgment will find themselves in a specific legal situation. The European Court of Human Rights will not deal with their cases for the time being, while at the same such persons will have to wait for remedies to be introduced at the level of domestic legislation if they want to obtain satisfaction there. If the process of enforcing the pilot judgment, i.e. the introduction of a remedy in the respondent state, becomes prolonged, these persons will certainly find themselves in what science has describe as a legal no-man’s land for a time.353

The role the Committee of Ministers of the Council of Europe plays in the enforcement of judgments will certainly be of immense importance at this point.

In the final analysis, the European Court of Human Rights may resume proceedings and decide repetitive cases by judgments, which constitutes a kind of rational pressure on the respondent state for the purpose of enforcing the judgment or ensuring the introduction of a novella in domestic legislation. However, this threat is not effective enough given that the European Court of Human Rights resorted to a pilot judgment in order to avoid getting clogged with cases of the same type. The precedent technique would certainly be more suitable from the standpoint of the individual applicant, but the court resorted to the pilot judgment template for the very reason that the previous standard technique had not proved adequately effective due to the large number of cases of the same type.

6.3. Political problem of introducing a novella in domestic legislation

As the problem of the functioning of the domestic legislation of a member state, which is highlighted and a solution to which is called for by the pilot judgment, is of a systemic nature, it is reasonable to expect this problem to be resolved in most of the cases through amendments to legislation. All Council of Europe member states are democratically organised. Laws are passed in parliament, and, as a rule, parliamentary procedure is not marked by speed. Furthermore, a law is passed in what is essentially a clash between government and opposition, who debate the bill. It is not difficult to imagine a situation in which one of these actors will try to exploit the very adoption of such an amendment for purposes not directly linked to the judgment – for instance, for triggering new elections. If nothing else, they would lengthen the respondent state’s activity ordered by the pilot judgment.

Judge Garlicki has rightly pointed out that in the Broniowski case a favourable outcome was achieved in a situation where a Court judgment was on a par with some judgments passed by domestic courts and certain draft laws which had already been submitted to Parliament for passage. This author tends to agree with his Polish colleague, but does not share his optimistic view that a pilot judgment can be useful where there are conflicting opinions within a member state, i.e. where a specific solution to a problem has both its advocates and opponents.354 If a debate in parliament or in public gains momentum, a political problem may become much more difficult than it may seem to us at first glance. It is not disputable that the enforcement of a judgment is an international obligation of the member state. However, the trouble begins especially when a legislative novella is required for such enforcement as in the case of pilot judgments.

The possibility of linking the enforcement of a judgment to political circumstances in a Council of Europe member state probably constitutes the weakest point of the novel device under discussion here. It is necessary for pilot judgments to become established so that we can make correct judgments about the risks that may threaten their enforcement. At this point, it is hard to be exclusive in this regard and form an opinion without adequate support from the case-law of both the Court and the Council of Europe member states. Making predictions of this type is a thankless task.

353. Lambert-Abdelgawad, 222, who is the author of this phrase; similarly, also Zagrebelsky, 531 (n. 26).

354. Garlicki, 190.
6.4. “Constitutional dimension” of the European Court of Human Rights’ procedure

The Court’s pilot judgment technique has endowed judicial procedure with a special characteristic that may be described as the “constitutional dimension” of judicial procedure. This term has been taken from Garlicki, who himself puts it in quotation marks.\textsuperscript{355} Using this term is unusual ad thought-provoking given that the ECHR is not a European constitution at all. Even so, the phrase seems justified because in the case of pilot judgments the European Court of Human Rights assesses the functioning of the internal system of a member state, doing so from the standpoint of a system of a higher order such as an international agreement embodied by the ECHR. It may be argued that this is standard procedure for the European Court of Human Rights whenever it examines a possible violation of the ECHR, but the specific nature of judicial procedure with pilot judgments lies in the fact that the Court generally subjects the norms of the internal system to control and orders their correction and adjustment to the ECHR. This is very much like the procedure of a constitutional court at the national level. In other words, the European Court of Human Rights resorts to controlling the internal normative system of a Council of Europe member state.

The phrase \textit{constitutional dimension} used by Garlicki at the aforementioned points of the article written in English, while handy and skilfully chosen, is not widespread in English terminology. The German language expresses this notion more aptly, as shown by Judge Caflisch in his address to the justices of the constitutional courts of the German-speaking countries in the article quoted earlier in this text. The German term is \textit{Normenkontrolle}, and in this context it is appropriate because it does not contain or allude to the word “constitution”\textsuperscript{356}. This term is also accepted by Garlicki, who claims that pilot judgments concern what in German jurisprudence is called \textit{konkrete Normenkontrolle}.\textsuperscript{357} It should be noted here that Caflisch is of the opinion – to use the literal translation of this German term – that the Court in Strasbourg does not exercise direct normative control. He does believe, though, that the Committee of Ministers of the Council of Europe has created an exception in that regard with its recommendation of 12 May 2004.\textsuperscript{358}

Pilot judgments definitely introduce a novel element in as much as – other than deciding a single specific case brought before the European Court of Human Rights – their effect extends to all other cloned or repetitive cases. This is the fact that best reflects the importance of the corresponding element of the definition of the concept of a pilot judgment such as has been set forth in this text.

At the same time, this is where the difference between the two techniques of judicial procedure – the precedent technique and the pilot judgment technique – is at its most obvious. In the case of precedents, the court feels bound in every subsequent case whose essential elements parallel those of another, already decided, case. In the case of pilot judgments, the European Court of Human Rights requires that the state introduce a novella in its national legislation to remove the systemic deficiency in the domestic legal order that gives rise to human rights violations. The passage of such a judgment is indeed reminiscent of a constitutional and judicial technique, raising the question of whether the European Court of Human Rights is slowly developing into a judicial instance with characteristics of a European constitutional court.

The time to answer this question has not come yet. Knowledgeable experts on the European system of human rights protection tend to speak of the existence of a “pan-European constitutional system of fundamental rights”.\textsuperscript{359} Those more daring voice their ideas of a possible progression of the Court’s procedure towards a system of constitutional and judicial procedure and a “constitutional vision of the role of the Court”\textsuperscript{360}. All this is supported

\begin{itemize}
\item \textsuperscript{355} Garlicki, 186, 191–2.
\item \textsuperscript{356} For this term cf. D. Popović, \textit{Judicial Review of Legislation and European New Democracies}, Mélanges Fleiner, Fribourg/Suisse 2003, 663. This term is generally translated into Serbian as \textit{kontrola ustanovnosti} ("constitutionality control").
\item \textsuperscript{357} Garlicki, 186.
\item \textsuperscript{358} Caflisch, 523.
\item \textsuperscript{359} Wildhaber, 98–9.
\item \textsuperscript{360} Garlicki, 192; Harmsen, 51.
\end{itemize}
Proceedings

by the position of the most recent constitutional law science, which claims that the constitutional systems of European states have a common denominator or core based on the following three guiding principles: democracy, human rights and the rule of law. These principles are largely derived from the case-law of the European Court of Human Rights.\(^{361}\) The Court itself stated in its judgment in *Loizidou v. Turkey* (paragraph 75) over a decade ago, that the ECHR represents a “constitutional instrument of the European public order”. This instrument is developing gradually.

Final judgments cannot be made at this level of case-law development. The pilot judgment is a novel device, which, should it develop correctly, will improve the work of the Court and, perhaps, give rise to the desire to gradually transform the essence of this pan-European judicial instance and thus change Europe’s current system of human rights protection. ★

---


Reopening of proceedings further to a finding, by the ECtHR, of a violation of Article 6 of the ECHR

Mr Florin Costiniu

President of the Civil Chamber of the High Court of Cassation and Justice of Romania

As far as constitutional rules are concerned, Article 11 of the Romanian Constitution establishes the principle that the Romanian state is required to fulfil, as such and in good faith, its obligations deriving from the treaties to which it is a party and that treaties ratified by Parliament are part of national law.

This constitutional provision applies the principle of trust between states of the international community – pacta sunt servanda (“agreements are to be kept”) – while at the same time reflecting the correlation between international rights and domestic rights through the incorporation of rules of international law into the domestic legal order.

This is done by Parliament by means of ratification of international legal instruments (agreements, conventions, protocols, charters, covenants, etc.) so as to render them binding. Once the ratification has passed into statute, the clauses of the international instrument concerned are incorporated in domestic law and acquire legal force.

In contrast to the latter process, Romania’s Constitution contains specific rules on international human-rights treaties.

Article 20, for instance, lays down that citizens’ rights and freedoms are to be interpreted and enforced in conformity with the international treaties to which Romania is a party and that international human-rights provisions in treaties ratified by Romania take precedence over domestic rules if these are different.


Under Articles 11 and 20 of the Romanian Constitution, the Convention and the protocols to it are integral to and prevail over domestic law; in other words, the ECHR and its protocols are now a binding primary source of domestic law, immediately entailing, nationally, enforcement of the Convention and its protocols by the Romanian courts and, internationally, acceptance of review of domestic court decisions as provided for in the ECHR.

The adoption of Protocol No. 11 to the ECHR, which entered into force on 1 November 1998, ushered in a reform of the Court’s system of supervision, and efforts to maintain and increase the effectiveness of the Convention human rights and fundamental freedoms have continued.

To ensure observance of human rights, the Convention lays down (Article 6, paragraph 1) everyone’s right to a fair trial: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall
be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

As can be seen from the wording of the Convention, the right to a fair trial comprises a number of elements: unrestricted access to the courts, a fair and public hearing within a reasonable time, a hearing by an independent and impartial tribunal established by law, and delivery of judgments in open court.

A. Unrestricted access to the courts

Unrestricted access to the courts is enshrined as a fundamental civil right in Article 6.1 ECHR, Article 21 of the Romanian Constitution, Article 10 of the Universal Declaration of Human Rights and Article 14.1 of the International Covenant on Civil and Political Rights.

In the Romanian Constitution, unrestricted access to the courts is understood as everyone’s right to bring a case before the courts for defence of his legitimate rights, freedoms and interests, with the safeguard that this right cannot be restricted by any law.

In terms of specific procedure allowing citizens access to the courts, the Code of Civil Procedure establishes the right to take a legal action (Article 109), together with ordinary and special channels for challenging court decisions (intermediate appeals: Article 282; final appeals: Article 299), such as proceedings to have a decision set aside (Articles 317 and 318) and review (Article 322). As for the Code of Criminal Procedure, this provides for a preliminary complaint (Article 279, paragraph 2(a)), challenging of measures taken by the public prosecutor’s office in connection with a prosecution (Article 278, first paragraph), ordinary and special channels for challenging court decisions (intermediate appeal: Article 361; final appeal: Article 385, paragraph 1), proceedings to have a judgment set aside (Article 386) and review or retrial (Article 393).

The above-mentioned procedures ensure that the persons concerned have access to a court whose jurisdiction in civil or criminal cases is established by law.

These rules on right of access to the courts are consistent with the European approach: under the Convention the exercise of this right specifically presupposes that everybody is afforded access to an organ established by law, i.e. a court before which the right can actually be exercised.

The Convention leaves states free to choose the precise means of ensuring unrestricted access to the courts since no means are specifically laid down in Article 6, paragraph 1.

Consequently, domestic law on the means of bringing cases before the courts applies in full. Nevertheless, this does not imply a right of access to all judicial bodies (courts of first instance, county courts, courts of appeal, the High Court of Cassation and Justice) or to all statutory remedies (appeals, proceedings to have a decision set aside, reopening of cases). As decided by the Plenum of the Constitutional Court in its Decision No. 1 of 8 February 1994, special rules for special situations may be laid down by law.

Such rules are found in relation to appeals in civil cases, for example: more specifically, the first paragraph of Article 282 of the Code of Civil Procedure lays down the categories of court decision which, depending on the type of claim, are not open to appeal. Decisions referring a civil case to another court (Code of Civil Procedure, Article 40, paragraph 4) are an example.

In domestic court practice, parties have often criticised the unavailability of free legal assistance and the stamp duty payable by plaintiffs in civil cases as being limitations on freedom of access to the courts.

The view is taken that neither of these things is a genuine limitation on freedom of access.

The obligation to pay judicial stamp duty, for example, does not infringe the principle of
The role of Supreme Courts in the domestic implementation of the ECHR

justice that is free of charge or, implicitly, the principle of unrestricted access, since the plaintiff may be obliged to return sums paid over under the terms of Articles 274 to 276 of the Code of Civil Procedure. In addition, Law 146/1997 on judicial stamp duty provides for exemption for some categories of civil proceedings, and the law also affords other effective safeguards for completion of court proceedings, including for persons with limited resources.

If anybody is unable to pay court fees without jeopardising his or her own livelihood or that of his or her family, Article 74 of the Code of Civil Procedure lays down the right to apply to the court for legal aid, and Article 75 of the same code establishes that the granting of exemptions, reductions or phased or deferred payment of stamp duty, together with free representation and assistance from a lawyer assigned by the Bar, are also covered by the concept of legal aid.

Given the above national provisions, it cannot convincingly be argued that the charges in civil proceedings breach freedom of access to the courts for purposes of Article 6.1 ECHR.

Another problem concerning freedom of access to the courts has emerged with regard to enforcement of Law 10/2001 governing the legal status of real property wrongfully confiscated by the communist state between 1945 and 1989.

This law provides that persons wishing to have their property returned or receive compensation for their losses must apply, through administrative channels, to the owner entity or, as appropriate, to the local authority in whose area the property is located before they can bring the case to court.

The High Court of Cassation and Justice has consistently held that the obligation to complete the preliminary administrative formalities is not a limitation on the principle of unrestricted access, since in the event of problems or dissatisfaction once this stage has been completed, the plaintiffs can always go to court.

B. A fair and public hearing within a reasonable time

This provision is intended to take account of such basic principles as adversarial proceedings and the right to a defence, both of which guarantee full equality of parties to the proceedings.

The adversarial principle enables parties to be equally and actively represented and put forward their claims during the proceedings. It is only by hearing the debate, the parties’ replies to the other side’s arguments and the differing opinions on the actions of each party that the court will be able to establish the truth and deliver a fair and legally founded judgment.

This principle is enshrined in various provisions of the Code of Civil Procedure. There is therefore no inconsistency between the provisions of the Convention and those of national law as regards the legal implications of the adversarial principle, and the domestic courts operate within a framework that ensures they do not contravene the adversarial principle or the right to a fair trial in their decisions.

The right to a fair trial includes the court’s hearing both sides in a manner that does not place either of them at a disadvantage, a safeguard provided by the right to a defence.

In Romanian law the right to a defence is also a constitutional principle: Article 24.1 of the Constitution states that this right is guaranteed, and paragraph 2 of the same article provides that at any stage of the proceedings the parties have the right to be assisted by a lawyer of their own choosing or an officially assigned defence counsel.

In concrete terms, the right to a defence includes all the rights and safeguards of a hearing that enables the parties to defend their interests. Financially it entails the right of the parties to be able to pay a defence counsel of their own choosing.

The right to a defence is also guaranteed by the organisation and functioning of the courts, which must comply with the principles of the rule of law, equality, non-payment, collegiality, public proceedings, judicial review and an active role for the courts.
Lawfulness means delivery of justice by the courts provided for in law and within the limits of the powers conferred on them by the legislature, and that judges answer only to the law. Equality of the parties means equality in their procedural dealings with the court and in their relations with each other through recognition of the two sides as having the same procedural rights and the same obligations. Non-payment means the availability of judicial solutions not dependent on payment of a fee. Judicial review means that a higher court can verify the lawfulness and merits of a decision delivered by a lower court. Lastly, the active role of the courts represents not interference with the parties’ interests but a guarantee that their rights will be complied with and their interests met for the purpose of establishing the truth of the matter.

The requirement of a public hearing is laid down in Article 6.1 ECHR and is achieved, firstly, through the parties’ access to the proceedings – a prerequisite for exercise of procedural rights and consisting in the right to a defence and the right to adversarial proceedings – and, secondly, by guaranteed freedom of access to the entire proceedings.

The concept of a public hearing in domestic law is interpreted in the same way.

Thus Article 127 of the Constitution, Article 5 of Law 304/2004 on the organisation of the judiciary, and the first paragraph of Article 121 of the Code of Civil Procedure all state that hearings are to be public unless the law provides otherwise; exceptions to this rule are laid down in law together with the criteria which the courts must apply when ruling on them. Under the second paragraph of Article 121 of the Code of Civil Procedure, the court may decide to exclude the public from the hearing where publicity might adversely affect public order, morals or the parties themselves.

To guarantee that they are public, hearings take place at the court’s usual known seat, at the time and date fixed by the court, according to the list of sittings posted on the courtroom door at least one hour in advance (Article 125 of the Code of Civil Procedure).

Public hearings are a guarantee that judges will act properly, impartially and independently, since it is not enough simply to do justice: justice must actually be seen to be done. It is for this reason that parties cannot be prevented from participating in hearings relating to their own cases – even when the public is not admitted (second paragraph of Article 121 of the Code of Civil Procedure) – and that third persons can be excluded from the courtroom only when a case is being heard in private.

The nature of the hearing does not affect delivery of the judgment, which must always be read out in open court, as expressly laid down in Article 6.1 ECHR and the third paragraph of Article 121 of the Code of Civil Procedure.

The Convention requirement that a case be heard within a reasonable time must be applied in the light of each individual case. Length of proceedings is assessed with reference to the nature of the damage, the complexity of the case, the conduct of the parties and the competent authorities, problems delaying the hearing, any backlog of cases and, lastly, use of remedies.

Prompt judgment is not expressly laid down by domestic law other than in a limited number of cases – for example, return of properties wrongfully confiscated during the communist period (governed by Law 10/2001) or adoption cases, governed by the Emergency Government Order 25/1997 (approved by Law 87/1998).

Similarly, the Code of Civil Procedure contains a series of rules to ensure that applications are settled within a reasonable time, irrespective of their nature. The most important of these rules are those in the first paragraphs of Article 155 and Article 156, which allow proceedings to be adjourned once by common consent of the parties or for lack of a defence, for example, and the rules set out in the first paragraphs of Article 260 and Article 264, whereby the reading of the judgment may be adjourned for a period of no more than seven days and the reasons for the judgment must be drawn up within thirty days after its delivery.

The purpose of trying a case within a reasonable time is to put an end to parties’ uncertainty by restoring as far as possible any rights violated and re-establishing the strict compliance with the law which should guide all legal
relationships in a law-based state and guarantees a fair hearing.

C. A hearing by an independent and impartial tribunal established by law

This independence must be twofold: for the courts and for the judges and prosecutors.

The independence of the courts is ensured by the fact that the judicial system within which justice is dispensed is not dependent on the legislature or the executive and does not form part of either.

This is reflected by Article 126 of the Romanian Constitution, which provides that justice is to be administered by the High Court of Cassation and Justice and the other courts of law established by law (courts of first instance, county courts and courts of appeal).

Article 126, paragraph 2, of the Constitution states that the jurisdiction of the courts of law and the conduct of court proceedings are to be as laid down in law.

The independence of the judiciary is dealt with in Article 124, paragraph 3, of the Romanian Constitution, which provides that judges are to be independent and subject only to the law.

As in the case of the courts, this provision underscores that justice is to be administered by judges without their coming under the influence of the executive or the legislature.

Independence in this form does not rule out intervention by the courts by means of judicial review further to an application to set aside a court decision.

It must be stressed that the supervision exercised over the president of a court in connection with court organisation (as provided for by Law 92/1992) in no way affects the independence of the judiciary. This supervision never concerns actual trial of a case.

Law 304/2004 on judicial organisation provides as follows: “There are no circumstances under which the verifications carried out can lead to interference in the conduct of the proceedings or the reopening of cases already tried.”

The independence of judges is guaranteed by the safeguards specified in the Status of Judges Act.

Thus the appointment and promotion of judges and prosecutors are governed by the special provisions of Law 304/2004 (Part VI) on judicial organisation.

In addition, judges and prosecutors are appointed on the advice of the Judicial Service Commission, as provided in the Judicial Service Commission Act (in accordance with Article 125, paragraph 2, of the Romanian Constitution).

Another safeguard ensuring the independence of judges and prosecutors is security of office (irremovability), by virtue of which they cannot be promoted or transferred without their consent.

The principle of irremovability is laid down in the Romanian Constitution: under Article 125, paragraph 1, judges appointed by the President of Romania are irremovable under the terms of the law.

The same article states (paragraph 2) that promotion for, transfer of and disciplinary action against judges are the responsibility of the Judicial Service Commission as provided in the Judicial Service Commission Act.

As part of a fair trial, impartiality is a guarantee for parties to court proceedings that they can have confidence in judges and prosecutors and the institutions in which these dispense justice.

The importance of this impartiality is recognised by an entire section of the Code of Civil Procedure (Book I, Part V), which specifies the cases in which the participation of a judge, prosecutor or any other person in a trial is deemed inexpedient, together with the procedure to be followed if it is held that such participation is biased.

Other matters relating to impartiality are also addressed in Book I, Part VI of the Code of Civil Procedure, which deals with transfer of proceedings to another court.

The Constitution likewise acknowledges the importance of this aspect of a fair trial by providing that the office of judge is incompatible with holding any other public or private
office other than teaching duties in higher education.

Having established that a court of law constitutes an integral part of a fair trial, the law gives it jurisdiction over cases both *ratione loci* (territorially) and *ratione materiae* (based on subject-matter).

In national law there are clear, precise statutory provisions setting out the powers of the authorities responsible for administering justice.

Thus Book I of the Code of Civil Procedure contains provisions dealing with jurisdiction *ratione materiae* (Part I), jurisdiction *ratione loci* (Part II), extension of jurisdiction (Part III) and the procedure to be followed in the event of disputes as to jurisdiction (Part IV).

It should further be stressed that laws relating specifically to a particular field of activity may deal with jurisdiction; to take jurisdiction *ratione materiae* as an example, the Code of Civil Procedure refers to “any subject-matter specified by law as forming part of the jurisdiction”, as in the case of Law 14/2003 on political parties.

### D. Delivery of judgments in open court

This rule ensures that parties to the proceedings are apprised of a court decision immediately after the deliberation that led to it.

The fact that the operative provisions of the judgment are read out in open court allows the unsuccessful party to renounce an appeal on the spot (Code of Civil Procedure, Article 267, paragraph 1).

A very serious problem – and one very relevant to Romania today – is raised by the reopening of domestic proceedings after a finding by the European Court of Human Rights of a violation of Article 6 of the Convention.

For complex reasons – the large number of cases (especially concerning ownership), legislative instability and some degree of inconsistency – Romania embarrassingly takes “pride of place” among those states most frequently brought before the European Court of Human Rights. For this reason, over and above the administrative measures taken by the government, it may be worth noting the legislative solutions, in terms of procedure, that are applicable in this situation.


Under the provisions in question, final judgments delivered in cases where the European Court of Human Rights has found a violation of a right laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms are reviewable if serious consequences of the violation remain and can be remedied only by a review of the judgment delivered.

The following may apply for the review:

- the person whose right has been violated;
- the spouse, or other affected relations, of the person convicted, even after the latter’s death;
- the public prosecutor.

The application for a review is lodged with the High Court of Cassation and Justice, which rules on the application with a bench of nine judges. The application must be made no later than one year after the European Court of Human Rights judgment’s becoming final.

Once the case has been referred to it, the High Court can stay execution of the impugned judgment of its own motion or at the request of the public prosecutor or the party concerned.

The public prosecutor’s participation is mandatory.

The parties are summoned to appear at the hearing of the application for review. The prisoner must be present in court. When the parties are present during the hearing of the application for a review, their submissions are also heard.

The High Court considers the application in conjunction with the case file and delivers a decision.
If the High Court finds that the application is out of time, inadmissible or unfounded, it dismisses it.

If the High Court finds that the application is well-founded:

- it sets aside part of the impugned decision in the light of the right infringed and, by reopening the proceedings pursuant to the provisions of Chapter III, Section II, halts the consequences of the infringement;
- it sets aside the decision and, if necessary to bring forward evidence, decides to reopen the proceedings before the court with which the infringement originated pursuant to the provisions of Chapter III, Section II.

The decision delivered by the High Court of Cassation and Justice is not subject to appeal.

Thus, as we have seen, this special case of review applies wherever the serious consequences of a violation of an ECHR right – as established by a final judgment of the European Court of Human Rights – remain and can be remedied only by review of the final judgment delivered by the criminal court in Romania. Such a situation may arise, for example, when the European Court of Human Rights finds a breach of Article 8 of the Convention through the application to a convicted person of the additional penalty of deprivation of parental rights. Additionally, there will be a breach of Article 6, paragraph 3(d), if witnesses for the defence have not been called and examined and the defendant is then convicted. The serious consequences of the violation of the right to respect for private and family life (in the former case) and the right to a fair trial (in the latter case) remain and can be remedied only by review of the judgment.

The 2003 legislation governing review of final judgments in civil cases introduced a new provision whereby a final judgment can be quashed if the European Court of Human Rights has found a violation of fundamental rights or freedoms as a result of the judgment and if the serious consequences of this violation remain and can be remedied only by a review of the judgment delivered.

The application for review must be made within three months from the date on which the judgment of the European Court of Human Rights is published in Romania’s Official Gazette. The application must be made to the court that delivered the impugned judgment.

These are the only circumstances in which Romanian law allows reopening of proceedings after a European Court of Human Rights finding that a court decision has infringed a fundamental right. This is only a partial solution to the problem and is not always satisfactory inasmuch as it sometimes calls in question the certainty and stability of the judicial system and the civil courts. We therefore consider it necessary for Parliament to consider other ways in which judgments delivered by the European Court of Human Rights might lead to prompter and more effective restoration of infringed rights.
Reopening of proceedings to establish violation of Article 6 of the ECHR and assess damage caused by violation of a right protected by the Convention

Ms Dušanka Radović
Judge of the Supreme Court of the Republic of Montenegro

Introductory remarks

In its decision to declare itself independent, the Republic of Montenegro undertook to implement and be bound by international treaties and agreements concluded and acceded to by the State Union of Serbia and Montenegro, which related to Montenegro and were compatible with its legal order. Pursuant to this decision, when it initiated the procedure for accession to the Council of Europe, Montenegro formally declared its readiness to succeed to any convention signed by the State Union of Serbia and Montenegro. The Committee of Ministers of the Council of Europe accordingly adopted a decision confirming the Republic of Montenegro as a party to, inter alia, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. Therefore, with respect to Montenegro, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention on Human Rights) is to be deemed to be in force, and to have been continuously implemented since 3 March 2004.

As part of the plan for reform of the Montenegrin judicial system, adopted by the Government of the Republic of Montenegro in 2000 and running from 2000 to 2005, over 30 laws were passed in that period. These laws were also rendered necessary by ratification of the European Convention on Human Rights.

All these new laws incorporate the principles and guarantees enshrined in the Convention and other international agreements ratified by Montenegro. This has contributed to the successful operation of an independent, impartial and efficient judiciary in the country, while also creating a need for further action to implement reform of the judicial system.

In June 2007, the Government of the Republic of Montenegro adopted a Strategy for Reform of the Judiciary for the period 2007-2012, developed jointly by representatives of the domestic judicial authorities and international organisations. In particular, it should be noted that the draft Strategy was appraised by Council of Europe experts as part of the 2003 CARDS programme in the area of justice.

The strategic objectives to be attained during the said period are: greater independence, autonomy and efficiency of the judiciary, easier access to the courts, guaranteed access to justice and increased public trust in the judiciary. All these objectives are individually discussed in the aforementioned document.
The role of Supreme Courts in the domestic implementation of the ECHR

National law

The new legislation – both substantive and procedural – incorporates the guarantees of the right to a fair trial referred to in Article 6 of the European Convention on Human Rights.

These guarantees and principles were incorporated in our legal system pursuant to the relevant provisions of international human and minority rights agreements in force in our territory and directly implemented under Article 10 of the Constitutional Charter of the State Union of Serbia and Montenegro, which, when ratified, take precedence over domestic law under Article 16 of the Charter. That article established the state’s duty, in the event of conflict between an international agreement and domestic law, to implement the former.

The draft of the new Constitution of the Republic of Montenegro also provides that ratified and published international agreements, and the generally accepted rules of international law, constitute an integral part of the domestic legal system; they take precedence over domestic law, and are directly applicable in the event of any inconsistency with domestic law regarding the regulation of relations (Article 9). Human rights and freedoms within the meaning of the European Convention are dealt with in a separate chapter, and the Constitution expressly provides that guaranteed rights and freedoms are exercised in accordance with the Constitution and ratified international agreements.

Specifically, it should be noted that the principle of the right to a fair trial, referred to in Article 6 of the European Convention on Human Rights, is incorporated in the Courts Act and in procedural law.

In terms of the volume of guarantees incorporated, the new Code of Criminal Procedure, the Code of Civil Procedure, the Administrative Procedure Act and the Administrative Disputes Act merit special mention.

In cases where an international court or a domestic court sitting at last instance finds that the rights or fundamental freedoms of a person accused in criminal proceedings have been violated, the new Code of Criminal Procedure makes it possible to reopen the proceedings, using an extraordinary legal remedy: an application for review of the lawfulness of the final judgment (Article 436, paragraph 2). Such an application may be lodged by the accused and his defence counsel with the court that gave judgment at first instance within one month of receipt of the international court’s decision or the domestic court’s final judgment. Applications for review of lawfulness are decided by the Supreme Court, whose decisions are the same as those on applications for protection of legality.

Although the 2004 Code of Civil Procedure contains the fair trial guarantees enshrined in the European Convention on Human Rights, practical application of the Code so far indicates that Council of Europe Committee of Ministers Recommendation No. R (2002) 2 regarding the domestic review and reopening of certain cases pursuant to judgments of the European Court of Human Rights has not been implemented.

That Recommendation places special emphasis on the obligation of contracting parties to abide by the final judgment of the European Court of Human Rights on any case to which they are a party, and on the fact that the Committee will monitor enforcement.

In addition to just satisfaction, which the Court of Human Rights may order under Article 41 of the Convention, it should be borne in mind that, in certain circumstances, that obligation may also involve taking action to ensure that the injured party is, as far as possible, placed in the position he occupied before the Convention was violated (restitutio in integrum). It is up to the relevant authorities in the state against which an application was filed with the Court for Human Rights to decide on the best way of effecting restitutio in integrum, making sure that the measure in question is compatible with domestic law.

To that end, the Act on Amendments to the Code of Civil Procedure of 2006 introduces an extraordinary legal remedy – application for retrial pursuant to a final judgment by the European Court of Human Rights concerning violation of a basic human right.

Within three months of a final judgment by the European Court of Human Rights, finding that a human right or fundamental freedom...
has been violated, the amended Code allows a party to apply to the domestic court of first instance, asking it to modify the decision which violated that right or freedom – provided that retrial is the only way of remedying the violation. This remedy is implemented by applying the relevant retrial provisions in the Code. Throughout the retrial, the domestic court is bound by the legal opinion set forth in the European Court’s final judgment (Article 428 (a)).

This provision makes it possible to review and reopen proceedings in cases where the European Court finds that the Convention has been violated, especially where:

The injured party continues to suffer the grave consequences of the domestic decision, owing to lack of an appropriate remedy in the form of just satisfaction, and retrial or review of the case offers the only remedy.

Now that the rights enshrined in Article 6 of the European Convention have been materially incorporated in the Courts Act, procedural law and the Obligations Act, a law on the right to trial within a reasonable time is now being drafted, for the purpose of introducing an extraordinary legal remedy to protect that right.

The main purpose of this law is to regulate that right, which derives from the basic right to a fair trial guaranteed by Article 6 of the European Convention, and also the right to an effective legal remedy guaranteed by Article 13. On joining the Council of Europe and ratifying the European Convention, every contracting state is required to ensure that the rights guaranteed by the Convention are fully respected by the state authorities, and that anyone whose rights and freedoms under the Convention have been violated is entitled to an effective remedy at national level.

Both the two elements in the right to a fair trial – the institutional element, i.e. independence and impartiality of the court, and the procedural element, i.e. a fair hearing – are guaranteed by the Convention, and each is subject to violation. A further element is trial within a reasonable time.

Public discontent with protracted judicial proceedings and strong feelings on this matter, and the large number of applications concerning violation of the right to trial within a reasonable time dealt with by the European Court of Human Rights – most of them ending in the state's being found guilty and ordered to pay compensation – make it necessary to provide an effective legal remedy and protect this right at national level, in accordance with the European Court's case-law and the Council of Europe's recommendations.

Another purpose of the new law is to make the courts more efficient by setting up machinery to ensure compliance with the time limits for taking procedural action specified in procedural law, the ultimate aim being to protect the right to a fair trial within a reasonable time.

**Draft law to protect the right to trial within a reasonable time**

This Law regulates conditions, methods and procedures for ensuring that the right to trial within a reasonable time is judicially protected, and that just satisfaction is made when that right is violated.

The Law provides for two remedies to protect the right to trial within a reasonable time: applications to expedite proceedings/for supervision orders, and claims for just satisfaction. It also stipulates who may avail of these remedies. In particular, it lays down criteria for determining whether proceedings are unreasonably long – criteria which are the same as those used by the European Court when hearing applications alleging violation of the right to trial within a reasonable time. It calls for prompt dispatch of cases, and envisages the possibility of calling judges and court presidents to account under the Courts Act when they fail to act on legal remedies for which it provides.

**Applications for supervision orders** – The Law provides that applications by parties to expedite proceedings/for supervision orders are decided by the president of the court concerned, since the Courts Act makes court presidents responsible for the regular and timely dispatch of court business, authorising them to take the action needed for this purpose, and also since effective protection of this important right does much to increase public confidence in the work of the courts. Courts
with more than ten judges may draw up annual duty rosters of judges to help their presidents to process applications for supervision orders. The Law explicitly provides that court presidents or judges may not deal with applications for supervision orders relating to cases in which they are exercising, or have exercised, judicial functions, and regulates further procedure in such cases. If an application for a supervision order is dismissed or not dealt with promptly, the relevant decision of the court president may be appealed, the appeal being decided by the president of the court of next instance. Reasons must be given for all decisions on applications for supervision orders. The purpose of these applications is to ensure that violations of the right to trial within a reasonable time can already be remedied in proceedings before the president of the court concerned, who may reject them for procedural reasons or because they are manifestly ill-founded. Otherwise, he may ask the judge involved to account for the length of the proceedings, having regard to the criteria laid down in the Law. If he accepts the reasons given by that judge in writing for procedural action to be taken, or decisions to be given, within six months at most, he notifies the applicant party accordingly, thereby terminating the application proceedings. If he finds, having regard to the circumstances and nature of the case, that the court is being unjustifiably slow in giving judgment, he gives it a deadline for completing certain procedural steps, and the judge a deadline for informing him of the action taken. He may order that a case be given priority treatment, if its circumstances and urgency warrant this.

Since experience has shown that lengthy judicial proceedings are mainly due to failure to act on the part of other public authorities, e.g. non-compliance with judicial requests for documents and other evidence, the Law authorises court presidents dealing with applications for supervision orders to set such authorities a deadline for compliance, and institute disciplinary or dismissal proceedings of they fail to act.

If the court president dismisses an application for a supervision order or fails to reply to the applicant within a certain time, the latter may appeal to the president of the court of next instance, who may dismiss the appeal as being out of time, filed by an unauthorised person or ill-founded, and uphold the lower court president’s decision – or alternatively modify that decision if he finds the appeal founded.

**Just satisfaction** – Application for just satisfaction is made to the Supreme Court of the Republic of Montenegro, usually after first applying for a supervision order. Exceptionally, this may be done by a party prevented for good reasons from applying for a supervision order. The aim is to obtain compensation for non-pecuniary damage resulting from violation of the right to trial within a reasonable time, for which the State of Montenegro is objectively liable. Compensation is set by law at €300–€5 000.

The Supreme Court, sitting as a three-member bench, rules on applications. It does so in a decision (when an application is dismissed as being out of time, being filed by an unauthorised person or not being preceded by an application for a supervision order) or judgment (when an application is upheld or dismissed), on the basis of criteria specified in law.

In ruling on applications for just satisfaction and deciding how much compensation to award for non-pecuniary damage, the court must take account of the extent of the damage and the purpose of the compensation, and also ensure that satisfaction does not give rise to complaints which are incompatible with its nature and social purpose. The Law accordingly allows it to assess the circumstances of the case with reference to criteria which the Law itself lays down, and particularly the party’s conduct during the proceedings, and merely find that the right to trial within a reasonable time has been violated, without setting the amount of compensation – which is compatible with the practice of the European Court of Human Rights. In such cases, it may grant the party’s request that the judgment be published. In the event of a more serious breach of the right to trial within a reasonable time, it may, at the party’s request, order publication of the judgment, and also award compensation.

The Law also regulates the right to compensation for pecuniary damage resulting from violation of the right to a hearing within a reasonable time in civil proceedings, in
accordance with the Obligations Act. Provision is also made for application of the appropriate parts of the Code of Civil Procedure in respect of all other matters concerning the determination of remedies for violation of the right to a hearing within a reasonable time which are not regulated by this Law.

Under the Law, state authorities, local authorities, public foundations and other public authorities appearing as parties in judicial proceedings are not entitled to just satisfaction, in the form of pecuniary compensation, for damage resulting from violation of the right to a hearing within a reasonable time.

The Law’s transitional provisions provide for its application to judicial proceedings instituted before it came into force, and after 3 March 2004, when Montenegro became bound by the European Convention on Human Rights. This means that the duration of proceedings before 3 March 2004 is relevant when a court, in deciding whether the right to a hearing within a reasonable time has been violated, is considering whether their duration after that date constituted unreasonable delay.

The Law has retrospective effects, in order to ensure effective legal protection of the right to a hearing within a reasonable time, in keeping with the Convention, from the time when Montenegro undertook to abide by it.

**Conclusion**

From the foregoing, it is clear that, for the most part, the new substantive and procedural laws incorporate guarantees of the right to a fair hearing, and other basic rights and freedoms enshrined in the Convention on Human Rights, and that existing laws are continually being improved for that purpose.

As for practical problems arising with reopening of proceedings in cases where the Strasbourg finds that rights have been violated, experience is still lacking, since the Court has not so far given final judgment on any application against the Republic of Montenegro.
Final Observations

Ms Vida Petrović-Škero

President of the Supreme Court of Serbia

Esteemed colleagues and guests,

I too would like to address you once again.

I am not going to repeat the conclusions and assessments as they are the same as those already mentioned, and I don’t think there is a single judge here that would not make a very similar assessment. I will only make a few remarks of my own as a judge participating in this conference. I am almost certain that each judge thinks the same – that only an independent judge can always interpret and apply national law in accordance with the provisions of the European Convention and in keeping with the case-law of the European Court. And only a judge with substantial knowledge can be truly independent.

Supreme courts and their judges play the most important role in creating a good judiciary. First and foremost, they must have substantial knowledge to have full independence, which will ensure – the provisions of national legislation notwithstanding – as effective human rights protection before national courts as possible.

This conference has proved that the experiences of the participating countries and the exchange of those experiences are crucial. It has become clear that most of us face the same or similar problems and that we resolve them in similar ways. It was very good to hear how the direct application of the Convention and precedents is regulated in other countries, especially as the countries of the region are faced with similar legal problems, but are at different levels of their resolution.

National courts and judges must make every effort to ensure the adequate protection of other rights for citizens involved in proceedings where the right to a fair trial is secured. However, no judiciary in any country functions independently in protecting these rights. It is necessary to provide laws with a well-implemented case-law of the International Court and standards from international conventions. The executive branch of government must ensure the necessary conditions for the application of laws. The exercise of the rights of citizens must not depend on whether the judicial budget is adequate, whether there is a sufficient number of courtrooms or whether the salaries in the judiciary are high enough. Citizens must expect their rights to be protected within their country because, failing that, they will have to seek protection in Strasbourg rather than in the country that failed them. Such functioning of the judiciary of a country, capable of guaranteeing the real protection of rights, must be ensured solely through the joint work of all three branches of government.

It is my special pleasure to be able to say that the invitation of the Council of Europe and the Supreme Court of Serbia to participate in the work of this conference was accepted by all the countries of the region. I believe this shows that we have the need and desire to speak the same language, the judicial language. Linguistic barriers, political systems or, perhaps, some other problems were not an obstacle for us. The desire to use the judicial language and the acceptance of the invitation were indicative of the desire and need to exchange views. Only Greece, due to the current fires and the resulting state of emergency, had to cancel its participation several days before the beginning of the conference.

As a co-organiser and host of this conference, I hope that all the participants will leave with useful knowledge and experiences obtained from other countries. Someone may find certain practices in other countries not applicable to the specific conditions of his or
her own country, but there will be new ideas, which will provide a solid basis for improving the protection of citizens’ rights. I hope that we will all leave this place with more experience and excellent impressions. I hope that we will also leave enriched by new acquaintances, new plans for networking and a new understanding that we can change our experiences and benefit from it greatly. I hope we are leaving with the desire and need to continue to exchange experiences because the countries of the region certainly need to do so.

In particular, I wish to express my appreciation to all the participants in this meeting for their active involvement. The quality of any conference and any meeting, regardless of its good organisation, can only be ensured by its participants. I therefore believe that we owe much appreciation to each other because we made this conference successful through our joint effort. I see it as a great success.

I want to thank our dear guests and, of course, the Council of Europe, on their joint work. To the office of the Council of Europe in Belgrade. On behalf of the Supreme Court, I would also like to thank the foreign relations advisor, who made a special effort – in addition to fulfilling his regular duties – to carry out all those tasks that would normally fall within the ambit of an entire team. Our team consists of Ms Ljubica Pavlovic.

I also wish to thank our excellent interpreters. We were not faced with a barrier as regards the language of the judges, but we were faced with the literal linguistic barrier and without such good interpreters we certainly would not have been able to exchange our experiences, ideas and expertise.

The organisers of this conference, the Council of Europe and the Constitutional Court of Serbia have prepared a small gift for you to remind you of this conference – our group photo and a CD that will take us back to the time we spent together.

Thank you all, and I hope we are all sharing the same good feelings.

Mr Philippe Boillat

Director General of Human Rights and Legal Affairs, Council of Europe

I should like first of all to express my warmest thanks to the speakers and all those who took the floor for the quality of their contributions. I believe we have identified the role of Supreme Courts and pinpointed the difficulties they have in implementing the European Convention on Human Rights.

The Convention, as has been pointed out, is the real constitutional European public policy instrument. The Convention and the Court's case-law are what binds European states together.

The Convention is a living instrument that must be interpreted in the light of present-day conditions. What are the prerequisites if the Court’s wealth of case-law is to be taken into account by domestic courts and influence the domestic law of the States Parties to the Convention? First all, the Convention must be directly enforceable. The 47 States Parties have now incorporated it into their domestic legal systems and we can but welcome this decisive step. Secondly, it is necessary to recognise that Convention law, as interpreted by the Court, takes precedence over any domestic legislation that runs counter to it. Lastly, res judicata, which in principle applies only to the State against which the judgment has been handed down, should in future be supplemented by the binding force of the Court’s interpretation: in addition to respecting the binding force of the judgment, as stipulated in Article 46 § 1 of the Convention, under which states undertake to abide by the judgment in any case to which they are parties, domestic courts are urged to apply the Court’s case-law “in anticipation”. This “horizontal” application of its case-law will make it possible to avert a very large number of applications to Strasbourg.
The role of Supreme Courts in the domestic implementation of the ECHR

The role of Supreme Courts is to guide lower courts, in particular by applying the Convention’s principles in their own case-law so that these become part and parcel of domestic law and its implementation. Admittedly, this is a real challenge for judges, who must often display legal imagination, but we are convinced that Supreme Courts are ready to rise to it.

As was repeated in the course of the conference, Supreme Courts are the prime guarantors of the effectiveness of the rights and freedoms safeguarded by the Convention. It is up to them to serve as a filter between domestic courts and the European Court of Human Rights. This is crucial if the principle of subsidiarity set forth in Article 13 of the Convention, which requires an effective remedy before a national authority making it possible to ascertain a violation and, if necessary, put a stop to it, is to be fully observed.

Needless to say, if they are to be able to follow developments in Strasbourg case-law and apply it, they must have access to it. This is a sine qua non condition. There are already commendable practices in many Council of Europe member states, in particular your own countries, where not only are the judgments translated and published in full, but summaries and comments of particular relevance to the country concerned are also translated and published. This good practice needs to become universal. Domestic courts, and in particular Supreme Courts, must encourage national authorities to translate, publish and disseminate the judgments of the European Court of Human Rights. The Council of Europe can of course help with this, and indeed is doing so, particularly through conferences such as this one. I would nevertheless remind you that, in accordance with Committee of Ministers’ Recommendation Rec (2002) 13, responsibility for this rests primarily with the national authorities.

I should also like to stress the importance of what has been called the “dialogue of judges”: frank, open dialogue between the Strasbourg Court judges and domestic court judges, particularly where domestic courts are responsible for harmonising case-law at national level. If such dialogue is to bear fruit, however, the judges must be familiar with the European human rights law they are being called on to apply.

If domestic courts are to implement the Convention, the judges must therefore have been trained in its requirements. The Council of Europe has, along with other international organisations and non-governmental organisations, done a great deal here. Once again, however, this is a responsibility that lies primarily with the member states. The idea is to put the training given to judges on an independent, institutional footing, for example by setting up judicial academies or legal service training colleges that are entirely state-financed. Lastly, states must ensure that training in the Convention is given to judges at all levels during their initial training and by means of in-service training throughout their careers, as called for in Committee of Ministers Recommendation R (2004) 4. We are on the right track, particularly with the Council of Europe HELP programme, which is designed precisely to ensure that training in the Convention and the Court’s case-law is included in the professional training curriculum of every judge and prosecutor in Europe.

To come back to the fundamental principles referred to at the conference, I would stress in particular the independence of judges and the judiciary, without which it is impossible to have a truly democratic society that respects human rights and the rule of law.

We dwelled at length on issues connected with respect for the right to have proceedings concluded within a reasonable time. The European Court of Human Rights is snowed under with applications concerning violations of this right, which is guaranteed in Article 6 of the Convention, in cases where there are no effective domestic remedies, i.e. no effective domestic means of appeal that make it possible to ascertain the existence of any violation and, if necessary, compensate the victims. It is not enough to provide a remedy for the symptom, however: it is necessary to attack the disease itself in order to prevent further violations. It is therefore essential to introduce other measures, for example to increase the number of judges when this is the cause of the problem, and to carry out the legislative reforms needed
to speed up proceedings. That said, proceedings should on no account be speeded up to the detriment of the requirements attached to a fair trial.

I should like to make a few comments on the execution of judgments under the supervision of the Council of Europe Committee of Ministers (Article 46 § 2 ECHR). When the domestic courts have failed to implement the Convention and the Court finds a violation, the question of just satisfaction arises. The respondent state will be required to take the individual measures needed to remove the consequences of the violation for the applicant (*restitutio in integrum*). Measures of a general nature will also be called for to prevent further violations. In principle, the respondent state has an obligation to produce a specific result and not just to use its best endeavours. In this context, domestic courts – and particularly Supreme Courts – will have to interpret the law in such a way that it is compatible with the judgment handed down by the Court. This interpretation in accordance with the Court’s judgment will, however, very often need be supplemented by a change in the legislation to meet the requirements of the judgment. I would remind you that the States Parties to the Convention are collectively responsible for the execution of judgments. This responsibility is set out in the Preamble to the Convention, pursuant to which the states are responsible for the collective enforcement of the rights and freedoms guaranteed by the Convention.

The pilot judgments also received our attention. This procedure has great potential as a means of removing repetitive or identical applications from the Court’s case list. By highlighting structural shortcomings and systemic problems in member states’ domestic legal systems, pilot judgments also indicate to the states concerned how these should be remedied. These judgments require, firstly, that steps be taken to remedy the domestic shortcomings and, secondly, that effective remedies be introduced to deal with similar applications to the Court that have been suspended.

I should like to remind you of the importance of Committee of Ministers Recommendation No. R (2000) 2 on the reopening of cases and say how pleased I am that so many Council of Europe member states now provide for this possibility, not only in the case of criminal proceedings but also in the case of civil and even administrative proceedings. Reviewing and re-examining cases on which there has been a final ruling at domestic level is sometimes the only way of properly remedying the violation ascertained by the Court.

We have, throughout the conference, drawn attention to the obstacles to the effective implementation of the Convention by domestic courts. But I am sure you will have noticed over the last two days that you are not tackling these obstacles on your own. The Strasbourg Court can provide guidance. The Directorate General of Human Rights and Legal Affairs is also ready to offer support. So you need have no hesitation in applying the Convention and the Court’s case-law.

Lastly, allow me, once again, to express my warmest thanks to Serbia for including this important conference in the programme of its Chairmanship of the Council of Europe Committee of Ministers, and to our host, the Supreme Court of Serbia, and more particularly its President, for the outstanding work they have done to organise the conference and for their very generous hospitality, which has been much appreciated all round.

I hope you have a good journey back and that I shall have occasion to see you again before long, whether in your own countries or in Strasbourg. ⭐
THE ROLE OF GOVERNMENT AGENTS IN ENSURING EFFECTIVE HUMAN RIGHTS PROTECTION

Seminar organised under the Slovak chairmanship of the Committee of Ministers of the Council of Europe

Bratislava, 3-4 April 2008

Proceedings
FOREWORD

The Council of Europe Seminar on the role of government agents in ensuring effective human rights protection took place in Bratislava on 3 and 4 April 2008 during the Slovak chairmanship of the Council of Europe’s Committee of Ministers.

The “respect for and promotion of core values: human rights, rule of law and democracy” arose as one of the main priorities of this chairmanship, in the line with the priorities identified during the Council of Europe’s Third Summit of Heads of State and Government, held in Warsaw in 2005.

Organised by the Legal and Human Rights Capacity Building Division of the Council of Europe, this Seminar gathered representatives from government agent offices from Council of Europe member states. It was chaired by Mr Emil Kuchár, Ambassador of the Slovak Republic to the Council of Europe.

Specific presentations from outstanding government agents were made on the four specific themes of this seminar:

- The role of the government agent in representing the member state before the European Court of Human Rights.
- The responsibility of the government agent in ensuring compatibility of legislation and practice with the standards of the European Convention on Human Rights.
- The contribution of the government agent in the execution of Court judgments.
- The government agent’s role in mainstreaming the Court’s requirements and case-law into the daily practice of all state bodies, notably through publication and dissemination.

The proceedings of this Seminar were coordinated by Mr Vincent Coussirat-Coustère, Professor of Public Law in the University of Lille II (France). They consist of a compilation of all the speeches held during the Seminar, including a summary of the issues and proposals presented during the discussions. They also contain the conclusions of the Seminar.★
Mr Jean-Paul Costa

President of the European Court of Human Rights

Minister, Deputy Secretary General of the Council of Europe, ladies and gentlemen,

Firstly, I should like to express my heartfelt thanks to the Slovakian authorities for their warm welcome, which lives up to their reputation for hospitality.

I am delighted to be here in Bratislava, particularly as this is my first visit to your beautiful country. My discovery of Slovakia will not be confined to the capital, however, for I shall be travelling to Kosice later today at the Constitutional Court’s invitation. Last year our Court hosted a sizeable delegation from the Constitutional Court of Slovakia, with which we have already developed a close relationship; we shall build on it further over the next two days. Owing to these meetings with the Constitutional Court, I shall unfortunately be unable to be present for the whole of the seminar, for which I apologise.

Slovakia has been chairing the Committee of Ministers of the Council of Europe for the last five months. This seminar will be one of the highlights of its chairmanship. In this connection, allow me to congratulate the Directorate General of Human Rights and Legal Affairs of the Council of Europe and the Government agent of Slovakia, Ms Marica Pirošíková, for having the excellent idea of organising it.

I had the privilege of hosting the Slovakian Prime Minister, Mr Robert Fico, at the European Court of Human Rights on 21 January; his visit reflected his commitment to the human rights protection machinery established in Strasbourg.

The priorities identified by the Slovakian chairmanship from the outset attest to Slovakia’s desire to make human rights protection a central focus. As President of the Court, which is the keystone of the European protection system, I am delighted.

The Court places great importance on the role of government agents in ensuring effective human rights protection. As you all you know, we hold meetings with government agents every couple of years; I believe these meetings, which you all attend, have proven very useful. They are organised in a spirit of respect for two fundamental principles: the Court’s independence, and its impartiality, given that the bulk of the disputes it has to settle are between individual applicants and states, which are themselves represented by their agents.

Such meetings are important. They afford the Court an opportunity to explain some of the problems it may face on a one-off or ongoing basis, and allow government representatives, who defend their state’s point of view within the procedural framework established by the European Convention to voice their concerns and mention any obstacles they may encounter in their day-to-day work.

I shall not go back in detail over the comments I made at the meeting for government agents on 5 November, which many of you attended. In any event, a number of changes have been effected at your request since that meeting, particularly regarding the time limits now set for submitting your pleadings. Likewise, the Court’s Internet site has been improved in the light of the observations made to us at the last meeting of agents to the Court. This clearly shows that we take such meetings seriously.

I would like to say that the Court is well aware of the lead role played by government agents. We understand the difficulties you may face. Needless to say, the growing number of applications has a direct impact on your work-
load, since it increases the amount of communication with defendant governments. This means you have to respond to more applications and answer more questions from the Court, even though you may not always have enough staff to keep up with the level of growth. With the assistance of the Department for the Execution of Judgments, you also have to tell the Committee of Ministers what has been, or is being, done to execute the Court’s judgments, which are binding under Article 46 of the Convention.

Today I should like to clarify a number of issues that, in my view, are becoming increasingly significant:

- Firstly, the considerable growth in the number of applications for interim measures the Court has to deal with, which involve you in turn;
- Secondly, the issue of friendly settlements, which are always to be encouraged;
- Lastly, your more general role in consolidating the Court’s authority, *inter alia* through the execution of judgments and legislative amendments.

Interim measures

Firstly, the number of interim measures applications submitted under Rule 39 of the Rules of Court has grown considerably over the last two years. In 2006, the Court in its entirety dealt with 444 applications. This figure rose to 867 in 2007, representing an increase of almost 100% (95.27%). The figures speak for themselves. For your information, the four countries most affected at present are the United Kingdom, France, the Netherlands and Sweden. Moreover, the figures do not include applications rejected because they fall outside the scope of Rule 39; I acknowledge that some applicants fail to interpret Rule 39 correctly, either out of ignorance or sometimes deliberately.

The Court now receives such applications on a daily basis. Most, but not all, of these cases concern foreigners or asylum seekers who maintain that they would be subjected to torture or inhuman or degrading treatment if they were sent back to their countries. The Court must therefore take a decision very quickly, for the time-limits are short and in some cases the impact of sending an asylum seeker back could be very serious, if not irreversible.

What is causing this very rapid increase? At least to some extent, it no doubt stems from the 2005 decision in the case of *Mamatkulov and Askarov v. Turkey*.\(^\text{363}\) This Grand Chamber judgment, in which, for the first time, the Court found against a state for failing to comply with a measure indicated under Rule 39 of the Rules of Court, undoubtedly gave the provision added effect. Moreover, it was in line with a shift in international caselaw generally, including that of the International Court of Justice.

Irrespective of the causes, one thing is certain: as government agents, you serve as a vital interface between the Court and the competent national departments when it comes to ensuring that the interim measure requested is applied.

I know that arrangements have been put in place, within both the Court Registry and your own departments, to ensure the smooth and, above all, speedy communication of measures requested by the Court; thank you for this. Efficient co-operation is essential in dealing with such requests, which are often urgent.

In this type of case, day-to-day communication between the Registry and the government agent in question must be as flexible as possible, for speed is of the essence. I know that your role as go-bet weens in such cases is not a straightforward one, and that you often have the task of making administrative departments other than your own understand that the expulsion of a given individual is to be avoided. You succeed in doing so most of the time, which is of the utmost importance. I am aware, however, that such requests also overload your own departments. Incidentally, some states have recently requested an in-depth review of the procedure, an idea of which I am wholly in favour.

\(^{363}\) Mamatkulov and Askarov v. Turkey, [GC], Nos. 46827/99 and 46951/99, 4 February 2005.
Friendly settlements

The second aspect I wish to emphasise is the significant role you play in facilitating the conclusion of friendly settlements.

Such settlements can take place at any stage in proceedings. The Court endeavours to promote them by making itself available to the parties, in accordance with the text of the Convention, but is aware of the crucial role you play in this connection. It falls to you to persuade your national authorities that a friendly settlement would be the most fitting solution in a given case; no doubt this is not always easy. You should realise that you can always count on the Court’s support with a view to reaching such settlements. Moreover, they are encouraged by the Group of Wise Persons.

Execution of judgments and legislative amendments

The third and last aspect of your work I wish to emphasise today is that it does not cease the day the judgment is given.

During the enforcement phase, you actively facilitate the decision’s implementation at national level.

In the course of my official visits, I have observed that, once a judgment has been given, particularly where general measures have to be adopted, it is the government agent who endeavours either to alert national courts to the need to modify their case-law so as to make it consistent with ours, or to persuade the legislature to amend a law deemed incompatible with the European Convention on Human Rights.

Your role then takes on its full significance; while in Strasbourg you are regarded solely as lawyers for the governments, in your own countries you are sometimes seen as lawyers for the Court. You thereby demonstrate once again that, as I said in November, you are officers – in the noble sense – of the law, and of the European justice system, just like the lawyers and non-governmental organisations whose task it is to defend or assist applicants.

In addition to the cases you defend, you have to study our Court’s judgments closely with a view to proposing any necessary amendments to national legislation if it turns out that, in Strasbourg, similar texts have been deemed incompatible with the Convention and have given rise to a judgment against a country other than your own.

As you know, the authority of our Court’s judgments is limited, being confined to the case at issue; they do not apply *erga omnes*, since only the state in question is bound by the decision given, at least in legal terms.

This means, for example, that once the Court has given a judgment against a state and the latter has then modified its system, legislation amended in the light of the Court’s case-law will coexist within the States Parties to the Convention with other, similar legislation that has yet to be amended, which will continue to be applied in accordance with a system deemed incompatible with the Convention. This situation is fortunately becoming less common, of course, with many states realising that it is advisable to anticipate a probable judgment against them by our Court.

Incidentally, it is often thanks to your influence that things “get back to normal”. In enabling your states to avoid possible judgments against them by Strasbourg, you simultaneously boost the authority of our judgments. I would like to thank you for playing this role, on which I place particular importance since it also reduces the number of applications and thus frees up the Court.

The Court cannot overlook the fact that the network of government agents provides it with regular partners who play a further role in addition to being parties to the proceedings. Accordingly, for several months we have been organising study visits to the Court Registry to give you a chance to get to know us, so that we can work together more effectively. As well as enhancing your understanding of our requirements, these visits afford us an opportunity to put forward our point of view. I know they are greatly appreciated by both yourselves and Registry staff.

Ladies and gentlemen, it is true that the Court must not favour one party over another, and its case-law has established principles designed to protect applicants’ rights, particu-
larly with a view to ensuring that they are not placed under an impossible burden of proof. It must, however, develop relationships that promote the cause that has brought us all here today: effective protection of human rights in Europe, to borrow the extremely well-chosen title of this seminar.

As government agents utterly loyal to your national authorities, you will also understand our institution’s judicial role and the need, for example, for equality of arms – in the proce-

dural sense – between an applicant to the Court and the respondent state. You show virtue in this respect, since you reconcile the state’s interests with the need for the rule of law. You are thereby applying the fundamental rule on which both international law and the European Convention on Human Rights are based: Pacta sunt servanda. It is not an easy role, but a crucial one.

Thank you very much.

Mr Štefan Harabin

Deputy Prime Minister and Minister for Justice of the Slovak Republic

Ladies and gentlemen,

It is an honour for me to speak to you in opening our joint seminar on the role of government agents in ensuring effective human rights protection, which is organised under Slovak chairmanship of the Committee of Ministers of the Council of Europe. Let me warmly welcome not only all the government agents of the member states of the Council of Europe but first of all the esteemed guests – Mr Jean-Paul Costa, President of the European Court of Human Rights; Ms Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, all participating personnel of the Secretariat of the Council of Europe, and particularly, Ambassador Emil Kuchár, Chairman of the Committee of Ministers’ Deputies of the Council of Europe and Permanent Representative of the Slovak Republic at the Council of Europe, who chairs this seminar. In addition, I would first of all like to thank the Directorate General of Human Rights and Legal Affairs of the Council of Europe for its assistance and co-operation in organising this seminar, especially for its precious advice and experience.

A redress of consequences of the violation of rights stipulated in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 is, undoubtedly, closely associated with the execution itself of judgments of this international judicial body. In this respect, it is amoral and inexcusable that a successful applicant has to wait a couple of years for the execution of a judgment. Therefore, at the domestic level, it is inevitable to ensure the timely and effective execution of judgments of the European Court of Human Rights. With the seriousness of this process grows equally the insubstitutability and significance of the role of government agents who are best familiar with a specific case, just in the part of the proceedings after the judgments of the European Court of Human Rights are brought, and the same in their execution. This event is therefore targeted to a discussion on both the role of the government agents in representing the member states of the Council of Europe before the European Court of Human Rights, and, particularly, on their contribution to the execution of Court’s judgments. I am confident that this seminar will provide you with precious ideas on how to strengthen and improve the position of government agents in ensuring the harmonisation of domestic laws and practice with the standards comprised in the Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, it will bring the opportunity to become acquainted with the experience of government agents of individual states in observing the judgments of the European Court of Human Rights, and in executing them.
First, I should like to touch the issue of ending a dispute between the parties amicably. There is no doubt that one of the material instruments for respecting human rights and fundamental freedoms is the option of a redress for torts. This closely relates to both the issue of a subsequent redress for infringements determined by the European Court of Human Rights in scope of the execution of judgments, and the opportunity to reach a friendly settlement with the applicant where state itself arrives at the conclusion that the application is not clearly ill-founded, and there are relevant reasons to proceed in this way. I appreciate this possibility since I believe that should the rights of a person were violated indeed it is a question of legal and democratic maturity of the state to make efforts to resolve this situation as soon as possible so that applicant need not wait a number of years for judgment being pronounced in his favour, and consequently for the execution of such a judgment. The Slovak Republic has chosen a procedure whereby a friendly settlement with the applicant on its behalf is made by the government agent with the approval of the Minister of Justice. This means that the agent asks the Minister of Justice for his approval of such a procedure before notifying the European Court of Human Rights of their will and readiness to resolve a specific case by a friendly settlement. The agent also asks the Minister of Justice for his approval of specific conditions of a friendly settlement. I come from the conviction that it is neither just nor fair to dispute against the applicant whose rights were clearly violated and, therefore, I am inclined towards this solution especially in the cases where the violation of an applicant’s rights has already been determined by some of domestic bodies, in particular, the Constitutional Court, and where the case does not raise any substantial issues which the European Court of Human Rights should respond and thus give guidance on how to resolve them on the domestic level.

This is the reason why the Slovak Republic would proceed to make a friendly settlement in such cases where applicants allege the violation of the right to a fair hearing within a reasonable time after a violation of their right has previously been determined by the Constitutional Court, which granted them just satisfaction the amount of which is, from the aspect of the European Court of Human Rights’ case-law, clearly unreasonably low. These are, in my opinion, the cases expressly suitable for making a friendly settlement. An advantage of such a procedure is, *inter alia*, the possibility of reducing the applicant’s costs and expenses in the proceedings, mainly the cost of legal representation and translation of the observations presented in the proceedings into one of the official languages of the Council of Europe that should be reimbursed by the Slovak Republic by virtue of legal costs in the event of detrimental judgment. The Slovak Republic would opt for another procedure only if conditions of the friendly settlement, as stipulated in the declaration proposed by the European Court of Human Rights, were expressly unacceptable to it; for instance, if the proposed amount seemed to be extremely high with regard to the circumstances of the case. If the applicant did not agree with the proposed friendly settlement then the Slovak Republic would proceed to the newly established opportunity to end the dispute based on the unilateral declaration by the government whereby the latter recognises the violation of applicant’s rights and undertakes to pay the applicant a sum of just satisfaction. As a result of the said procedure, there has recently been an increase in the number of cases where the European Court of Human Rights has acknowledged, by its decision, a friendly settlement between the applicants and the government, after having made sure that the friendly settlement achieved was based on the respect for human rights as defined in the Convention for Protection of Human Rights and Fundamental Freedoms and its Protocols, and has decided on the striking out of applications from its case list of. In 2007, 24 cases were so ended in respect of the Slovak Republic, compared to 4 cases in 2006. Besides, last year, additional 9 cases were ended based on the unilateral declaration of the government. Also in some of cases where the European Court of Human Rights has delivered a judgment detrimental to the state concerned, the possibility of making a friendly settlement in the matter of just satisfaction remains still open provided that the European Court of Human Rights has not determined on it yet and adjourned it. In
relation to the Slovak Republic, however, such cases are not numerous.

As we all know, execution of judgments of the European Court of Human Rights may not be mistaken for the payment of awarded just satisfaction only. In scope of this process, the states take general and individual measures as required by the Committee of Ministers of the Council of Europe, and which may differ in form, depending on which articles of the Convention for Protection of Human Rights and Fundamental Freedoms have been violated. The process of execution is complicated, and it should be, therefore, co-ordinated on the domestic level. In this respect, I highly appreciate the adoption of the Recommendation of March 2007 on effective domestic remedies to accelerate the execution of judgments of the European Court of Human Rights, which should be an important guidance and useful instrument for the member states of the Council of Europe. This crucial legal instrument provides the member states with the recommendation to appoint a co-ordinator for the execution of judgments on the national level. The co-ordinator would be in contact with competent domestic bodies responsible for individual phases of the execution process. The co-ordinator should be authorised to get relevant information, to work with the bodies issuing decisions in the course of the execution process and, if necessary, to perform or initiate the appropriate measures to accelerate the execution process.

In the Slovak Republic, the role of such a co-ordinator is played by the government agent before the European Court of Human Rights. The government agent, in compliance with his/her status and within his/her terms of reference, ensures and supervises the due execution of decisions of the European Court of Human Rights. For this purpose, principally in co-operation with the Ministry of Foreign Affairs, he/she informs the Committee of Ministers of the Council of Europe of the completion of judgments and decisions of the European Court of Human Rights and of the developments in the law of human rights and freedoms in the Slovak Republic. The agent participates at the meetings of the Committee of Ministers’ Deputies of the Council of Europe, which permits him/her to follow the course of the execution of judgments immediately, not only in relation to the Slovak Republic but to other countries as well, and thus to better understand the attitudes and requirements of the Committee in connection with execution of judgments, and equally to be inspired by the measures to be adopted by other countries, aimed at judgment execution. Moreover, the agent discusses directly, on bilateral level, with the personnel of the Department for the Execution of Judgments in the Secretariat General of the Council of Europe. The experience of the Slovak Republic is that by using this procedure, the biggest effectiveness in respect of execution of judgments of the European Court of Human Rights has so far been achieved.

At domestic level, the agent who is, because of his/her position, familiar in detail with the specific case and has best knowledge of the case-law of the European Court of Human Rights and the developments therein, should play a more important role in the preparation and adoption of the legislative instruments concerning human rights and fundamental freedoms. Therefore, in the Slovak Republic, it is considered as advantage for the agent to be a part of the Ministry of Justice, which is the author and presenter of a large portion of laws. Thus, the agent can, even in the process of creation of law, present his/her opinion of the wording from the point of view of observing the guarantees anchored in the Convention for Protection of Human Rights and Fundamental Freedoms and made by the case-law of the European Court of Human Rights. The target is to ensure the harmonisation of adopted laws with the above-mentioned material and binding international instruments, and not only to avoid judgments detrimental to the Slovak Republic, but first of all to provide as effective and as general adherence to the human rights and fundamental freedoms as possible.

Naturally, the wording itself of a law, no matter how much in harmony with international guarantees, is not sufficient. It must be linked to such application by the domestic bodies that would equally respect the established case-law of the European Court of Human Rights. For this purpose, it is necessary to ensure that domestic bodies of law applica-
The role of government agents in ensuring effective human rights protection

tion first know and secondly respect this case-law. In this context, the extended information on judgments of the European Court of Human Rights becomes more significant. Therefore, in scope of execution of a specific judgment in the Slovak Republic, the latter is translated into the Slovak language and through minister’s or agent’s letter the judgment is distributed to the domestic bodies concerned, in particular to the courts. The domestic bodies must also, however, be acquainted with judgments against other states, since they also may, with regard to the interpretation powers of judgments of the European Court of Human Rights, affect the Slovak application practice. In the Slovak Republic, the general information on the case-law of the European Court of Human Rights is also provided through publication of judgments in the journal for judicial practice named “The Judicial Revue” (Justičná revue) the publisher of which is the Ministry of Justice. This journal publishes the Slovak translations of all the judgments and selected decisions against the Slovak Republic, as well as the Slovak translations of selected judgments against other states.

All the translations are made by the Ministry of Justice staff, the judgments and decisions against the Slovak Republic are performed by the Office of the Agent of the Slovak Republic before the European Court of Human Rights, and selection of the most significant decisions is made by the government agent. This journal is distributed to all the courts in the Slovak Republic and equally available to any and all of the barristers, public prosecutors and other legal professions, including the public at large. Further, to the extension of the case-law of the European Court of Human Rights, it is desirable, in my opinion, to use the knowledge and expertise of the government agent as much as possible. This is why in the Slovak Republic, the government agent not only assists in organising many training courses for judges, public prosecutors and barristers, and leads such raining courses, but based on my decision the government agent also participates at regular meetings of the presidents of district and regional courts. At the meetings, the government agent can inform on the latest case-law of the European Court of Human Rights that must be respected without delay, and he/she can also point out to some defects in the judicial practice, and he/she equally can respond immediately to the questions concerning the issues of human rights and fundamental freedoms protection.

The Slovak experience is a result of more than fifteen-year period during which the Slovak Republic has been a contracting party to the Convention for Protection of Human Rights. In many countries, however, there is a much longer experience. Even this event should contribute to an exchange of knowledge amongst the government agents of particular member states of the Council of Europe, namely in the area of representation before the European Court of Human Rights and in the area of execution of the Court’s judgments. the function of the government agent before the European court of Human Rights is not easy. I therefore deeply esteem the work of all of you performing this function, as well as the work of our guests from the European Court of Human Rights, Secretariat General of the Council of Europe, and others who have considerably contributed to streamlining the operations focused to ensure the observance of human rights and fundamental freedoms, the sphere I myself consider very important.

Thank you. ★
Ladies and gentlemen,

It is a great pleasure to welcome you on behalf of the Council of Europe. I should first like to congratulate and thank the Ministry of Justice of Slovakia – and you personally, Minister – for the initiative to host this seminar on the role of government agents in ensuring effective human rights protection in Bratislava during the Slovak chairmanship of the Council of Europe’s Committee of Ministers.

From the outset, I should like to welcome the fact that the Slovak authorities have identified “Respect for and promotion of core values: human rights, rule of law and democracy” as one of the main priorities of the Slovak chairmanship of the Committee of Ministers. Respect for, and promotion of, the core values of the Council of Europe is not only the backdrop against which this seminar is taking place, but falls also within the priorities set out at the Council of Europe’s Third Summit of the Heads of State and Government, which was held in Warsaw in 2005.

We cannot stress enough that respect for human rights starts at the national level. This is the principle of subsidiarity enshrined in the European Convention on Human Rights. In the light of this subsidiary character of the supervision mechanism set up by the Convention, the Committee of Ministers has since 2000 recommended to member states to intensify their efforts to implement the European Convention on Human Rights at the domestic level and improve the national mechanisms allowing speedy execution of the judgments of the Court.

This was also the message of the Ministerial Conference in Rome in 2000, which marked the 50th anniversary of the Convention. Ministers asked to pay increased attention to the need to consolidate the European system of protection of human rights and to guarantee the long-term effectiveness of the Convention system. One of the most visible signs of the stress put on the system is the Court’s extremely heavy case-load, with some 103 000 pending applications. Admittedly, not all of them are “real” applications. But even if we reduce this number by a quarter, we still have over 75 000 applications pending. That is too many to make the system work effectively. The increase in the number of applications and the time required for many remedial actions also places the Committee of Ministers under much pressure. There is no doubt that a full application of the principle of subsidiarity is therefore key to avoid a complete paralysis of the system.

Against this background, we are gathered today to look at the role of government agents in ensuring effective human rights protection. This seminar is a continuation of the line begun with the previous meetings of government agents organised in Vilnius in 1999 and in The Hague in 2003, meetings in which member states benefited from the exchange of experience and good practices.

Government agents contribute at least in four essential respects in ensuring effective human rights protection, both at the national and the European level.

First, they are responsible for representing and defending member states before the European Court of Human Rights. This is a more complex task than it might appear at first.

Their pleadings must of course take into account the underlying principles of the Convention and the relevant case-law of the Strasbourg Court. Agents have also the responsibility to duly inform the Court about relevant domestic law and practice: in this way, they can contribute to the quality of the Court’s judgments. In addition, Agents have a certain interest in ensuring that their governments intervene in cases against other countries. Finally, they can also use their discretion and persuasive authority at home to facilitate the work of the Court in Strasbourg, for example by providing consistent efforts to reach friendly settlements in clone and repetitive cases.
The role of government agents in ensuring effective human rights protection

Should there be cases where the envisaged position of their government is clearly untenable in view of the Court's established case-law, Agents should use strong persuasive skills to convince national authorities that such cases are not to be pursued at all costs. In other words, government agents should not only be agents of the state in Strasbourg, but also agents of the Convention system in their capitals. I wish to recall that Protocol No. 14 provides for a simplified procedure for manifestly ill-founded cases, in particular repetitive cases.

The agent's unique expertise on the Convention should be recognised, where appropriate by providing an adequate standing within the national legal system. That expertise should be relied upon by other national authorities, which should act in close cooperation with the agent, be it in the framework of the Court's proceedings or the execution of the Court's judgments.

Second, because of their thorough knowledge of the case-law of the Strasbourg Court, government agents can naturally play the role of "legal watchdogs", and warn national authorities of important developments in the case-law of the Court which might have an impact on domestic legal systems. The agents are also well placed to identify trends in the applications or to detect practices which may reveal a nascent or very real structural problem, and can promote the adoption of corrective measures at an earlier stage. In some member states, the agents play an active role in verifying the compatibility of draft laws, existing laws and practice with the Convention and the case-law of the European Court of Human Rights, and in ensuring that appropriate steps are taken to bring legislation and practice in line with Convention standards. This way, the agents contribute not only to preventing human rights violations, but also to limiting the number of applications to the Court, in particular series of cases resulting from the same problem of incompatibility.

Third, government agents play an important role in the framework of the execution of the Court's judgments. The agent is in many situations the national authority who is the best placed to initiate and co-ordinate the adoption of different measures which may be required at the national level. The importance of co-ordinating the adoption of different measures has been emphasised by the Committee of Ministers in its recent recommendations. It is also worth noting that in some cases the agent actively contributes to the establishment and operation of smooth domestic procedures for the full and rapid execution of the Court's judgments. It must, however, be noted that pleading cases before the Court and ensuring execution of judgments are two very different things, and they both demand a lot of resources. This seminar is a good opportunity to discuss whether agents' offices would need reinforcement if they are to perform both these tasks successfully.

As to the adoption of general measures, a government agent may play an important role in persuading the government to initiate and support draft laws aimed at preventing further violations of a similar nature. Making efforts to speed up the legislative process and providing effective remedies both for the future and possible violations already committed are important contributions to resolve the issue of clone and repetitive cases, which is a serious problem for the Court. Throughout the legislative process, a government agent can also advise on the consistency of the proposals with the requirements of the Convention and inform national authorities of solutions found in other Council of Europe member states which have been faced with similar problems.

Government agents are also very well equipped to deal with the issue of individual measures, since they have a detailed knowledge of the specific circumstances of the case that forms the subject of the judgment and can immediately envisage solutions to remedy the particular problem faced by the applicant. They are well placed to provide applicants and competent authorities with advice on this issue.

In addition, when the source of the violation is related to a practice inconsistent with the Convention, the agent's personal involvement can be decisive in putting an end to the violation. Our experience in working with government agent's offices, especially when it comes to co-operation activities for the judici-
ary or law-enforcement authorities, shows that the agent plays a primary role in promoting a better understanding of the requirements of the Convention within the national legal system and in prompting the necessary changes in mentalities and practice.

Finally, a government agent can play a key role in ensuring a broad dissemination of the Convention standards among all state bodies. The agents’ extensive and up-to-date knowledge of the case-law of the Court and of the Committee of Ministers’ requirements puts them in an ideal position to actively promote such dissemination. A government agent could, for instance, contribute to selecting Court judgments which might have an impact on the domestic legal system, and in particular mobilise other national stakeholders, which can raise awareness of Convention standards. In fact, such stakeholders are manifold: they include associations of judges, prosecutors and lawyers, law journals and official journals, human rights institutions, universities and NGOs, as well as training institutions for legal professionals. The government agent cannot of course be expected to disseminate Convention standards him – or herself, but he or she can certainly encourage others to do so.

The Committee of Ministers also called for rapid translation and dissemination of the decisions and resolutions adopted by the Committee of Ministers in the context of the execution supervision. Here too, a government agent may play an important role.

Today’s seminar will provide the opportunity to look at the ways the agent can contribute towards all these processes. I would like to stress that a broad dissemination of Convention standards is a prerequisite for ensuring that such standards are known and applied by national authorities, in line with the subsidiarity principle enshrined in the Convention.

Ladies and gentlemen, everything I have said is motivated by the key objective for this meeting, namely to discuss issues of practical relevance for Government agents, with relevance to their roles, resources and status. The way in which the debate is organised aims at a free exchange of views and the active participation of all present. I encourage all of you to take full advantage of this format. We believe that the effective exchange of information is a vital element in making the system function more effectively. The results of your exchange of views will benefit the Convention system as a whole, and help to improve and reinforce the protection of human rights of our citizens.
The role of government agents in ensuring effective human rights protection

**THEME I:**

**THE ROLE OF THE GOVERNMENT AGENT IN REPRESENTING THE MEMBER STATE BEFORE THE ECtHR**

Moderator: Mr Arto Kosonen, Government agent of Finland

Ms Marica Pirošíková

**Government agent of the Slovak Republic**

Ladies and gentlemen, dear colleagues,

First of all, on behalf of the organisers I should like to thank you for accepting the Deputy Prime Minister and Minister for Justice of the Slovak Republic’s invitation to attend this event held under the Slovakian chairmanship of the Committee of Ministers of the Council of Europe. We have had the great privilege of hearing contributions during the seminar from Ms Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, Mr Jean-Paul Costa, President of the European Court of Human Rights, and Mr Štefan Harabin, Deputy Prime Minister and Minister for Justice of the Slovak Republic. I would also like to thank Mr Emil Kuchár, Chair of the Committee of Ministers’ Deputies of the Council of Europe, Ambassador Extraordinary and Plenipotentiary and Permanent Representative of the Slovak Republic to the Council of Europe, for chairing the seminar, along with the various speakers and moderators. I would particularly like to thank Ms Hanne Juncher, Head of the Legal and Human Rights Capacity Building Division, Ms Clementina Barbaró, Head of Unit in the Legal and Human Rights Capacity Building Division, and the Secretariat of the Directorate General of Human Rights and Legal Affairs for their valuable co-operation and assistance in organising this event.

My contribution concerns the role of government agents in representing member states before the European Court of Human Rights (referred to hereafter as “the Court”). In this connection, I would like to share the experience I have gained in nearly eight years working at the office of the government agent, and to draw your attention to some of the problems we have faced and our efforts to try and resolve them. I shall also make a number of comments on the role of government agents in upholding human rights.

I would like to begin with some general observations on the agent’s position and duties in the Slovak Republic, the legal basis for his or her work being the regulations adopted by government order. Under those regulations, the Ministry of Justice represents the Slovak Republic in dealings with the Court through an agent who represents and defends the Republic’s interests before the latter; at the same time, however, he or she ensures and supervises the proper execution of the Court’s decisions, keeps the Committee of Ministers of the Council of Europe informed – in co-operation with the Ministry of Foreign Affairs – about the execution of those decisions and submits proposals to the Minister for Justice for measures aimed at stamping out recurrent violations of the Convention. By the end of March each year, the agent drafts an activity report, which the Minister for Justice then submits to the Government of the Slovak Republic and the Slovakian National Council Committee on...
Proceedings

Human Rights, Nationalities and the Status of Women.

I shall now move on to the first aspect I wish to address: obtaining information from national authorities in connection with proceedings before the Court. I started working at the agent’s office in 2000. Compared with previous years, there was a significant increase in the number of applications notified to the Government of the Slovak Republic that year. At the time, there were two lawyers in the office as well as the agent, it was difficult to find translators into English, we had only a single Internet connection, and Slovakian authors wrote only rarely about issues relating to the Court; above all, however, in our early communication with the national authorities, which we had asked to comment on the applications and to forward files to us, we realised that their understanding of the Court’s proceedings and case-law was minimal, even though the Convention had direct effect within our legal system. Accordingly, we went to see numerous court presidents in person or straight to the judges with jurisdiction over the cases to which the applications related; the level of cooperation improved considerably once we had provided them with more information. We also realised that, given their linguistic handicap (not understanding the Court’s official languages) and the complex nature of the subject, they needed to be educated about the latter and supplied with documentation of a kind to aid their understanding.

In conjunction with non-governmental organisations, we then set up a project entitled “Training for judges and legal trainees in the case-law of the European Court of Human Rights”, which ran from August 2001 to November 2002. In August 2001, during the initial preparation phase, we produced two publications and had them printed; they were then distributed to seminar participants and other interested people. The first contained the current Slovakian version of the Convention, the Slovakian translation of a number of key provisions of the Rules of Court and a short presentation of the admissibility criteria and the applications filed against the Slovak Republic. The second set out the Court’s case-law in relation to Articles 3, 5, 6 and 10 and Article 1 of Protocol No. 1. The publications were drafted by staff of the agent’s office. During the next phase of the project, nine seminars were held for judges and legal trainees from all over Slovakia. At the seminars, we taught participants how to interpret the applicable national provisions in accordance with the Court’s case-law, providing them with Slovakian versions of its landmark decisions. Our discussions with them also generated suggestions for legislative amendments, which we passed on to the relevant directorates within the Ministry of Justice. Some participants subsequently forwarded to us decisions of theirs referring directly to the Court’s case-law; others contacted us to request more detailed information about the Court’s decisions.

We continue to organise regular seminars for judges, senior court officers, prosecutors and lawyers. Demand has increased considerably following the introduction on 1 January 2002 of a new domestic remedy enabling individuals to appeal to the Constitutional Court on the grounds that, inter alia, their rights guaranteed under the Convention have been violated in proceedings before the authorities. Should the Constitutional Courts allow such an appeal, ruling that a final decision, measure or other action has violated an individual’s rights or freedoms, it will set aside the decision, measure or action in question. The Constitutional Court may also dismiss the case pending fresh proceedings, rule out proceedings for the violation of fundamental rights or freedoms or, where this is possible, order the perpetrator to restore the situation prior to a violation of fundamental rights or freedoms. It may also grant the applicant reasonable pecuniary compensation.

The Court’s case-law is no longer an unfamiliar concept in Slovakia; the seminars give rise to animated discussions on the interpretation of human rights.

In conjunction with the Judicial Academy, the Slovakian Chamber of Lawyers and non-governmental organisations, over the last two years we have set up training projects financed from European Social Fund allocations; as part of these projects, we have published a 570-page volume entitled Commentaries on selected articles of the Convention for the Protection of Human Rights and Fundamental
The role of government agents in ensuring effective human rights protection

Freedoms, distributed to seminar participants free of charge. The Convention articles included in this volume were selected and interpreted in the light of topics discussed during the seminars; it also highlights decisions of the Court that are particularly relevant to the Slovakian legal system. The commentaries on the respective articles, which include an interpretation of key principles and legal reasoning, are not based solely on the Court’s decisions, but also supplemented by the relevant national case-law, particularly that of the Constitutional Court.

Based on our experience, I have to say that the organisation of regular seminars for judges and prosecutors has helped to bring about a significant improvement in the length of time taken by the latter and the quality of the information they forward at our request with a view to preparing the Slovak Republic’s defence. This gives us enough time to draft a memorial in Slovakian, which we then submit for comment to all the bodies involved and the relevant directorates within the Ministry of Justice; this is particularly important during periods in which the Court notifies the government of a considerable number of applications at the same time, which has been a frequent occurrence in recent years. Further to the Court’s meeting with government agents in November 2007, I would like to know whether the Court, when notifying your countries of applications, now takes into account the complexity of the case in setting the deadline for submitting the memorial, or whether it continues to allow the same amount of time for both simple and more complicated cases. In this connection, I was interested in the comments made by some agents during the meeting with the Court, to the effect that it had not met their requests to have the deadline for submitting memorials extended. I have to say that our office has never had such problems, although we request an extension only in exceptional cases. I would also like to know whether the law in your respective countries expressly entitles the agent to be advised of confidential information, and how such information is forwarded to the Court. Your experiences might be helpful with a view to making the necessary legislative amendments in the Slovak Republic. We have the following questions: should agents be subject to security checks that may last several months and impede their ability to meet the deadlines for filing memorials in respect of applications notified just after they have taken up office, or, on the contrary, should their right to be advised of confidential information connected with proceedings before the Court be stipulated directly by law as an integral part of their position? Who should decide at national level on the range of relevant documents submitted to the Court? How should such information then be submitted to the Court? By diplomatic bag? In addition, the Slovak Republic does not yet have any experience of implementing interim measures. I would therefore like to hear about any practical problems you have faced in relation to decisions on such measures and the action taken to resolve situations arising from them.

The second point I wish to address relates to friendly settlements and unilateral declarations. Firstly, I would like to say that I agree with Ms Sally Dollé, Section Registrar of the Court, who emphasised the key role played by agents in this respect at the meeting with government agents in November 2007. Friendly settlements should be regarded as the best way to settle cases raising "simple" issues under the Convention, since they save a great deal of time and public money, as well as avoiding stigmatisation of the government in question in the event that the Court finds a violation. In the Slovak Republic, the agent starts negotiating a friendly settlement after obtaining prior consent from the Minister for Justice. The cases that generally give rise to a friendly settlement are those in which the applicants allege a violation of their right to a hearing within a reasonable time, following a Constitutional Court decision on the issue of what constitutes a reasonable time. The Constitutional Court’s decision is disputed either in respect of the amount of reasonable pecuniary compensation awarded, or on the grounds that it has not granted such satisfaction. In such cases, we start negotiating a friendly settlement if the compensation awarded to the applicant by the Constitutional Court was manifestly inappropriate in the light of the Court’s established precedents. In this regard, the Court helps us considerably in brokering a friendly settlement; in most cases, applicants are prepared to
reach a friendly settlement on the strength of statements forwarded by the Court, even though they may have demanded multiple amounts in their applications. There are also cases, however, in which applicants refuse to negotiate a friendly settlement on the strength of the statement forwarded by the Court. In such instances, in accordance with a prior opinion from the Minister for Justice, we attempt to settle the case by means of a unilateral declaration by the government, in which we acknowledge that the applicant’s rights have been violated and state that we are prepared to pay him or her a certain sum as just satisfaction. There are also applications alleging more than one violation, whereas the unilateral declaration is confined to the complaint relating to an obvious violation of the Convention. In such cases, the Court declares the first complaint inadmissible on the grounds that it is clearly ill-founded or inconsistent with the Convention, and strikes the second one off the list on the strength of a unilateral declaration by the government.

The third point I wish to address concerns the role of government agents to the Court in respect of cases brought against other states. An agent may be involved in one of two ways. Firstly, an application may be filed against another Contracting Party by a national of the state in question. Secondly, agents may be involved in helping to resolve issues bearing a direct or potential relation to applications filed against the states they represent in proceedings before the Court; they may be able to provide the Court with additional information about the issues involved so as to help it assess whether I find it frustrating to draft memorials relating to a departure from the Court’s established precedents in respect of the expulsion of foreigners suspected of helping to organise terrorist attacks; and the case of Soffer v. the Czech Republic, concerning the applicability of the “civil component” of Article 6 of the Convention to proceedings before the Constitutional Court.

Lastly, I would like to make a few remarks aimed at establishing whether government agents are there to defend the state or to uphold human rights, or both. Since I started working at the agent’s office, I have been asked whether I find it frustrating to draft memorials defending the government against people who have had their human rights violated. In many instances, in accordance with a prior opinion from the Minister for Justice, we attempt to settle the case by means of a unilateral declaration by the government, in which we acknowledge that the applicant’s rights have been violated and state that we are prepared to pay him or her a certain sum as just satisfaction. There are also applications alleging more than one violation, whereas the unilateral declaration is confined to the complaint relating to an obvious violation of the Convention. In such cases, the Court declares the first complaint inadmissible on the grounds that it is clearly ill-founded or inconsistent with the Convention, and strikes the second one off the list on the strength of a unilateral declaration by the government.

The third point I wish to address concerns the role of government agents to the Court in respect of cases brought against other states. An agent may be involved in one of two ways. Firstly, an application may be filed against another Contracting Party by a national of the state in question. Secondly, agents may be involved in helping to resolve issues bearing a direct or potential relation to applications filed against the states they represent in proceedings before the Court; they may be able to provide the Court with additional information about the issues involved so as to help it assess whether I find it frustrating to draft memorials relating to a departure from the Court’s established precedents in respect of the expulsion of foreigners suspected of helping to organise terrorist attacks; and the case of Soffer v. the Czech Republic, concerning the applicability of the “civil component” of Article 6 of the Convention to proceedings before the Constitutional Court.

Lastly, I would like to make a few remarks aimed at establishing whether government agents are there to defend the state or to uphold human rights, or both. Since I started working at the agent’s office, I have been asked whether I find it frustrating to draft memorials defending the government against people who have had their human rights violated. In many
cases, it is not pleasant for government agents to have to defend the state’s position before the Court; provided their work is not confined to representing the government before the Court, however, they can have a considerable impact on respect for human rights at national level.

Incidentally, I would like to point out that, given the large number of decisions, even we government agents – who deal with the Court’s case-law every day – have difficulty finding our bearings and keeping abreast of developments in it. At the same time, some members of the legal profession in a number of Council of Europe states do not master the Court’s official languages well enough to understand its decisions published on the Internet, while those in countries having had several decades of socialist rule also need to be educated about certain aspects relating to respect for human rights. Many Council of Europe states have not yet managed to overcome objective factors causing judicial proceedings to exceed a reasonable time; this also leaves judges little time for in-depth study of the Court’s case-law.

In the light of these observations, I am of the view that agents and their staff should pass on their knowledge by proposing legislative amendments, running seminars and issuing publications.

When agents are notified of an application, or at least that a judgment has been given against another state, they may realise that legislative amendments are necessary. At the same time, their experience enables them to provide the competent legislative authorities with information about the amendments needed in order to bring the law into line with the Court’s case-law. Their links with agents from other states enable them to find out how similar problems have been resolved in other countries, which may serve as a model. I would like here to thank those of you who have helped me in this way and to assure you that our office will do the same.

In some cases, no legislative amendments are necessary and the national authorities simply have to modify their case-law. In such situations, it can be very helpful to hold seminars during which the government agent or his or her colleagues alert participants to the relevant case-law of the Court. It has also been helpful to hold seminars for lawyers, aimed first and foremost at reducing the still-alarming number of applications that clearly fail to meet the admissibility criteria and identifying ways of interpreting the applicable legal rules in accordance with the relevant case-law of the Court as soon as a case comes before the national authorities. Incidentally, I cannot see any drawback to agents and their colleagues communicating basic information to applicants, particularly as regards the running of proceedings before the Court.

The production of publications is another means of drawing attention to the problems associated with the application of the Convention at national level, and of making legal professionals and the general public aware of the complex issues surrounding proceedings before the Court.

Agents play a key role in protecting human rights when it comes to remedying the consequences of violations as part of the execution of the Court’s judgments. It is they who know the details of a case, and they can quickly identify the general and individual measures that need to be adopted in order to execute the judgment. In the Slovak Republic, the agent ensures and supervises the proper execution of the Court’s judgments, submits reports to the Committee of Ministers of the Council of Europe on the general and individual measures taken in the Slovak Republic in connection with their execution, and prepares the necessary documents with a view to the adoption of final resolutions on terminating the supervision of such execution. Since 2003, I have regularly taken part – along with a number of my staff – in meetings of the Committee of Ministers’ Deputies of the Council of Europe and bilateral negotiations with the Council of Europe Secretariat. Participation in such meetings and bilateral negotiations helps to give the government agent responsible for executing the Court’s decisions at national level a clear idea of what is expected of the state during the execution phase.

As I have already said, in the Slovak Republic the agent drafts an activity report by the end of March each year, which the Minister for Justice submits to the government and the Slo-
vakian National Council Committee on Human Rights, Nationalities and the Status of Women. In addition to outlining his or her activities during the previous year and providing statistical data on applications filed against the Slovak Republic, the agent highlights important decisions by the Court and indicates the situation with regard to the execution of judgments, as well as suggesting possible solutions at national level. The report is subsequently published on the Government Office and Ministry of Justice websites, featuring inter alia brief descriptions of judgments against the Slovak Republic handed down by the Court the previous year. It also gives the agent an opportunity to discuss problematic issues highlighting shortcomings in terms of respect for human rights at national level.

As I do not wish to exceed the time-limit I have been allocated, so as to leave enough time for discussion, I shall simply make a few final observations. The role of government agents is a very difficult one, given the associated responsibilities and the problems they face in their day-to-day work, especially if they do not wish the latter to be confined to the task of defending the government before the Court, but also to encompass the goal of improving the situation with regard to respect for human rights. On many occasions, co-operation with a number of you has filled me with fresh energy and inspiration, for which I am very grateful. I hope that this seminar on the role of government agents in ensuring effective protection of human rights will give us an opportunity both to pool our experience and to further our mutual co-operation.

Thank you very much for your attention.

Mr Vít A. Schorm

Government agent of the Czech Republic

My role having been simplified by my Slovakian colleague’s valuable contribution, I shall largely reinforce what she has just said. Before doing so, however, I would like to endorse the many thank yous she has already addressed to various deserving people, and to add our colleague Marica Pirošíková herself to the list; she was no doubt instrumental in arranging this meeting in Bratislava, on the banks of the Danube.

But let us get to the very heart of our topic, which is the role of government agents in proceedings before the Strasbourg Court.

Firstly, the status of the Agent of the Czech Government appears to be fairly similar to that of my Slovakian counterpart. The agent is also part of the Ministry of Justice, and also submits regular reports to ministers regarding the country’s situation before the Strasbourg Court and the execution of the Court’s judgments. Other than this, the agent operates relatively independently, and rarely receives instructions from the government or the Minister of Justice.

Secondly, the government agent’s office has to communicate with the authorities that examined the case referred to in an application filed with the Court on which the government has to comment.

We consequently approach the ministries, other administrative authorities or courts involved in the case or able to help shed light on the facts and practices contested in the application, with a view to consulting the relevant files and requesting opinions. Such co-operation with the authorities concerned is governed by a 2001 Act; a legislative act was found to be necessary at the time in order to overcome the courts’ occasional refusals to cooperate in the examination of each case notified by the Court. Notwithstanding a law requiring each authority to respond and give

375. The word “autonomously” was preferred during the discussion following the contribution.
The role of government agents in ensuring effective human rights protection

its opinion at the agent's request, the replies are highly variable in quality. This no doubt reflects the authors' knowledge of the Convention as well as their willingness to co-operate.

My Slovakian colleague focused mainly on her work in issuing publications and training members of the national legal service, thereby improving their understanding of the standards laid down in the Convention so that they are better able to respond to the agent's requests. Indeed, agents and their teams in those countries that became parties to the Convention only after 1990 appear to have a natural inclination towards such activities. The staff of the agent's office themselves deliver almost all the human rights courses run by the Czech Republic's Judicial Academy. One of the challenges we face is to overcome a degree of passivity among participants, who are often content just to listen.

Nevertheless, the question arises as to the extent to which judges have to comment on a case they have previously examined in the course of their judicial duties. The law provides that the agent must approach the head of the jurisdiction concerned, which is supposed to be a body within the National Courts Administration. This rule does not remove all ambiguity, however; the heads of each jurisdiction are also judges, and even if they themselves were actually to comment on their judicial colleagues' methods, this activity would still remain on the fringes of the exercise of judicial power. A jurisdiction's response cannot, therefore, be expected to shed light on every aspect of the facts and the law applicable to them under the Convention. On the other hand, our Constitutional Court has set up a specialised analysis unit within its registry; the staff of this unit respond not only to requests from the government agent, but also – and above all – to questions raised by the constitutional judges themselves; as a result, the quality of the information it provides to both the agent and the constitutional judges has improved a great deal over the last few years. Such units have also been set up within the country's other two supreme courts.

A separate issue concerns the extent to which the government agent can influence the progress of a pending case referred to in the notified application. The continued independence of the judiciary is a sacrosanct rule; no one can really speed up the snail's pace at which judges proceed, for example, which conveys a somewhat woeful image. Can the agent actively suggest that an administrative authority rectify a potential source of violations of the Convention, however? The fact is that anything the state, represented by its agent, does at the domestic level – albeit legitimate and approved by the Court – to influence the outcome of a pending case is likely to upset the applicant, who would already have been hoping to win his or her case, provoke a reaction and arouse suspicions of abuses of power.

I do not have a great deal to add about the issue of processing confidential information, other than to mention the practical direction from the President of the Court on written pleadings, which provides that secret documents should be filed with the Court by registered post. This does not really resolve the problem at national level in respect of the legislation on the protection of confidential information. The question also arises as to whether the legislation allows protected information to be made available to the Court, that is, to judges and registry staff, given that the latter are clearly not included among the persons to whom such information can legally be disclosed. That said, I have never had to deal with this type of problem in my six years as an agent.

My experience of the interim measures indicated under Rule 39 of the Rules of Court is confined to two cases, both relating to foreigners threatened with expulsion. In the first case, the measure was not ordered. The government was first asked to provide information about the applicant's situation and the likelihood he would be expelled; the government promptly complied, and the Court subsequently decided not to make any further demands. In the second case, the measure was ordered immediately, without any prior request for information about the applicant's situation. It subsequently turned out, however, that the applicant, who had written the word "Help!" three times at the end of his application, had left the Czech Republic of his own accord, in a Mercedes moreover, without being deported by the police.
The agent’s office has developed an extremely constructive co-operative relationship with the Interior Ministry department responsible for immigration and asylum policy. This department has been advised of the Court’s interpretation as set out in the judgment in the case of Mamatkulov and Askarov v. Turkey376, and has adhered to it each time I have had to respond to a 7 p.m. telephone call from the Court informing me that an interim measure was in the air. We join forces as soon as the director of the department receives my call, even though the details provided by the Court must then be communicated in writing. The question naturally arises as to whether every administrative or judicial authority would respond as co-operatively as the Interior Ministry department in charge of foreigners, which does not exactly have an extremely benevolent reputation. In any event, I can say that we would always proceed in the same fashion; with the judgment in the case of Mamatkulov and Askarov v. Turkey377 at our fingertips, we would alert all concerned to the danger of a gratuitous violation of Article 34 of the Convention, for which anyone contesting the Court’s authority would automatically be held responsible.

Thirdly, negotiations with a view to a friendly settlement are always an interesting topic, with some variation in the approaches adopted. On the one hand, I agree in principle with the suggestion made at one of our previous meetings that regulations be drafted on government agents to the Strasbourg Court, covering inter alia the ethical issues surrounding the action taken by agents with a view to reaching friendly settlements with applicants. On the other hand, it seems to me that there is nothing stopping agents from negotiating directly with applicants, without being under the constant (or omnipresent) watch of the Court Registry.

It is important to bear in mind that the Registry is not always as active as the parties might be entitled to expect in the light of Article 38 §1.b of the Convention. There is a fairly obvious explanation as to why, in the vast majority of cases, the Registry simply proposes a joint written declaration, specifying a figure, to the parties. Where such a declaration is submitted, we do not normally discuss it in private. Moreover, we have never tried to force applicants to accept such proposals by exerting unlawful or undue pressure. In any event, the applicants themselves have to confirm to the Court that they have accepted the solution negotiated; we have always agreed that they will write to the Court enclosing a copy of the parties’ joint declaration.

Lastly, although I am by no means unconditionally in favour of conducting private negotiations whenever the opportunity arises, I believe negotiation is allowed; after all, friendly settlements reflect more or less active negotiations between the parties. More active, or even proactive, negotiations may seem unusual or atypical in a state governed by the rule of law, but that state is a party to proceedings, the parties are on a relatively equal footing, the proceedings have not been lost in advance, and the state does not necessarily have to be on the defensive in every respect. I would even go so far as to say that applicants, unlike the state, sometimes tend to abuse the fact that agents are part of the state’s hierarchical structure; it is consequently possible to report them to their superiors or even to lay a criminal complaint about their work, so as to force them to adopt a particular position before the Court, either during the proceedings or in the context of friendly negotiations.

Fourthly, to date we have intervened little in cases against other states, under either the first or second paragraph of Article 36 of the Convention.

As regards intervention in cases in which the applicant is a Czech national, we often reserve the right to intervene, but very rarely do so in the end; surprisingly, when this does happen it is not solely for the purpose of assisting the applicant. In fact, we have intervened in just one case in which the Court applied Article 29 §3 of the Convention, back when the respondent government was not yet allowed to respond to the applicant’s submissions; our written intervention, consisting of questions rather than statements, afforded additional opportunities for the parties to comment on

The role of government agents in ensuring effective human rights protection

certain points on which we felt insufficient light had been shed.

As regards intervention in other cases, we have been guided by whether or not issues similar to those raised by the application exist in our legal system. It is difficult to take a decision within the time-limit stipulated by the Rules of Court, however, notwithstanding the fact that the Court has made considerable efforts recently to inform the general public of pending cases that have just been notified.

Nevertheless, I would like to know whether colleagues have criteria they use as a basis for deciding whether to intervene in either of the scenarios provided for under Article 36 of the Convention.

Fifthly, over the past year we have been working with a law firm on the state’s defence in a series of sensitive cases concerning the regulation of tenancy relationships, which bear some resemblance to the leading case of Huttenczapska v. Poland. The government decided that the Ministry of Justice should hire a law firm for these cases, even though the government agent had never previously relied on such assistance. A call for tenders was issued, and one of the two firms that showed an interest in such a government contract was selected. The law firm has less experience of Convention law than the government agent’s team, however, meaning that its draft initial submissions on the admissibility and merits of the applications had to be substantially rewritten by the agent’s office. Naturally, such assistance costs the state many times more than its total annual expenditure on the agent’s office; this shows that we play a valuable role.

I would consequently like to find out more about the practices of states that entrust law firms with the task of preparing submissions, or even representing them at hearings before the Court. It may be the case, however, that the situation differs between central and eastern Europe, on the one hand, and the United Kingdom or the Netherlands, on the other.

Lastly, it has been difficult to ensure positive perceptions of the government agent’s work in the media and society at large. Indeed, the agent’s work brings him or her into conflict with applicants, who sometimes find support in the media thanks to a well-publicised sorry tale. In addition, journalists see the agent’s work simply as a series of cases lost by the state, owing to their habit of focusing solely on bad news, their lack of understanding of how the Strasbourg organs operate and their inability to discern the large number of complaints declared inadmissible by the committees or in decisions on admissibility, or even hidden in chamber or Grand Chamber judgments. Where the agent is successful before the Court, this also means the failure of a claim that may be interesting or even audacious, and thus attractive.

Nevertheless, are there ways the government agent’s image can be improved?

Dear colleagues, I hope I have sparked reactions that will fuel the discussion scheduled to start at this point on the first major theme of our seminar. Thank you for your attention. ★
Discussion

Mr Jakub Wołąsiewicz (Poland)

The agent operates independently and does not take instructions from the government except at his or her own request. Nevertheless, the agent cannot be responsible for upholding human rights, since his or her primary responsibility is to defend the state before the Court. Regulations defining agents’ role should be drawn up, for they cannot simply be regarded as lawyers; on principle, what is needed is a kind of charter setting out their rights and obligations before the Court.

Communication with the Registry is crucial to concluding friendly settlements. When it comes to cases identical to a previous case involving another state, the Registry’s comments enable the agent to propose a reasonable settlement; in other cases, the Registry’s observations on the agent’s proposals make it possible to reach a compromise.

Mr João Manuel Da Silva Miguel (Portugal)

My contribution concerns an issue that, in my view, needs to be addressed prior to any discussion of this initial theme, namely the very idea, or concept, of government agents.

The Convention does not mention government agents, who are referred to only in Rule 35 of the Rules of Court.

There is no international paradigm in respect of the agent’s role. It is an area in which each state has the power to adopt the rules it considers most appropriate to the goal pursued.

Some states do not even have any rules on the selection, appointment, rights and duties of agents; others, however, have adopted regulations stipulating the government agent’s powers, rights and duties.

There is thus a range of different situations and solutions, but the aim is the same: to represent the state before the European Court of Human Rights.

Any discussion of agents’ task of representing governments before the Court must therefore define that task. The two presentations by our colleagues, whom I would like to thank, showed that agents do have a role to play. In my view, therefore, we need to clarify the nature of that “role”, including their powers, rights and duties, which should be set out in specific regulations on government agents.

Mr Vit Schörm talked about agents’ independence in the exercise of their functions. I would prefer to talk about autonomy, a word that has the same meaning but avoids any confusion with a guarantee specific to judges. In any event, the key is to grant agents certain guarantees in the exercise of their functions: agents are lawyers for the state, but they are more than just lawyers, since as representatives of a Contracting Party they must respect certain boundaries but must also enjoy a degree of freedom of conscience in performing their duties.

Regulations on agents – encompassing all of these principles – would, in my view, also enhance the Court’s authority.

In this connection, the Council of Europe – through the Steering Committee on Human Rights – could study the existing legal rules pertaining to government agents and, at the very least, develop harmonised “minimum standards” that agents ought to enjoy in the exercise of their functions.

These are my thoughts and suggestions on the subject.
Mr Slavoljub Caric (Serbia)

I would like to expose briefly the situation in my country concerning the status and work of the government agent.

The Republic of Serbia ratified the European Convention on Human Rights in March 2004. Four years from then, we have possibility to cope with very different cases and problems.

The status of the government agent has been regulated by the Decree on the Agent. The role of the agent implies diversified functions.

Namely, the agent has a role to protect the interest of the state before the European Court of Human Rights and to represent the country before this Court. In performing this function the agent prepares the written observations and takes part in the oral hearings (he participated in the oral hearing in the case Markovic v. Italy, as an third party).

The Court has brought 16 judgments in respect of the Republic of Serbia since March 2004, which are the subject of supervision by the Committee of Ministers pursuant to Article 46 of the Convention. Some of these judgments have not become final yet, in two cases a Relinquishment of Jurisdiction to the Grand Chamber was made pursuant to Article 43 of the Convention, whereas the judgments have become final in ten cases.

The Decree on the Agent prescribes that the agent takes care of the enforcement of the adopted judgments. It means that the agent translates and organises the dissemination of judgments and supervises the implementation of individual and general measures as well.

As for the dissemination, all the judgments were published in the Official Bulletin of the Republic of Serbia and on the website of the Office of the Agent after they had been translated. In addition, a wide distribution of the judgments to the courts has been arranged, as well as the round tables related to different issues about the enforcement of judgments. The Office of the Agent also published a book containing the judgments adopted against Serbia as well.

As for the payment of damages and costs of the proceedings, it is important to point out that all the amounts awarded by the judgments of the European Court had been paid before the judgments became final, in all the cases where it had been estimated that there would be no Relinquishment to the Grand Chamber. The amount of just satisfaction awarded by the Court varied from €1 000 to €15 000.

As for the individual measures, the judgments adopted so far could be classified by the type of violations established by the Court. The largest number of judgments relates to a violation of the principle of a trial within reasonable time. In such cases, it is most frequently expected that the proceedings before the domestic court would be completed with the final judgment and the final judgments of the domestic courts would be enforced. In some cases, such as family matters, where a violation of Article 8 of the Convention had also been established, in connection with Articles 6, paragraph 1, and 13 of the Convention (there are three such judgments), the Committee of Ministers expects particular attention in conducting the proceedings in the instant cases aimed to protect the interests of children.

In the field of family matters, a non-enforcement of the final judgment has a specific weight, due to unfavourable consequences for the applicants. This might be most obvious in the case of Tomić v. Serbia378 where the domestic court had been trying in vain, within the period from 18 March 2005 to 14 March 2007, to enforce the judgment awarding the custody of a child to the mother, which in the meantime, the father of the child abused to put out of force the enforcement title in a separate suit.

Bearing in mind the above-mentioned finding of the Court, the applicant still has the right to request a reopening of the proceedings within the prescribed term pursuant to Article 422, paragraph 1 item 10 of the Law on Civil Procedure. This is also found out by the decision number 11 of the Committee of Ministers of the Council of Europe, brought at the human rights meeting held on 5 December

---

Proceedings

2007, stating that the adoption of the final resolution in this case by the Council of Europe’s Committee of Ministers is postponed in order to monitor the events in relation to a possible request. Otherwise, pursuant to the resolution of the Committee of Ministers of 19 January 2000, the Republic of Serbia stipulates an option that a proceedings is reopened after the judgment by the European Court of Human Rights in a civil and a criminal proceedings, whereas the Law on Criminal Procedure prescribing this matter has not come into force yet.

The second group of cases relates to a violation of the right to freedom of expression for conviction for defamation. In such cases, in addition to dissemination and the payment of damage, in respect of individual measures, a reopening of the proceedings may also be expected, and from the general aspect it is the best to comply with the instructions specified in the Resolution of the Parliamentary Assembly of the Council of Europe – Towards decriminalisation of defamation of 4 October 2007.

Besides, the first judgment against the Republic of Serbia concerned a violation of the right to the presumption of innocence guaranteed by Article 6, paragraph 2 of the Convention and in that particular case the Committee of Ministers was satisfied with a wide dissemination of the judgment and the payment of the costs of the proceedings before the judgment became final. Accordingly, this case was struck off the list of cases discussed by the Committee of Ministers. Other cases are still on the agenda of the Committee.

As for the general measures, the main problem comes down to the provision of effective remedy to respect the right to a trial within reasonable time.

In this respect I would like to underline the judgment adopted by the Court in the case of V.A.M.379, wherein, as the second judgment adopted against Serbia, the Court noticed this problem.

The agent has a very prominent role in the conducting of the negotiation concerning the friendly settlement. He has concluded the friendly settlement in five cases until this moment. However, as a precondition for the conclusion of a friendly settlement it is necessary to obtain the permission of the body whose act provokes the procedure before the Court. It is sometimes very difficult to establish which body is the responsible one because there are several judicial instances that could be involved in the proceedings.

The Decree on the Agent does not stipulate the right of the state to intervene. In this sense the agent follows the criteria established in Article 36 of the Convention as well as the importance of the issue at stake for the Republic of Serbia and the number of persons affected by the same issue. Until this moment the agent has intervened in four cases.

In the Markovic v. Italy380 case the problem relates to the theory of political acts. In that case the agent pointed out that the adoption of the theory of political acts may considerably limit the scope of the law implementation in the sphere of access and efficiency of legal remedies as guaranteed by the Convention.

Apart from that, the doctrine of political questions would, by its very nature, justify an exemption from judicial control of the acts made in foreign policy implementation based on the so called raison d'Etat, which might make it almost impossible to execute and protect human rights.

In the case of Gajic v. Germany the main issue relates to the problem of violation of human rights on the territory of the Serbian province – Kosovo and Metohija. Other two cases where the Agent intervened are still pending and relate to the consequences of the dissolution of the former Yugoslavia.

Finally, the agent participates in the work of the CDDH, the DH-PR and Working Group A under the scope of the DH-PR.

---


380. Markovic and Others v. Italy, [GC], No. 1398/03, 14 December 2006.
Ms Radica Lazareska-Gerovska (“the former Yugoslav Republic of Macedonia”)

In the Republic of Macedonia, the government agent does not have the status of an autonomous body, but that function is carried out within the frameworks of the Ministry of Justice.

In 2001 the government adopted a Decision on the determination of the position of the government agent of the Republic of Macedonia in the European Court of Human Rights procedure. According to it, the government agent of the Republic of Macedonia is appointed from among the State Counsellors of the Ministry of Justice, under the Law on Civil Servants. Practising his function, the government agent provides general cooperation of the Republic of Macedonia bodies with the Court and with the other bodies of the Council of Europe in cases when the Republic of Macedonia is a party to a dispute before the Court, prepares defence and directly represents the Republic of Macedonia in the Court procedure, mediates in contacts between the Court and the domestic courts, the administrative bodies and the other bodies of Republic of Macedonia, and undertakes other actions connected with the protection of human rights within the framework of the Council of Europe.

The government agent acts on behalf of the Republic of Macedonia and is obligated to represent its interests in the Court procedure. The government agent undertakes all legal actions according to the general policy of the Republic of Macedonia, and upon his request or upon the initiative of the Parliament of the Republic of Macedonia, the President of the Republic of Macedonia, the Government of the Republic of Macedonia and the Minister of Justice of the Republic of Macedonia, the government agent obtains general instruction about the way of representing the Republic of Macedonia interests.

Mr Ferdinand Trauttmansdorff (Austria)

National case-law serves as an effective lever with a view to improving the application of the Convention at domestic level and thereby preventing disputes before the Court. From this...
perspective, it is essential that national constitutional courts orient their case-law in the light of that of the European Court.

Mr Derek Walton (United Kingdom) 381

Both speakers raised the question of criteria before deciding whether to seek to intervene as a third party. The United Kingdom’s policy is not to intervene simply because the applicant is British. However we do consider intervening where the issue at stake is important to us. In such cases we consider in particular whether it would be helpful to draw the Court’s attention to the importance that the case has to us by intervening and supporting the responding governments’ case. Alternatively, we may consider intervening in order to advance arguments that might not otherwise be advanced by the parties to the case.

We were also asked about our experience in the use of law firms for assisting the government in defending cases in Strasbourg. We regularly use lawyers from outside government to assist us in drafting observations and appearing at oral hearings. With the large number of cases involved in the United Kingdom, this is a matter of practical necessity.

Others, including the President of the Court, have mentioned the difficulty posed by the increase in the number of Rule 39 indications made by the Court in recent months.

Mr Francesco Crisafulli (Italy)

I agree that the agent’s role should be clearly defined under domestic law and that agents should enjoy a degree of freedom or autonomy (perhaps not outright “independence” in the sense in which the word is used to refer to the judiciary) in the exercise of their functions, strategic decisions and so on. I do not think there is any room for European standardisation, however, for the various national constitutional and legal systems are too different. I doubt, therefore, whether it is really possible to draw up regulations on agents, as Mr Schörm and a number of speakers have suggested, or to incorporate such regulations into a common legal model.

As regards friendly settlements, which Ms Pirošiková discussed, I have to say that it is sometimes impossible to evaluate the Court Registry’s proposals without knowing, on the one hand, the criteria applied by the Court in order to calculate just satisfaction (which should yield a scale for assessing the amount the state saves by agreeing to a friendly settlement) and, on the other hand, the calculation of the

381. The opinions expressed are personal and do not reflect those of the British Government.
The role of government agents in ensuring effective human rights protection

Mr Hans-Joseph Behrens (Germany)

As far as third-party intervention is concerned, it is Germany’s practice not to intervene as the state of which the applicant is a national (Article 36 §1 ECHR), other than in exceptional circumstances. On the other hand, consideration is given to third-party intervention under Article 36 §2 where a case’s outcome may affect national legislation.

Ms Inger Kalmerborn (Sweden)

It follows from internal rules of the Ministry for Foreign Affairs that it is the Director General for Legal Affairs of the Ministry who is the government agent. A few other civil servants at the Ministry have been appointed by the Minister for Foreign Affairs to act as agents in individual cases.

There are some rules decided by the Director General concerning the handling of cases within the Ministry. There is no particular statute concerning the agent’s co-operation with the courts and the administrative authorities. This does not present any particular difficulty in practice. In each case there is close co-operation between the agent’s office and other Ministries concerned, which request the necessary information, including the case-files, from the authorities and the courts. Decisions on which position to assume in the proceedings before the Court are agreed upon by the agent and the other Ministries concerned, which usually follow the advice given by the agent.

The agent has a vast experience of requests from the Court for interim measures in aliens cases. Requests concerning failed asylum seekers are transmitted to the Migration Board which decides to stay the execution of an expulsion decision pursuant to a provision in the Aliens Act.

As regards friendly settlements, it is the agent who negotiates and concludes the agreement with the applicant or his or her representative. The other Ministries involved have the last word concerning the maximum amount that can be agreed upon.

As for outside assistance, the agent does not use the services of law firms. In respect of cases referred to the Grand Chamber or particularly complex cases, however, academics are occasionally asked to give their opinions or to review the defence submissions.

Ms Deniz Akçay (Turkey)

Turkey has considerable experience of the interim measures provided for under Rule 39 of the Rules of Court, both before and since the Mamatkulov judgment. Whenever the authorities have been informed in time, we have complied with the requests made by the Court (or the Commission prior to Protocol No. 11).
Bearing in mind the large number of such requests for the suspension of expulsions and the considerable efforts each request for an interim measure necessitates on the part of national authorities, however, we are of the view that such measures should be notified by one of the Court’s senior lawyers as early as possible, and coupled with a specific, detailed investigation.

Ms Anne-Françoise Tissier (France)

It is neither necessary nor even advisable to provide agents with regulations designed to secure their autonomy – if not independence – vis-à-vis national authorities. Agents must stick to their role as legal advisers, who must not express a position contrary to that of their principals.

France rarely engages in third-party intervention under Article 36 §1 of the Convention. As for third-party intervention under Article 36 §2, consideration has to be given to the matter, and the implications of such intervention assessed. Intervention by more than one third party may in fact be regarded as beneficial for both the Court and the states, prompting the Court to respond in its judgment to several states in relation to the same issue; at the same time, however, the question arises as to whether the Court judgment may have effects on a state engaging in third-party intervention, which may not be the outcome it was seeking.

Ms Monika Mijić (Bosnia and Herzegovina)

The agent’s position is governed by an administrative decision by the government, giving him or her a degree of autonomy within the Ministry for Human Rights and Refugees. This autonomy is an advantage in so far as it allows the agent to communicate directly with the government and the European Court. Agents’ work is somewhat solitary, however, since they do not really have any colleagues at national level; accordingly, they ought to meet more often at the international level to discuss issues connected with their role and pool their experiences. As for the agent’s relationship with national authorities, Mr Crisafuli’s image of a mother with her children illustrates it well: it is a relationship characterised by protection and criticism.

Bosnia and Herzegovina has some experience of the interim measures provided for under Rule 39 of the Rules of Court in respect of an expulsion; the national authorities questioned the scope of these measures “indicated” by the Court, which the agent had to convince them were mandatory.

As regards third-party intervention on the basis of the applicant’s nationality (Article 36 §1 ECHR), our rule is to intervene only in cases of general interest to Bosnia and Herzegovina or where a case’s outcome may have an impact on a significant number of our nationals.

Mr Vladimir Grosu (Moldova)

In addition to the specific prerogatives assigned to the agent, the fact that he or she is appointed by the government confers a symbolic authority that simplifies the exercise of his or her functions; being regarded as the state’s representative before the European Court, the agent consequently has direct access to all Moldovan public authorities.

In the course of proceedings before the Court, the agent may exercise his or her right of initiative with a view to securing a favourable outcome for the state; examples include proposing a friendly settlement to the applicant or...
submitting a unilateral declaration to the Court in which the state acknowledges a violation or undertakes to rectify it. The agent naturally has a duty to keep national authorities informed of the progress of cases, so that arrangements can be made for the judgment to be executed and just satisfaction paid where necessary.

Ms Isabelle Niedlispacher (Belgium)

As regards the issue of regulations on government agents, I am of the view that the agent’s position is that of a lawyer: no more, no less. Like a lawyer, the agent has a duty to tender advice. The client can decide whether or not to take it, but the agent’s sole responsibility is to provide expert advice in the light of the Court’s case-law at the time the opinion is given. Should that case-law change, the agent will explain it to the authorities when the time comes to prepare the defence or execute the judgment.

While it may sometimes be difficult for agents to understand the Court’s case-law or the judgment or to explain these to the authorities, they can make use of their links with other agents and/or the execution department.

One of the few causes of problems is no doubt the fact that a particular authority may not listen to the agent, but in many cases such a situation is totally unrelated to the issue of regulations.

Third-party intervention under Article 36 §2 is a worthwhile option, but it can be difficult to make the most of it. Where agents are approached directly by other States Parties, they have only inadequate or belated information about the details of a case in which they might consider intervening.

Mr Frank Schürmann (Switzerland)

In many respects, the possibility of intervention available to third parties under Article 36 §2 of the Convention is a valuable, worthwhile way of participating in proceedings before the Court and thereby contributing to the “proper administration of justice”. In practice, however, relatively little use is made of that possibility; in my experience, this is often quite simply because agents do not have the time to identify cases that might lend themselves to such intervention or to organise it where appropriate.

As far as Swiss cases are concerned, third-party intervention (by two member states) has taken place in only one instance so far (Stoll case382). In the opposite direction, Switzerland has never intervened under Article 36 §2 to date.

All the same, I am of the view that, notwithstanding the practical difficulties, agents ought to endeavour to make greater use of this possibility. I was very interested in the criteria applied in the United Kingdom, as outlined by Derek Walton earlier; they might also be relevant to other states.

Mr Ignacio Blasco Lozano (Spain)

The issue of government agents’ independence must be placed within the national context specific to each state. Where the agent is regarded as a government adviser, as is the case in Spain, the need for independence is not felt, since such independence is naturally inherent to the agent’s very position. It is not appropriate, therefore, to seek to harmonise national regulations on agents vis-à-vis the idea of independence.

Moreover, the agent’s technical role as an adviser means that he or she is not afflicted by...
the schizophrenia sometimes mentioned; the agent is not torn between his or her role in defending the government and an additional role in upholding human rights. Even at the stage of executing the judgment, when the agent’s role is more one of upholding the Court’s solution, he or she continues to advise the national authorities.
The role of government agents in ensuring effective human rights protection

Theme II: The responsibility of the government agent in ensuring compatibility of legislation and practice with the standards of the ECHR

Moderator: Mr Arto Kosonen, Government agent of Finland

Mr Yuriy Zaytsev

Government agent of Ukraine

On 23 February 2006 the Ukrainian Parliament passed the Act on the Execution of Judgments and Decisions and the Application of the Case-Law of the European Court of Human Rights, setting out procedures for ensuring that national legislation and practice are compatible with the norms laid down in the European Convention on Human Rights (the Convention); accordingly, it stipulates the actions to be taken by government authorities.

It should be noted that the Act was received fairly favourably by the European institutions; two years after it was passed, however, one is entitled to ask about the practical impact of its implementation. This is the aspect on which I wish to focus in my contribution.

I would like to say a few words about the Act. In particular, it stands out from other legislative texts in that Parliament had to put it to the vote twice. The first attempt, in 2001, failed; having been passed by Parliament, the law was vetoed by the President. Key amendments were made in 2005, the most significant one being the inclusion of the main provisions set out in the five fundamental recommendations of the Committee of Ministers of the Council of Europe.

These were not “cosmetic changes”; the amendment was genuinely a matter of principle. As one of the bill’s authors, I can confirm this: let us take the example of the drafting of the provisions on procedures for ensuring the compatibility of national legislation and practice with the norms set out in the Convention.

Firstly, I would like to discuss the Act’s main provisions in relation to checking compatibility.

Section 19 stipulates that the compatibility of all bills must be checked, as must that of draft regulations submitted for government registration. The Act provides for such checks to be conducted by means of special legal appraisals. The findings of these appraisals give rise to specific conclusions.

Where no appraisal is carried out, or the conclusion reached is that the act in question is incompatible with the requirements of the Convention, the government may refuse to register it.

The compatibility of existing legislation and acts with the Convention is checked rea-
It must be said that thousands of acts are submitted for government registration every year, many of which do not come within the scope of the Convention. A “filter mechanism” consequently needs to be set up so as to exempt those acts outside the Convention’s scope from the requirement for an appraisal of their compatibility with the Convention.

In order to set up such a mechanism, however, there is a need for specialists with an in-depth knowledge of the Convention and the European Court’s case-law to monitor each stage in the preparation and entry into force of the texts in question.

Therein lies the other major problem: Ukrainian ministries and local bodies do not have any specialists at this level at present. Their lawyers normally deal with problems of a different nature. Many of them do not have an in-depth knowledge of the European Court’s case-law, and are consequently not in a position to anticipate the various everyday situations in which violations of the Convention may occur.

It was crucial, therefore, to develop an effective “filtering mechanism” that did not necessitate the involvement of a large number of Convention experts. Otherwise, the whole appraisal system would have been paralysed; it should be pointed out here that the government agent’s entire appraisal department comprises just nine staff.

Against this background, we have developed a scientific method of implementing appraisals, based on two components: one structural and the other semantic.

The structural component consists of an algorithm providing for the review of draft regulatory acts on the basis of a test of their compatibility with the Convention. It may be outlined as follows: firstly, the act’s author states whether or not it comes within the scope of the Convention. If it does, the regulatory act is sent to the government agent’s office for appraisal; if it does not, it is submitted directly for government registration, with a note to the effect that it does not come within the scope of the Convention. Even in the latter scenario, however, a check is undertaken: if the Ministry of Justice registrar finds that the act is in fact relevant to the Convention, notwithstanding the

---


reasonably frequently, particularly in fields such as police work, criminal proceedings and imprisonment.

The findings of such checks are submitted to Cabinet, along with proposals to amend existing legislation.

I shall now say a few words about the practical application of these provisions, starting with the institutional aspect. With a view to the Act’s implementation, a Ukrainian Government resolution stipulated that it was up to the Ministry of Justice, as an institution, to review compatibility with the Convention.

In turn, the Ministry of Justice issued an order assigning such appraisals to a specialised department whose staff have an in-depth knowledge of the Convention and the European Court’s case-law. To this end, an appraisals department was set up within the office of the government agent to the European Court of Human Rights.

The order also stipulated that each appraisal must give rise to official conclusions on the compatibility of bills or regulations with the Convention. In order to rule out any chance that a particular act might enter into force without the aforementioned conclusions being issued, the government amended the Cabinet regulation and government order on the registration of regulatory acts. The amendments provided that such conclusions were a prerequisite for the entry into force of such acts.

Having resolved the institutional issues, however, the next main problem was the model’s implementation. At least two key difficulties had to be resolved in order to address it.

Unfortunately, the fact is that regulatory acts – that is, acts issued by ministries and local bodies – constitute the greatest hazard when it comes to potential violations of the Convention and human rights violations in general. Accordingly, the procedure for government registration of such acts was introduced back in 1992. Such acts are registered by the appropriate department within the Ministry of Justice.
The role of government agents in ensuring effective human rights protection

A Work in progress 411

note, he or she submits it for appraisal on his or her own initiative. Authors who attempt to avoid having their regulatory acts appraised thereby run the risk of missing the deadline for registration.

Nevertheless, as has already been mentioned, there is an obvious flaw in the procedure: the lack of knowledge and experience of the Court’s case-law. In-service training is undoubtedly the way to remedy that deficiency, and development of such training is a priority. Education is far too lengthy a process, however, so we have opted for a stopgap solution.

The above method of implementing appraisals has been approved by the government agent as an official document. It includes lists of areas and everyday situations liable to give rise to violations of the Convention. These lists are based on the articles of the Convention, and incorporate as much of the Court’s case-law as possible.

For example, the list under Article 3 includes the phrase “deadline for filing the medical report” as an identifier of possible violations: in the case of Nevmerrzhitsky v. Ukraine, the Court found a violation of Article 38 ECHR on the grounds that the applicant’s medical report was not submitted to the Court; it had been destroyed because the deadline for filing such documents had expired.

The index of potential violations contains 345 such identifiers; given that the Convention is “living law”, the list is open-ended.

All interested parties have a copy of this auxiliary index; both the author of a regulatory act and the government registrar can simply consult it in relation to any matter covered by the draft regulatory act in question and submit the latter for appraisal. Where at least one issue listed in the index is identified, the regulatory act is submitted for appraisal.

Yet in practice, 18 months after the mechanism was introduced, the authors of such acts still consult the government agent’s office even during the preparatory phase. This enables them to bring their acts into line with the Convention before an appraisal is even conducted.

This method has proven effective in practice, enabling us to process some 1 100 bills and regulatory acts last year and more than 300 so far this year.

By appraising all draft regulatory acts coming within the scope of the Convention, it is also possible to identify priorities when it comes to reviewing existing legislation on a reasonably frequent basis.

Where the appraisal of a draft highlights certain flaws in existing regulatory acts bearing a systemic link to that draft, the acts in question must also be appraised. For example, the appraisal of the directive on inmates’ correspondence highlighted flaws in the Code for the Enforcement of Criminal Sanctions, resulting in the drafting of a bill making the relevant amendments to the Code.

As I have just said, the aforementioned system for appraising compatibility with the Convention applies to all acts, including bills drafted by the executive; on the other hand, it is not mandatory for bills drafted by members of Parliament. We hope, however, that this problem too will soon be resolved. Firstly, it is becoming increasingly common for MPs to submit their bills for appraisal, for they understand the importance of this procedure; secondly, it is to be hoped that the passing of the Act on Legislative Instruments will make such appraisals mandatory for all those involved in the legislation process.

Ukraine also makes systematic efforts to amend existing legislation in the light of the European Court’s judgments, in accordance with national legislation.

Under the aforementioned Act on the Execution of Judgments and Decisions and the Application of the Case-Law of the European Court of Human Rights, the government agent submits proposals to Cabinet regarding the steps to be taken to prevent further violations, including legislative amendments.

These proposals, set out in an official document, are considered by senior government officials, who then give instructions to the relevant ministries together with specific deadlines for their implementation. Ongoing

387. Nevmerrjitsky v. Ukraine, No. 54825/00, 12 December 2005
supervision is undertaken by government officials.

The European Court’s decisions in cases against countries other than Ukraine also gives rise to amendments to domestic legislation. In such instances, a bill is drawn up by the government agent’s staff at the Ministry of Justice’s request, with the involvement of other interested government departments. In the wake of the decision in the Baranowski v. Poland case, for example, we set in motion the drafting of a bill amending the Code of Criminal Procedure because we identified a similar problem that might eventually lead to a finding of a violation of Article 5 of the Convention.

Appeals by Ukrainian citizens to the Ministry of Justice and other government bodies are a key factor in detecting violations. Such applications arrive in the government agent’s office; where evidence is found of a violation or potential violation of the Convention, they are dealt with appropriately, either in relation to the specific case in question or more generally in some instances.

For example, some national courts make it difficult for prisoners to obtain the evidence in their criminal files that they need in order to submit an application to the European Court. In response to such complaints, the government agent began by sending court officials explanatory memoranda about Article 34 of the Convention, asking them to provide the required documentation; we then set up a working group to draft the necessary amendments to Ukrainian legislation.

The most complicated issue, however, is probably that of improving national administrative and judicial practice.

To a large extent, administrative practices can no doubt be improved by bringing ministerial acts into line with the Convention. But what is it to be done about the so-called “human factor”, or in other words arbitrary decisions by officials?

We hope to resolve some aspects of this problem – at least in the area we see as most important, that is, the length of preliminary police investigations and court proceedings and the time taken to execute judgments – by passing the bill on individuals’ right to lodge applications with national courts concerning violations of reasonable time-limits.

The bill clearly provides that a judge’s finding of such a violation will serve as a basis for launching a disciplinary inquiry; the perpetrator may be held legally responsible.

In my view, however, wider dissemination of information on all the European Court’s decisions – without exception – in cases against Ukraine, to both officials and the general public, is the most effective tool for combating violations.

In accordance with the Execution Act, therefore, the government agent sends information about each of the Court’s judgments against Ukraine to all the public bodies concerned and to the Ombudsman. I also have the summary of each decision published in the government journal, which is not only circulated within public institutions but also distributed to the general public. A full translation of the text of each decision is published in the Official Bulletin of Ukraine (Ofitsiyni Visnyk). Inter alia, these publications allow members of civil society to take action to address specific problems that may strike a deep chord within society at large.

In some cases, the scale and frequency of such problems mean that every official in a particular area needs to be made aware of the European Court’s position.

Following the recent decision in the case of Kucheruk v. Ukraine, for example, the government agent sent the management of the State Department for the Enforcement of Criminal Sentences (the Ukrainian prison service) an explanatory memorandum concerning the prohibition on the use of excessive force against inmates by prison staff. The explanatory memorandum was coupled with instructions that it be brought to every prison officer’s attention, and that the government agent be supplied with a detailed report on the appropriate steps taken in each prison.

It is well-known, however, that national courts play the most decisive role in ensuring the application of the Convention’s provisions within the domestic legal system. Accordingly, my country desperately needs to see domestic
judges move closer to the values of the Convention, first and foremost by changing their mentality.

Dozens of seminars on the Convention and the Court’s case-law are held in Ukraine. One major project consists of in-service training for a standing group of appeal court judges, one from each region; moreover, it is being implemented with support from the Council of Europe, in particular, and the active involvement of the government agent. It has been running for three years, and has already been effective in ensuring the application of the Convention. A course on the Convention and the European Court’s case-law has been included in the curricula for the Judicial Academy, the Prosecutors Academy and the Bar School.

We are developing computer packages to help national courts apply the Court’s case-law. As already mentioned, analyses of the Court’s decisions concerning Ukraine are published in specialised legal journals, while the Court’s judgments concerning other states are published in a specialised quarterly review produced by a non-governmental legal organisation. As the editor of that review, the government agent selects the decisions to be translated, bearing in mind the needs of Ukrainian legal practice.

In my view, however, the most significant motivating factor for judges will be the inclusion of the following short sentence in Section 17 of the Execution Act: “In their deliberations, courts shall apply the Convention and the case-law of the Court as a source of law”.

It is my hope that the enshrinement of the Convention’s values in domestic case-law, based on the rule of law and respect for human rights, will be the logical outcome of the steps being taken by Ukraine’s various national institutions.

Mr Derek Walton

Government agent of the United Kingdom

Before we look at specific measures to ensure compliance, I’d like to say a few words about responsibility for implementing the Convention.

Article 1 of the Convention provides that: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”. This shows that the primary responsibility is on the government of the state. It is a matter for the internal organisation of the state as to how it chooses to discharge this responsibility. The government agent is likely to have a role because this makes sense in practical terms rather than because of any obligation under the Convention.

In particular the Agent may have a direct role in ensuring compliance, e.g. Strasbour-proofing new legislation themselves. Or he or she may have an indirect role, e.g. ensuring that robust systems are in place to ensure compliance throughout government.

In the United Kingdom, we have operated both systems at different times. Until 2000, the government agent often played a direct role in ensuring compliance with the Convention. However in 2000, our Human Rights Act came into force and responsibility for ensuring compliance was decentralised.

I will draw on that experience to examine the main aspects of arrangements for ensuring compliance with the Convention. In particular, I will look at how we ensure compliance with the Convention of (a) new legislation; (b) new practice and policy; and (c) existing law and practice.

389. The opinions expressed are personal and do not reflect those of the British Government.
New legislation

It is clearly important that there are effective systems for ensuring that new legislation complies with Convention. The Executive and the Legislature both have a role to play.

The Executive

It is within the Executive that the choice between a decentralised system and a centralised one is most stark. In the United Kingdom, before the Human Rights Act, we had a fairly centralised system. Relatively few people within government had a detailed working knowledge of the Convention. The government agent and his team were among them and so, naturally, draft laws were often sent to us for checking. But this was not an ideal arrangement. The quantity of legislation made it impractical for the government agent to scrutinise all draft laws. Not only did we not have sufficient resources, but we also lacked the technical expertise in many of the areas in which the United Kingdom legislates that is needed for an in-depth analysis of compatibility. Furthermore, separating the scrutinising of laws from the policy development within the lead department increases the risk of tension between the Agent and the department promoting the law, who may have very different aims.

Since the Human Rights Act, we have had a decentralised system within the United Kingdom. Departments now have the primary responsibility for ensuring compliance of new laws with the Convention. Section 19 of the Act is the key provision. It provides that, when a Minister presents a draft law to Parliament, he or she must certify whether the law will comply with the Convention. In addition to this obligation, there is also a procedural requirement for a more detailed memorandum identifying the rights engaged by the draft law and explaining why the law will be consistent with those rights. Of course, this requires careful scrutiny within the lead department before a law is proposed. Since the Minister is personally responsible for certifying compliance, he or she will ensure that he has good advice and that his department has sufficient lawyers, with the necessary expertise in Convention law, to provide that advice. As a result, lawyers across government have had to develop expertise in human rights alongside their other areas of specialisation. This is a more efficient arrangement overall as they are now in a position to understand both areas of law concerned. It also means that human rights considerations can be integrated in policy development at an earlier stage; and it avoids any risk of tension with the Agent. As a result, it is now very rare for my office to be involved in Strasbourg proofing.

The Legislature

Parliament also has a distinct role to play. When a Minister says that his or her draft law complies with the Convention, Parliament does not simply take the Minister’s word for it. A Joint Committee on Human Rights was established in 2001. It rigorously scrutinises all new draft legislation and it reports to Parliament on matters which it believes require attention while a draft law is progressing through Parliament.

New policy or practice

Checking the compliance of new practice or policy with the Convention is a matter mainly for the Executive (the Legislature has no obvious role here). Again the choice is, in principle, between a centralised or a decentralised system. But in practice, as least in a country like the United Kingdom, there are simply too many policies and practices for a centralised system to work effectively. Decentralisation is essential.

For this reason the Human Rights Act (Section 6) made it unlawful for a public authority to act incompatibly with the Convention. This again puts the duty to comply directly on the departments responsible for policy. As with Section 19, the effect is to require them to acquire the necessary exper-
The role of government agents in ensuring effective human rights protection

tise to ensure they fulfil their legal duty. Again, there is only a minimal role for the Agent.

Existing law and practice

Ensuring compliance with the Convention is more difficult when it comes to existing law and practice. Here the choice is between carrying out a systematic review of all existing law and practice or relying on a system of ‘trigger points’ at which to review particular laws and practices.

A systematic approach might perhaps be appropriate when a state first becomes bound by the Convention. As a long-standing party to the Convention, that is not the case for the United Kingdom and we have not carried out a systematic review of all existing law and practice. Instead, we rely on a system of trigger points to assess the compliance of existing arrangements. So what trigger points do we use?

Cases before national courts

A number of important tools were introduced by Human Rights Act to ensure that, when a matter comes before a Court, the Court is equipped to ensure that the Convention is complied with. Among these tools is Section 3, which allows a court to interpret existing legislation compatibly with the Convention. This provides the courts with a means of bringing an existing law, which would not otherwise comply with the Convention, into line. So, in one case, a provision excluding evidence of prior sexual behaviour at a rape trial was interpreted so as not to exclude evidence necessary to provide for a fair trial.

Another important tool introduced by the Act was Section 4. It may not always be possible to interpret an existing law compatibly with the Convention under Section 3. If so, the Court may declare the provision in question to be incompatible with the Convention under Section 4. So in another case, the Court decided that it could not, on any reading, interpret the word female in English marriage law to include a person who has changed gender. Since this put the law in breach of the Convention as interpreted by the Strasbourg Court in Goodwin v. the United Kingdom\textsuperscript{390}, the national court declared the law to be incompatible with the Convention.

The effect of a declaration of incompatibility is not, however, to strike the law down. Instead it falls to the Executive to take the action necessary to bring the impugned law into compliance. This may be achieved through a fast-track amendment procedure (Section 10 of the Act), which allows a Minister to issue a remedial order to correct an incompatibility found by national court or by Strasbourg. Alternatively, and in practice more frequently, primary legislation is used to achieve the same result.

\textsuperscript{390} Christine Goodwin v. United Kingdom, [GC], No. 28957/95, 11 July 2002.

Cases before the Strasbourg Court

The starting point here is Article 46 (1) of the Convention, under which the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. There is of course a specific mechanism provided for in the Convention to supervise execution of judgments. In accordance with Article 46 (2) the final judgment of the Court is to be transmitted to the Committee of Ministers, which is to supervise its execution. The government agent has a role to play in this process; but that is the subject of another session.

Judgments of the Strasbourg Court against other states

Judgments against other states are, of course, not directly binding on non-parties to the case. Judgments are given a particular legal and factual context that may not easily be transposable to situations in other states. But such judgments may well be of help in inter-
interpreting Convention obligations to third states. In the United Kingdom, public authorities are under an express statutory duty to act in compliance with the Convention. So how should they keep track of developments in the Court’s case-law that may assist a state in understanding its obligations?

One option is to take a systematic approach. The United Kingdom’s Ministry of Justice does this. It produces a regular information note highlighting significant developments in the Court’s case-law that it circulates to human rights contacts in all government departments. This helps departments to identify developments that may be of significance to them.

Another option is to take a more ad hoc approach. We also do this in the United Kingdom. Specific cases may be drawn to a particular department’s attention for action.

The judiciary also need to keep abreast of Strasbourg developments given the powers that they have to interpret legislation compatibly with the Convention and to make declarations of incompatibility where this is not possible.

Conclusion

The United Kingdom’s experience has been that the best way to ensure compliance with the Convention is to mainstream human rights issues so that all government departments take human rights fully into account when elaborating their policies and laws. This is what works for us.

This means the government agent has a less prominent role to play in day-to-day compliance issues than might otherwise be the case. But he or she nonetheless has an essential role to play in developing robust systems (such as the Human Rights Act) to ensure that the system works effectively.

The government agent also has an ongoing role in helping departments to understand the Strasbourg system, the implications of the court’s judgments and as a source of information and advice.

So I have taken 20 minutes to say what I could perhaps have said in two sentences: the government agent does not necessarily have a direct responsibility for ensuring compliance with the Convention but he or she can play a very useful role in helping the government discharge its responsibility to comply. The nature of that role, though, will differ in different systems.

Discussion

Mr Răzvan Horaţiu Radu (Romania)

The compatibility of bills with the European Convention already has to be checked under Romanian law. Article 20 et seq. of the Constitution provide for the incorporation of international treaties into domestic law and their primacy over national legislation; in addition, the Constitutional Court has the power to assess laws – both before and after they are promulgated – in respect of fundamental rights. In practice, this assessment exercise is now part and parcel of the legislative drafting process; Romania has some experience in this area owing to a 2000 Act which established the principle in relation to European Union law and the treaties.

It has also become common practice to bring legislation and administrative practices into line with judgments of the European Court; examples include amendments to the Criminal Code articles on defamation, amendments to the legislation on custody of children and extraordinary appeals, and the Ministry of Justice circular on inmates’ correspondence.
Mr Lipot Hőltzl (Hungary)

Derek Walton’s presentation defined the focus of our discussion: should the compatibility of existing domestic law – legislation and administrative practices – be systematically reviewed on a regular basis, or solely in response to judgments delivered by the Court?

As far as Hungary is concerned, systematic reviews were conducted *ex ante*, that is, prior to the signature and ratification of the European Convention; this was the “compatibility exercise” asked of new Council of Europe member states. Since Hungary became a Contracting Party, it has no longer been able to conduct such comprehensive reviews on a regular basis, owing to a lack of human and budgetary resources. At the government agent’s request, however, domestic law is reviewed both where the Court finds against Hungary, in which case it is a matter of taking the necessary general steps to comply with the judgment, and where the reasoning given for judgments against other states appears to warrant amendments to domestic law so as to make it more compatible with the Convention.

Mr Frank Schürmann (Switzerland)

I should like to draw your attention to a difficulty we sometimes face when it comes to assisting and advising the offices responsible for drafting new legislation. Increasingly, we are unable to give a clear indication as to whether or not a particular solution is compatible with the requirements of the Court’s case-law. Using traffic lights as a metaphor, it is – fortunately – unusual for the light to be red, that is, where the suggested solution is clearly incompatible with the Convention. In some cases, we can give the green light – this too is a positive sign, of course. More and more often, however, the light is orange: that is, the Court’s case-law does not yield clear enough conclusions. In such cases, we must simply raise our remaining doubts and warn the competent authorities that there may be a problem under the Convention. The situation is far from satisfactory; where our doubts stem from the Court’s case-law itself, it detracts from the latter’s authority. To borrow the image used by Ms Mijić earlier, when she compared the agent’s role to that of a mother (who defends her child before the Court, but must also criticise him or her afterwards if the Court finds a violation): it is as though the mother were saying to her child: “maybe you shouldn’t do that, but I’m not quite sure”. It goes without saying that such a plea is unconvincing.

Ms Deniz Akçay (Turkey)

The compatibility of national legislation and practices with the requirements of the Convention and the Court’s case-law is reviewed according to a different framework in each legal system, depending on how centralised or autonomous the latter is. In Turkey, the compatibility of bills is systematically reviewed by the relevant parliamentary committees as part of the process of applying to join the European Union. Such monitoring is particularly important in the wake of the amendment of the Turkish Constitution; the new last paragraph of Article 90 provides for the primacy of international human rights conventions over national law.

Where the agent’s views are sought as part of such checks, his or her opinion on compatibility is bound to be hypothetical, since he or she cannot commit the European Court, which may take an entirely different view of the law in question. The key to this exercise, however, is to ensure that there is an awareness of the need to check, at a particular point, whether bills are compatible with the Convention.
In the Republic of Macedonia the compatibility of national legislation with ECHR standards is ensured in two ways.

As regards the existing legislation, the compatibility was evaluated by an inter-agency working group, set up at the moment of signing the Convention (1995). The evaluation process went on for two years whereby a large number of laws were harmonised, so that at the moment of ratification in 1997, it was assessed that the Republic of Macedonia legislation was in line with the European Convention on Human Rights.

As to the new legislation drafted, there is no centralised system which would assess each draft law from the aspect of its harmonisation with the European Convention on Human Rights and its case-law, but it is left to each drafter of the proposal. Given the fact that in the Republic of Macedonia the agent is in the Ministry of Justice, he has an insight into the legal texts proposed by the Ministry, but he may only point to the government that certain draft law may be problematic from the aspect of the European Convention on Human Rights, which is not binding for the legislator. In the information communicated to the government in relation to the judgments adopted against the Republic of Macedonia, the government agent also indicates the problematic legislation, pointing in which direction it should be changed, which is also not binding for the drafter.

Given that an inter-agency body for human rights has already been set up within the Government of the Republic of Macedonia, it is being considered to expand its competencies in this direction also (to follow the compatibility).

However, we are aware that it is very hard to ensure compatibility with the European Convention on Human Rights, given the high dynamic of work of the Court.

Mr Ignacio Blasco Lozano (Spain)

The decentralised system referred to by the British government agent is far preferable to any other, more centralised type of system. A centralised system runs two risks: firstly, there may be an attempt systematically to review – as a preventive measure – the compatibility of all bills with the requirements of the Convention, which is unlikely to be feasible; secondly, the stage may be set for an intractable conflict between the Constitution and the Convention, both of which clearly rank higher than the prospective legislation but whose hierarchical relationship is controversial.

It is better for the ordinary courts to review compatibility after the event, although this depends on the position treaties occupy within the national legal system.

Ms Inger Kalmerborn (Sweden)

The government agent is an important player – but not the only player – in checking the compatibility of bills with the Convention; Sweden has a hybrid system, which is neither fully centralised nor completely decentralised.

The agent is asked to give his or her opinion on bills, but they are then submitted to the Legislative Council, comprising three judges from the Supreme Court and the Supreme Administrative Court, which also checks their compatibility with the Convention. In so far as the Council’s opinion is not binding – although it is generally followed – bills are again reviewed by the government, including the agent’s office, before being forwarded to Parliament.

The difficulties encountered in the course of such reviews relate, firstly, to the bills’ tech-
The role of government agents in ensuring effective human rights protection

Technical content – in respect of taxation, for example – which may be beyond the technical expertise of the agent’s staff, and, secondly, to the complexity of the issues raised; this may mean that the agent can give an opinion only subject to provisos, in which case he or she must say so and accept responsibility.

Naturally, such problems may be alleviated by training ministry officials in Convention law, thereby helping to ensure better-quality bills.

Sweden does not review the compatibility of existing legislation on an ongoing basis; such reviews are conducted only on an ad hoc basis in the light of the Court’s judgments and developments in its case-law.

Mr Jeroen Schokkenbroek (Council of Europe)

A number of government agents have just said that it can be difficult to state reliably whether a bill is compatible with the Convention and its judicial interpretation. An additional avenue worth considering in such cases would be to approach the Council of Europe for help; it is not the latter’s role to comment on compatibility, of course, but it can provide assistance in the form of an evaluation by an independent expert. This would give national authorities a second opinion, the conclusions of which could be compared with those of national lawyers.

Ms Mai Hion (Estonia)

It would be invaluable to have Council of Europe experts’ opinions on bills; as my Hungarian colleague emphasised, checking compatibility is a fairly difficult exercise. Such checks must be carried out, however; they play a useful preventive role, for instance by keeping Parliament fully informed of the requirements deriving from the European Convention. Nevertheless, a bill’s compatibility is not 100% certain, since one also has to reckon with internal decisions and the role of the ministry responsible for drafting the bill; the part played by the government agent in this process is one of providing answers to the questions he or she is asked. Owing to a lack of human resources, however, the agent cannot check the compatibility of every bill. To a large extent, therefore, such checks of compatibility rely on the work of national courts in ensuring that existing legislation complies with the Convention.

Mr Jakub Wołąsiewicz (Poland)

Reviewing bills’ compatibility with the Convention and the associated case-law is a delicate matter. How can a Council of Europe appraisal or the agent’s opinion be put to the best possible use when ministerial authorities do not have to act upon either of them?

As far as checking the compatibility of existing legislation is concerned, there are situations involving structural violations against which the agent is powerless; this is the case where the violation stems not from the law – which, therefore, does not need to be changed – but from judicial practice. Accordingly, I am convinced that there is a need for dialogue between the European Court and national supreme courts.

One question remains: where the same situation exists in the law of several states and the Court finds against one of them, does its judgment have an impact on the others, placing them under an obligation to amend their legislation as a preventive measure to make it compatible with the Convention?
Mr Francesco Crisafulli (Italy)

I wonder what the real purpose of Recommendation Rec (2004) 5 of the Committee of Ministers is, as it seems to me that the true aim is not to check the compatibility of bills with the Convention, but to ensure regular checks of existing legislation.

Either way, I note that the recommendation ends up giving the Convention supra-legislative status, akin to constitutional status, which may cause difficulties for some legal systems (particularly dualist systems). In Italy, for example, we have long had a real problem when it comes to reconciling centralised monitoring of laws’ constitutionality (for which the Constitutional Court has exclusive competence) with the possibility of diffuse (or decentralised) monitoring of laws’ compatibility with the Convention, undertaken by the ordinary courts (in respect of substantive aspects or legitimacy). Personally, I am of the view that systematic monitoring of existing legislation, in the light of the Convention and the associated case-law, would be impossible in Italy, both for the practical reasons mentioned by a number of speakers and for constitutional reasons. Recently, in the wake of two judgments by our Constitutional Court, which I shall have an opportunity to discuss in my presentation, the situation has been as follows: the ordinary court is under an obligation, as far as possible, to interpret Italian legislation in a manner consistent with the Convention, as interpreted by the European Court; should this prove impossible, it must raise the issue of the law’s constitutional legitimacy before the Constitutional Court; the Constitutional Court will then decide the matter in the light of Article 117 of the Constitution (which requires the legislature to legislate in accordance with the state’s international obligations), with due regard to the Strasbourg case-law.

All the same, when it comes to assessing – on a preliminary basis, or in any event in the absence of a Court judgment directly challenging the validity of a particular piece of legislation – a bill or Act’s compatibility with the Convention, major problems may indeed arise. It is true that the Court’s case-law is founded on principles, but judicial solutions often apply to a particular case; this is the nature of the system, for the judge’s material application of the concepts developed – such as fair balance and proportionality – depends on the circumstances of each case. When the agent (or any other lawyer) is asked to comment on a bill’s compatibility with the requirements of the Convention, therefore, he or she can only give an opinion tinged with uncertainty. The agent shares this discomfort, however, with all those seeking answers in the Court’s judgments, including both national judges and Council of Europe experts (whose contribution is certainly valuable, but by no means resolves all the issues). Accordingly, the agent should not be concerned if his or her opinion is subsequently contradicted by a development in European case-law or even a departure from existing precedents: in such cases, mistakes are in the nature of things, and neither the Convention nor the Court can expect other-worldly perfection of the solutions opted for at national level.

Ms Anne-Françoise Tissier (France)

In theory, it falls to the ministry responsible for each bill to review its compatibility with the Convention. As a result, the agent is consulted primarily in relation to slightly tricky issues, the answer to which is rarely obvious, especially given that, as the Italian and Swiss agents have emphasised, reviews are conducted at a particular point well before the Court has to give any ruling. It is consequently frustrating for the requesting ministry to receive an answer lacking conviction, and for the agent to be subsequently contradicted by the Court. It is thus with little enthusiasm that the agent
reviews the compatibility of national legisla-
tion with the Convention.

Mr João Manuel Da Silva Miguel (Portugal)

The Portuguese system is similar to the
French and Italian systems; the government
agent’s opinion is requested where the minis-
try responsible for the bill considers it neces-
sary. The problem is consequently that his or
her opinion is sought in relation to the most
complex, unclear issues; this is compounded
by the fact that the opinion given is based on
existing case-law, and is consequently valid
only for a limited period.

Mr Vít A. Schorm (Czech Republic)

There is no definitive answer to the question
raised by the Polish government agent. A find-
ing against one state will clearly have indirect
repercussions on other states whose domestic
legal systems exhibit the same features – as a
result of actions or omissions – as those cen-
sured by the Court; nevertheless, the other
states, which will no doubt be interested in the
Court’s judgment, are under no legal obliga-
tion to comply with it. While these other states
may wish to align themselves with the solution
identified by the Court, as a preventive meas-
ure, it is therefore up to them how they choose
to do so; this choice has to be available to them
so that they can make allowances for the
requirements of their legal systems. Not being
the state found against, which has to comply
with the judgment, they are under the lesser
obligation of ensuring that their system is com-
patible with judicial interpretation. They are
bound by the “precedent” set rather than the
final judgment, and do not have to take exactly
the same measures as those adopted, with the
Committee of Ministers’ approval, by the state
in question. Following the Kudla judgment, for
example, the Czech Republic chose to adopt a
different remedy (comprising both preventive
and compensatory components) from that
implemented by Poland; the Court subse-
quently deemed this remedy to be partially
consistent with the requirements of its case-
law (the compensatory component was ruled
to be effective, while the preventive compo-
ponent was not), bearing in mind that both the
Polish and Czech solutions comply with
Article 13 of the Convention.

Mr Jean-Laurent Ravera (Monaco)

It cannot be denied that the Court’s case-law
sometimes generates uncertainties that gov-
ernment agents have to deal with in their task
of assessing the compatibility of domestic law
with the requirements of the Convention.
Although these uncertainties may expose the
agent to the frustration of having to give an
ambiguous opinion or subsequently being
contradicted by the Court, they are very
important and are part and parcel of a dynamic
“democratic society” always open to change.
Ms Marica Pirošíková (Slovak Republic)

National legislation can also be brought into line with the Convention through the intervention of a constitutional court responsible for ensuring compliance with international obligations having direct effect. This is the case with the Constitutional Court of Slovakia, whose interpretation of the Convention – with which the legislature has to comply – is sometimes stricter than that of the European Court. ★
The role of government agents in ensuring effective human rights protection

SUMMARY OF DAY ONE

Mr Arto Kosonen

Government agent of Finland

In their role in representing the states before the European Court, agents may wish to be subject to regulations setting out their specific responsibilities. Adopting such an approach in isolation, however, is likely to launch an endless debate on the degree of independence – or merely autonomy – enjoyed by agents vis-à-vis their national authorities. Given the range of views aired by agents themselves, it is important to take a flexible approach to the matter.

Agents would undoubtedly like to have more opportunities for dialogue with one another, in relation to both their respective experiences and the progress of pending proceedings; this was clear from the opinions voiced in relation to third-party intervention. Consideration must therefore be given to the form such exchanges could take.

It is also clear that some agents regard themselves as being responsible for defending their national authorities before the Court, but are more reluctant to see themselves as being responsible for upholding human rights. Agents’ professional practice transcends this opposition in a number of respects, however, since it is designed to assist the Court in its task of administering European justice: the implementation of interim measures, proposals for friendly settlements, and the submission of unilateral declarations are undoubtedly all examples of situations in which the government agent seeks to ensure the administration of balanced justice.

Under Article 1 of the Convention, the States Parties have to bring their domestic law into line with the Convention. Should every possible effort be made to ensure that national legislation and practice are compatible with the Convention, however? In any event, answers to this question vary, with pragmatic approaches coexisting alongside more systematic approaches.

There is no doubt that the compatibility of existing legislation is a complex issue. On the one hand, incompatibility may stem not from the very text of the legislation, but rather from its practical application, about which there is little the agent can do; on the other hand, the agent does not have the time or human resources to review the compatibility of existing domestic law as a preventive measure. The matter will consequently come to the fore as the result of a finding against the state in question. While it is bound up with the wider issues surrounding the execution of judgments, it is a separate issue in that it involves persuading national authorities of the need for general measures; it seems more fitting to attempt such persuasion by friendly means – interpersonal relationships, visits, written reminders and so on – rather than simply asserting one’s authority. Nevertheless, the question has arisen as to the liability of the national public body responsible for the violation found.

The task of assessing the compatibility of bills is no easier. The opinion given by the agent is confined to a text at the draft stage, and does not of course relate to its future application, which may give rise to differing interpretations and developments modifying the scope or meaning of the law. Moreover, the agent’s opinion is based on the legal situation under the Convention at a particular moment in time; the agent must therefore incorporate the possibility of a development in the Court’s case-law or even a departure from existing precedents, which naturally does not enhance the clarity of his or her opinion or make it straightforward to implement. In addition, some agents find that their task is made more arduous by the fact that, in reviewing bills’
compatibility with the Convention, they have to endeavour to balance the state’s obligations to the Council of Europe with those it has to the European Union.
Theme III: The contribution of the government agent to the execution of judgments of the ECtHR

Moderator: Ms Anne-Françoise Tissier, Government agent of France

Ms Deniz Akçay

Co-agent of the Government of Turkey

I should like to note from the outset that there is no definition of the government agents’ role, or even a substantive reference to it, in the Convention, the Rules of Court or the Committee of Ministers’ rules on the execution of judgments of the Court. The matter was not discussed in the process of drafting Protocols Nos. 11 and 14.

While this approach is perfectly understandable from an international public law perspective, it has to be said that separate bodies have recently been set up within some monitoring mechanisms to act as coordinators or points of contact for national authorities. Article 15 of the Convention for the Prevention of Torture clearly calls for each state to designate an authority to receive notifications from the Committee. It also invites governments to notify it of any liaison officers they may appoint.

Many agreements on criminal cooperation also provide for the designation of national authorities to act as liaison officers.

Even monitoring mechanisms unrelated to conventions or agreements, such as the European Commission against Racism and Intolerance, also have provision for national liaison officers.

The fact that there is no reference to a government agent or national authority in the system established by the Convention in 1950 may be put down to a fundamental assumption – indeed, a fundamental gamble – on the part of its authors, who believed that the Convention’s supervision mechanism was more likely to be concerned with intergovernmental applications, and that in any event few applications would come before the Court once the Commission had dealt with them.

A more interesting question, of course, is why no thought was subsequently given to defining the role of government agents in the process of drafting Protocols Nos. 11 and 14, when we knew that the initial gamble had failed to come off owing to the rapid rise in the number of individual applications.

Why was this? Perhaps a certain momentum had built up; after all, why add a separate, “visible” new element after more than 50 years, when the focus was on restructuring the system around a single, more efficient Court?

There is another reason too, however: institutional practices had become ingrained in 50 years of operation. By and large, it was regarded as preferable for each national legal system to have the freedom to select or appoint its own agent, with the result that there was no uniformity as to the ministries responsible for recruiting or appointing agents; in addition, agents were not in it for the long haul, with many of them holding the post pending
another appointment. Let us be honest: being an agent did not, and still does not, constitute a clearly defined career path in every state.

Although new Council of Europe member states have opted to appoint agents and set up agent’s offices, therefore, this has not become standard practice.

As far as “collective” relations with the Court are concerned, there is no structured, collective communication with it other than the biennial meetings with the Registry and members of the Court.

As for the Committee of Ministers, I remember a proposal for regular meetings of agents in their capacity as execution officers. Incidentally, a more elaborate version of this proposal called for meetings of agents to be held for the purpose of supervising execution.

These proposals were not followed up, however. Unless a specific appointment was made, the position of agent was an abstract concept prior to Recommendation Rec(2008) 2, and in most instances this is still the case; in any event, there is no clear definition of agents’ role.

Notwithstanding the fact that there are no uniform rules or, in particular, common professional standards, the supervision of the execution of judgments has grown phenomenally over the last 20 years.

Execution has now become an “art” comparable to that of defending states before the Court, with its own principles and objectives.

Incidentally, the concept of execution of judgments itself is mentioned only in a single, short article of the Convention. It should be borne in mind that Article 41 of the Convention, on “just satisfaction”, encroaches on the execution process somewhat by accepting from the outset that “the internal law of the High Contracting Party” may allow “only partial reparation to be made” for the consequences of a violation.

In the view of the Convention’s authors, therefore, the execution of judgments was already a secondary concept, confined to any general measures that might be necessary.

Only Recommendation Rec (2008) 2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights ventures to identify a national authority responsible for playing at least a co-ordination role in supervising the execution of the Court’s judgments.

This authority may be the agent, but does not necessarily have to be, since the term “agent” is never used; instead, the term “co-ordinator” refers to an authority whose role may be analogous to that of the agent.

Given the wide variety of national practices, the recommendation did not go as far as specifying the agent as this authority; as a rule, the nature of the duties expected or advocated by the recommendation may, however, be said to coincide more or less with those of agents.

What specific role is, or would be, played by an agent-like authority able to help speed up the process? Are we pushing on doors that are already open? Lastly, while it is true that the recommendation’s expectations of this agent-like authority are no doubt important, the latter’s role – let us be realistic – is not critical.

In short, the recommendation asks the co-ordinator to:

- acquire relevant information,
- liaise with persons or bodies responsible at the national level for deciding on the measures necessary to execute the judgment,
- and, if need be, take or initiate relevant measures to accelerate the execution process.

Although important, these three expectations are not critical, and will prove even less adequate where more serious problems arise, necessitating political decisions either at the highest level of government or in conjunction with government decision-making by national parliaments. In my view, it is ridiculous to think that these three “tasks” will make an agent the deus ex machina of full and rapid execution.

The recommendation gets it right, however: it is the member state’s responsibility to:

- ensure the existence of mechanisms for effective dialogue and transmission of information between the co-ordinator and the Committee of Ministers,
- take the necessary steps to ensure that all judgments are executed,
develop effective synergies between the different authorities,
identify as early as possible the measures required for this purpose,
prepare action plans,
take steps to inform the various players in the execution process,
disseminate the vade mecum concerning execution of judgments of the Court,
as appropriate, keep their parliaments informed of the situation concerning execution,
where required by a “significant persistent” problem, ensure that all necessary action is taken at the highest political level if need be.

In terms of the tasks to be performed, and above all the obligations and responsibilities to be taken on, the role of the focal point – described as a “co-ordinator” assigned a number of tasks which, albeit important, are fairly administrative in nature – clearly bears no relation to the other, more general responsibilities falling to the contracting state.

Nevertheless, the system outlined in the recommendation does not place any restrictions per se on a specific state that might wish to assign some or all of the other responsibilities listed in Recommendation Rec (2008) 2 to its focal point, co-ordinator or, better still, agent.

At the same time, it is – perhaps – important not to lose sight of the fact that agents’ role in the execution process is not the same as that they perform before the Court, where, with all the information obtained from their authorities to hand, they argue as qualified lawyers for a ruling of inadmissibility or a finding that no violation has occurred.

The execution phase is extremely sensitive, in that the finding of a violation comes between the agent and the authorities. In a way, the judgment thereby turns the government agent into the Committee of Ministers’ agent as well.

In this new scenario, the agent has to convince the authorities to take measures at odds with their position, which in some cases he or she may even have argued as the government’s agent before the Court.

This is particularly obvious where the Court highlights systemic problems necessitating legislative or constitutional amendments, regulatory, administrative or educational measures, or – more serious still – both.

In other instances, it can be difficult to adopt individual measures in so far as it may be necessary to reopen court cases in which a final judgment has been handed down. Alternatively, it may be necessary to reopen situations that might call into question the gains made by a third party.

In relatively straightforward cases that do not give rise to objections, therefore, a judgment’s execution may be sped up by means of rapid communication with the authorities concerned, under the agent’s supervision.

In the event of structural problems, however, agents may be in an awkward position: firstly, agents themselves must be convinced of the need for the measures to be suggested to the authorities. There is always a moment of inner struggle – resulting from the law of inertia in the face of a finding of a violation – against the outcome one has fought long and hard to avoid. It is difficult to “convert” to upholding the Court’s judgment when one has previously defended – for several years in some cases – contentions and arguments that the Court rejects one by one in its judgment.

Naturally, objections may also be raised by the authorities, for the judgment represents a challenge that they too must overcome via the execution process.

In terms of the responsibilities outlined in the recommendation – irrespective of the co-ordinator’s official title, for it may be assumed that the agent will be at least a co-ordinator – it should be possible to envisage a more active, and above all more practical, role for agents.

As regards the technical aspects of such intervention or initiatives (translations, dissemination and so on), we have of course heard, and will continue to hear, about a number of variations based on people’s positive or less positive experiences. Nor do I wish to dwell on the idea of systematising our responsibilities, which could not be more unlikely given the very wide range of rules to which agents are subject.
There is, however, one aspect I believe we all need to think about: the ability to anticipate at an early stage, as far as possible, those judgments that will prove difficult to execute.

Every application goes through different stages. There is a point, however, at which we may already sense that the Court will find a violation; it may have done so in similar cases, the decision on admissibility may contain statements that presage such an outcome, or, lastly, we ourselves may be aware of a structural problem inherent in the law.

In all of these scenarios, I believe we ought to be in a position to indicate to our authorities the measures that a violation might necessitate.

The new set-up outlined in Recommendation Rec(2008) 2 has given a higher profile to the role of the government agent (or the co-ordinator or national authority responsible for execution, for that matter), both before and after a finding of a violation, conferring duties and responsibilities; it is up to the agent to explore whether or not these powers are clearly defined, and to experiment far more actively where they have been assigned to him or her.

There is also every reason to continue on this path, vis-à-vis the Committee of Ministers and the Secretariat staff responsible for supervising execution as well as national authorities, so as to tread on sure ground and avoid misunderstandings that might arise at a late stage.

Another step I regard as essential in some cases is to vary the range of execution procedures by disseminating appropriate information to members of the national legal service and civil servants and providing in-service training for the staff of authorities involved in the execution process, without confining ourselves to the measure specifically required in execution of the judgment. It is not a matter of dispersing resources: on the contrary, it is a concerted strategy geared to raising the awareness of all those within the national machinery on an ongoing basis.

I would like to close with a suggestion: in the wake of the new recommendation, it strikes me as appropriate to consider holding regular meetings between government agents and the Secretariat staff responsible for execution, along the lines of the biennial meetings with the Court. Such meetings would enable agents – without referring to individual cases, on the same basis as the meetings with the Court, moreover – to raise any problems they may encounter in respect of execution and discuss various aspects of execution in general with the Secretariat staff responsible for supervising judgments.

Mr Francesco Crisafulli

Co-agent of the Government of Italy

When I arrived in Strasbourg in May 2000, I – just like my predecessor, whose deputy I was – wore two quite distinct hats: that of the Delegation’s legal adviser, which I put on to attend the Committee of Ministers’ human rights meetings; and that of co-agent, which I respectfully removed in the courtroom to plead before the European Court of Human Rights. Each of these hats linked me to a different chain of command: one involving the Permanent Representative, and the other the agent. It is true that both chains of command were headed by the same entity: the Italian Government, represented, moreover, by the same Ministry of Foreign Affairs, to which both diplomatic officers and the government agent’s office are attached. There was nevertheless a clear distinction between them, which was not without practical implications.

I virtually had a free hand in my role as agent: the highly technical nature of the task of defending the government before the Court left me a great deal of room for manoeuvre, particularly given that in Italy the management
The role of government agents in ensuring effective human rights protection

structure within the agent’s office has always been purely formal and theoretical. In practice, its three members (agent, co-agent and deputy co-agent) have always been on a largely equal footing, giving one another considerable freedom in dealing with cases, in a spirit of both co-operation and independence that is very typical of the judicial system (from which the co-agent and deputy co-agent have traditionally been appointed), where the only kind of hierarchy accepted is one based on experience. Incidentally, all the work relating to the European Court of Human Rights is assigned to the two co-agents based in Strasbourg, while the titular agent concentrates on his or her other duties, including proceedings before the Luxembourg Tribunal and Court.

At the Committee of Ministers’ human rights meetings, on the other hand, I represented (on behalf of the Permanent Representative and in my capacity as legal adviser) both the complex political hierarchy of the Ministry of Foreign Affairs, which speaks for the government on the international stage but is often unfamiliar with violations found by the Court and the obligations that may derive from such judgments, and the Ministry’s no less complex relationships with the other ministries, administrative departments and authorities that are generally responsible for the measures to be taken in execution of the judgment, but in some cases have little sense of the European and international dimension of their tasks. I was subject to more constraints when wearing this hat. In fact, my work as a legal adviser was largely that of a liaison officer: presenting to the Deputies any information received from the capital, which then had to be confirmed in writing (giving rise to legitimate doubts as to the point of this solemn yet needlessly long and impractical procedure, which resulted in an overhaul of these working methods); taking note of the Secretariat’s comments and requests; relaying these comments and requests to the relevant ministries; and awaiting further information.

The purely administrative nature of my position as legal adviser, the more rigid supervisory structure, the primarily “ministerial” approach taken to execution matters and the international political factors that sometimes influenced the latter all impeded more incisive, proactive measures on the legal adviser’s part, theoretically prevented any direct contact with non-ministerial authorities and relegated the adviser to the sidelines of the execution process. Although legal advisers felt able to take their action further on some occasions, this came down largely to individual initiative, personal standing and experience, the relative latitude and various special relationships that may be afforded by membership of the judiciary, especially in dealings with the courts, and a certain “Mediterranean” flexibility that accommodates the odd departure from rules and procedures. On the whole, however, especially at the beginning, such initiatives were greeted with polite interest – albeit condescending at times – and their results were less than impressive.

Things have changed since then.

Some of you may remember the plea I myself made at the meeting of government agents in The Hague, organised by the Dutch chairmanship in December 2003. I argued that agents should participate directly in the human rights meetings and have greater, more direct involvement in the judgment execution process; I also argued for a review of the agent’s position within the institutional structure of our states (a review I regarded – and still regard – as being closely bound up with agents’ influence on the implementation of judgments, and thus of the Convention itself). Needless to say, I am under no illusion that I helped spark the changes we have been seeing for some time, but I do flatter myself that I at least predicted them.

It is a fact that more and more member states have appointed specially qualified legal experts to their representations; some of these experts also hold the post of co-agent. Other countries have adopted the practice of sending agents or their staff to Strasbourg for the human rights meetings, either to take part directly or to provide technical assistance to the diplomats responsible for presenting the government’s position, at least for those meetings in which particularly sensitive cases concerning the state in question are under discussion. Lastly, it appears to be becoming increasingly common for agents or their staff to be assigned the task of conducting evalua-
tions and bilateral discussions in conjunction with the Secretariat with a view to resolving the various problems that may arise in the course of an execution procedure.

These developments in states’ practice have not been confined to a purely domestic framework; indeed, they reflect a change in the attitude and practice of the Council of Europe organs. I cannot say which of these gradual changes started first or whether there is a causal link between them – and if so, I could not say which was the cause and which the effect. I note, however, that as well as coinciding chronologically, these changes appear to be related and interdependent. In this connection, I feel it is necessary – and only fair – to add that similar changes have been taking place within the Execution Department: a greater focus on legal and technical aspects of the execution of judgments and the need to avoid making them a pretext for general political stances or pressure; a growing willingness to listen to the delegations and engage in open, transparent bilateral dialogue; the considerable care taken to ensure that judgments and the information about national law supplied by the defendant state are analysed scrupulously by both sides; in short, a pragmatic commitment to the practical outcome of the exercise and a genuine awareness of its inherent limitations. For my part, I welcome this approach and am delighted to see it continue.

The Committee of Ministers’ “new” working methods, drawn up at the Norwegian chairmanship’s behest nearly four years ago, no doubt represent an important stage in this overall development; they are still subject to verification, evaluation and, where necessary, minor adjustments by the successive chairmanships. These new methods have made the human rights meetings a great deal more productive. In particular, they put an end to the pantomime whereby each case was called by name, even if there was nothing about it that warranted discussion, just so that a delegation could drone out a string of information which was impossible to retain (and had to be reconfirmed in writing in any case) or declare, with numerous circumlocutions, that it had nothing to say (which is generally done more quickly in silence). However, they also promoted the bilateral communication between the Secretariat and the delegations I alluded to earlier; in so far as they enriched the content of the human rights meetings and made them more technical in nature, they also encouraged the states to send their agents or specialised legal advisers – who were either permanently based in Strasbourg or came from the capital – to them.

The Norwegian initiative was part of a process of reforming and streamlining the procedure for supervising the execution of judgments; a more efficient procedure was widely seen as a prerequisite for ensuring the long-term operation of the entire Convention system. Specialists never overlooked or underestimated the importance of executing judgments and bringing national legal systems into line with the requirements of the Convention, as gradually revealed by the Court’s case-law. It was particularly in the light of the declaration adopted in Rome on 4 November 2000 by the ministerial conference held as part of the celebrations marking the Convention’s 50th anniversary (a major event, which was already mentioned in the course of yesterday’s proceedings), however, that the issue of execution of judgments really took on, in the minds of all those involved in the mechanism for protecting fundamental rights, the crucial importance we now place on it. Since then, member governments, the Committee of Ministers, the PACE and, last but not least, the Court itself (which, increasingly often, is gradually overcoming the restraint it has always shown in respect of execution and including paragraphs devoted wholly and specifically to the application of Article 46 in its judgments, alongside those relating to the application of Article 41) have made resolute efforts – each within its own particular sphere – to improve execution procedures and mechanisms, sustained by a day-to-day awareness of their importance with a view to ensuring effective protection of fundamental rights in Europe and “rescuing” the Court from drowning under the rising tide of applications.

Right from the earliest stages of this wide-ranging reform, it became obvious that the execution of judgments (notwithstanding all that is specific, distinctive and individual about this operation) was closely bound up with efforts to prevent violations, resolve systemic
problems and develop domestic remedies: in short, to bring domestic law into line with the requirements of the Convention, as part of a circle (vicious or virtuous as the case may be) centred on a commitment to respect and guarantee human rights, extending to all aspects of the principle of subsidiarity and embracing the “constitutional” dimension of Convention law.

I think the broader concept of “execution” may thus be said to include certain measures – such as verifying the compatibility of laws and bills, advocated by Rec (2004) 5 of the Committee of Ministers – which, without being directly related to the implementation of a specific judgment, nevertheless anticipate general measures that may one day prove necessary, when – sooner or later – the application of flawed legislation has given rise to a finding of a violation.

The practical developments I mentioned earlier, coupled with the wide-ranging process of reflection I have just outlined, recently led to the adoption of Rec (2008) 2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights. Deniz Akçay has spoken at length on the subject, and I endorse her comprehensive, relevant analysis.

It is true that the recommendation does not expressly mention agents, that it contains few details conducive to a precise definition of the co-ordinator’s role and that it assigns the co-ordinator only incidental tasks. Those who, like myself, were involved in the preliminary work are aware of the extent to which this undeniable element of “uncertainty”, or perhaps reticence, was a product of both the considerable variation in our respective constitutional and legal systems and the no less considerable variation in our countries’ mentalities and cultures, geography and demographics and political and institutional traditions and practices, in short, the constraints Ms Akçay mentioned earlier. The need to respect these specific national features while carving out a path that is both accessible and practicable for all, yet also able to take us forward rather than locking us into a loop with no way out and no prospect of progress, was a major challenge for the experts responsible for drafting the text of the recommendation. They rose to it, and in my view the recommendation, notwithstanding all its limitations, is evidence of their success; they took a sizeable step in what I regard as the right direction: giving agents a central role in the execution process.

It strikes me as absolutely self-evident that the government agent’s involvement enhances the judgment execution process; in my view, we have a practical illustration of this before our very eyes, which is worth all the arguments in the world. I have already sung the Execution Department’s praises, and do not wish to detract from its members’ personal merits at this point; I am sure, however, that they have been spurred on, stimulated and encouraged in their work by the Director General, Philippe Boillat, whose wealth of professional experience stems – as if by chance – from his long and brilliant career as the Swiss Government’s agent. Watching the way he operates and deals with the problems raised by the execution of judgments, one cannot help but see the signs of a long-standing familiarity with the task of representing the state before the Court on a daily basis, and the intimate, detailed knowledge of the Strasbourg case-law that goes with that. Do we need convincing any further? Just think how often each of us, when examining a new application and starting to sketch out our defence, imagines the implications the various possible outcomes of the proceedings might have in terms of execution, and bases his or her arguments and the order of his or her conclusions (main or subsidiary) on these prognoses, in an attempt to avoid at least the finding that would give rise to the most significant individual or general measures. It is clear that the agent, who will often have anticipated the requirements of the execution process before the judgment has even been given, is undoubtedly the most appropriate person to interpret the stipulations deriving from the decision once it has been handed down.

For my part, therefore, I have no hesitation in advocating an interpretation of Rec (2008) 2 that places the greatest possible emphasis, at national level, on the role and position of both the “co-ordinator” and the agent, on the understanding that these two players in the execution process may either be one and the same, subject to certain conditions, or remain distinct.
As you know, Italy has had some difficulties in relation to the execution of judgments, for instance in bringing its domestic law into line with the Convention and ensuring the effective exercise of the responsibilities deriving from the subsidiarity principle. It would take us off on a tangent to analyse them here; suffice it to say that these difficulties were – and still are, in so far as they may still be ongoing – the result of various factors: both the dualist approach to international public law and a certain lack of training in international human rights law among legal professionals (particularly civil servants and members of the national legal service); the position assigned to treaties (and the Convention in particular) in the constitutional system of sources of law, which is not always clearly defined by doctrine and case-law, along with a number of distinctive features of the Italian political and parliamentary process; and the fact that rights under the Convention have almost completely superseded constitutional rights, coupled with differences between the European Court’s interpretation and that of national courts (including the Constitutional Court), as well as a degree of rigidity in the domestic legal system.

Since the ministerial session of May 2004, which represented a crucial stage in the process of reforming the European system for protection of fundamental rights, and thanks to the 2005 amendment of Article 117 of the Constitution (although in actual fact the reasons for the latter were politically unconnected to a desire to ensure better protection for rights under the Convention), Italy has embarked on a process that has already yielded significant results; it is to be hoped that it will serve as a starting point for positive changes in the area under discussion.

Chronologically speaking, the first – and perhaps most spectacular – new developments arose in the parliamentary system. They resulted partly from the steps the PACE has started to take in respect of the execution of judgments, beginning with Resolution 1226 (2000), and in particular the “kick-start” represented by Resolution 1411 (2004) and its threat to make use of Rule 8 of the Rules of Procedure, as well as from the active role played by the Italian parliamentary delegation and its then chairperson, Mr Azzolini, following the latter text’s adoption.

Indeed, Mr Azzolini initiated a bill (which subsequently became Act No. 12 of 2006, known as the “Azzolini Law”) which amended the 1988 Act concerning the organisation of the Prime Minister’s office by inserting a new provision on execution of the Court’s judgments. I shall return to it in more detail in a moment, but I would first like to paint a quick picture of the other measures taken by Italy.

Back in 2005, before the Azzolini Bill had even finally been passed, the Presidents of both Chambers had sent the chairpersons of the respective parliamentary standing committees two letters announcing that judgments of the European Court against Italy would systematically be forwarded and recommending that they be taken into account both in the context of examination of bills and with a view to any other initiative covered by Parliament’s constitutional powers. The Chamber of Deputies’ legal department was also asked to produce a quarterly publication summarising and explaining all the judgments handed down by the Court against Italy. This publication is aimed primarily at elected representatives and parliamentary officials, and serves as a reference with a view to ensuring that the Court’s case-law is taken appropriately into account in the exercise of parliamentary functions, particularly in respect of legislation. Lastly, a special file on bills’ “compatibility with the Convention” (similar to those put together for some years now on “compatibility with the Convention” and “compatibility with Community law”) is now systematically included in the material parliamentary departments supply to the standing committees responsible for examining bills.

In my view, these various measures effectively address – at least in theory – the requirements set out in Committee of Ministers Rec (2004) 5 as regards the preventive verification of the compatibility of bills with the Convention.

Other initiatives went hand in hand with those I have just mentioned:

- a centralised payment system under the authority of the Ministry of Economic Affairs and Finance, designed to simplify...
and speed up the payment of just satisfaction, and the introduction of an arrangement whereby sums paid by the state can be recovered from local or autonomous bodies, so that those authorities and officials whose actions are directly implicated in the finding of a violation do not escape accountability;

- more training for members of the national legal service (since 2006); further developments are expected, following the establishment of a legal service training college;

- two judgments of the Constitutional Court (Nos. 348 and 349 of 2007) which, on the basis of the amended text of Article 117 of the Constitution (requiring the central and regional legislatures to comply with Community law and international treaties), set aside legislative provisions (relating to compensation for compulsory purchase or illegal dispossession by the authorities) that the European Court had deemed contrary to Article 1 of Protocol No. 1; over and above their specific subject-matter, these judgments are extremely important in terms of the more general incorporation of the Convention and its case-law into domestic law (I talked about this briefly in an earlier contribution and shall not go back over it).

Coming back to the Azzolini Law, this is the wording of the new provision inserted into the Act on the organisation of the Prime Minister’s Office:

“The Prime Minister, either directly or by delegating a minister:

…

*a-bis* shall promote the fulfilment of the government’s responsibilities arising from judgments of the European Court of Human Rights in respect of the Italian State; shall immediately communicate the said judgments to the Chambers so that they can be examined by the competent parliamentary standing committees, and submit an annual report to Parliament on the position as regards the execution of the said judgments”.

To a large extent, this provision is modelled on that (set out in the preceding paragraph) relating to Community law, particularly as regards the consequences of judgments of the CJEC. This development is politically significant, since for the first time an analogy – if not an equivalence – is implicitly established between EU law, which has been fully acknowledged within the Italian legal system for decades, and Convention law, which, by contrast, is struggling to be incorporated.

Another interesting aspect is the fact that this new task is assigned to the Prime Minister rather than the Minister for Foreign Affairs: given that, within the constitutional system, the Prime Minister is responsible for overseeing and co-ordinating the government’s activities and ensuring the consistency of the executive’s policies, this decision implicitly makes the implementation of the Court’s judgments a central focus of political activity.

A comparison between the Azzolini Law and Rec (2008) 2 highlights some obvious similarities.

For instance, in my view the fact that the task of “promoting” the execution of the Court’s judgments is assigned to the Prime Minister, either in person or through a delegated minister, is wholly consistent with the suggestion that the role of “co-ordinator” be assigned to an individual or body with the powers and authority mentioned, in particular, in points 1, 5 and 10 of the recommendation. I would even go so far as to say that it reflects a desire –voiced by some delegations during the preliminary work, but not unanimously approved in the end – to have the text require co-ordination “at a high political level” or “at the highest political level”.

The recommendation and the Azzolini Law are also consistent with one another in that they provide for Parliament to be kept informed; point 9 of the recommendation envisages this as a possibility where necessary (“as appropriate”), while the national law stipulates that it is a task the Prime Minister must perform monthly in the case of information about new final judgments, and annually in the case of the report on the position as regards the execution of judgments; an initial report to the Italian Parliament was submitted in 2007, and the 2008 report is being prepared. This part of the Act must be read in conjunction with the initiatives of the President of the Chamber of
Deputies and the President of the Senate, which I mentioned earlier.

As for the specific theme under discussion today, on the other hand, it is true that the government agent is not mentioned in either the Act or the order of the Prime Minister laying down practical rules with a view to its implementation. In fact, the latter refers to “prior liaison with the Permanent Delegation of Italy to the Council of Europe” (Section 1 § 3) and “links with the Delegation” (Section 1 §5), in relation to – respectively – the communication of judgments to the relevant authorities with a view to commencing “the procedure of implementing the obligations arising from the said judgments, in accordance with Articles 41 and 46 of the Convention” and the promotion of friendly settlements. This phrasing, albeit imprecise, has been unreservedly interpreted as referring to the co-agent’s office, located within the Permanent Delegation, which in practice is now directly and systematically involved in the aforementioned activities, as well as in preparing the annual report to Parliament.

Looking at the various tasks of the “co-ordinator” mentioned in point 1 of the recommendation, the first two are primarily technical in nature; the third, however, is not. Depending on the specific features of different legal systems, it may be that the power to “take or initiate relevant measures to accelerate” the execution process is confined to those in a particular position of authority, which may not necessarily be the case for the agent.

More generally, among the various suggestions the Committee of Ministers has made to the contracting states by adopting the text in question, some can easily be regarded as tasks assigned to agents, while others call for the involvement of an individual or body vested with both institutional and political authority. Agents could no doubt be given responsibility for the measures listed under points 3, 4, 7 and 8, for instance, without any need to alter their status. On the other hand, it is already more debatable whether, given the existing state of affairs and their status in most of our countries, agents can “facilitate the adoption of any useful measures to develop effective synergies between relevant actors in the execution process at the national level either generally or in response to a specific judgment and [...] identify their respective competencies” (point 5 of the recommendation). As for preparing action plans, “if possible including an indicative timetable”, it strikes me that this is a task necessitating the ability to anticipate or decide on the adoption of measures that may come within the purview of different authorities (such as certain individual measures or general measures entailing the adoption of regulations), autonomous entities (such as regions or Länder) or even constitutional organs (where, for example, the judgment requires legislative amendments for which parliamentary procedure must be followed). In my view, therefore, the preparation of action plans inevitably calls for the involvement of authorities enjoying institutional and political power enabling them to anticipate or even determine – at least partially – the operational decisions to be made, the time needed to implement them, possible ways of influencing the course and duration of constitutional procedures and so on. It seems to me quite plain, therefore, that a high-level political and institutional authority must be involved.

Even so, such involvement does not always suffice: it is not unusual, in fact, for the execution of a judgment of the Court to necessitate the adoption of a court decision (an individual measure or a general departure from existing precedents), which by definition cannot be subject to any influence on the part of other government authorities. This is a major problem; we are all aware, I think, of the contradiction – one we have all come up against, and which is inherent to the system – between the concepts of separation of powers and the autonomy and independence of the judiciary, on the one hand, and the responsibility, on the other hand, that international law and practice place on the government for acts or omissions that, in some cases, are part of the judicial function and consequently cannot be imputed to the government, and which the latter cannot rectify without infringing on the court’s prerogatives. This is too vast and far-reaching an issue, however, for us to be able to address it here.391

How, then, can an enhanced status for agents – which I believe to be an implicit aim of
Rec (2008) 2 – be reconciled with the wide variety of tasks the Committee of Ministers suggests that the member states perform as part of the execution process? In practice, two different approaches may be identified.

The first – adopted, I believe, by some of our states, although they are still in the minority – involves assigning the role of agent to a public figure enjoying democratic legitimacy who is part of the government team (such as a minister, deputy minister or state secretary). This solution, whereby the task of conducting technical and legal analysis of execution issues is merged with that of developing and implementing the necessary political will to take the required measures, has the advantage of reducing the number of handovers and simplifying the process by concentrating it in the hands of a single institutional figure. This ought to make execution easier and faster, at least in theory. It also has a number of evident disadvantages, however. Firstly, the agent’s role is directly linked to – and spectacularly dependent on – the uncertainties of the political process and governmental upheavals: the agent thereby becomes the spokesperson for a majority, a government, instead of the government (or rather, the state) in his or her objective function of representing the state internationally as a continuous constitutional entity over and above changes in political direction. Secondly, bearing in mind the need to find a single individual who both possesses certain technical skills and enjoys political and democratic legitimacy, it may give rise to constraints that are difficult to cope with, especially for small countries. Thirdly, combining the two roles in a single individual would impoverish the dialectical confrontation – albeit difficult at times, but so very constructive – between the dual perspectives of legal analysis and political sensitivity. Lastly, there is a danger that a member of the government may be too busy with other urgent problems and end up delegating all the tasks relating to the European Convention to colleagues with a greater or lesser degree of expertise, rather than taking a personal interest in them, thereby reducing his or her contribution to a mere façade and nullifying many of the benefits of this solution.

The second approach – adopted by a majority of our states – involves assigning the role of agent (and possibly that of co-agent) to one or more civil servants who are part of a particular ministry’s administrative structure in one way or another, while giving a member of the government (no doubt the minister in question) political responsibility for execution. This is more or less the solution adopted in Italy. The agent – or rather the co-agents, in practice – thereby continues to act in a technical consultancy capacity, but deals with a high-level political figure (the Prime Minister or delegated minister) who is expressly in charge of promoting measures to execute judgments; the latter thus has specific responsibility in this area and a duty to liaise with Parliament (which in turn has the power to direct the government’s actions and exercise political supervision).

This type of arrangement remedies certain shortcomings that may be identified in the other model, as I have just said, but it is hardly innovative and by no means resolves the asso-
cated difficulties, especially in “big” countries, or those whose institutional, bureaucratic and cultural traditions impede, or totally prevent, direct contact between agents and their political interfaces. In Italy, for example, it would be impossible for me to explain a problem or possible solution directly to the Prime Minister or the delegated minister without going through (and being “filtered” by) the office responsible for tasks connected with the judgment execution process under the order implementing the Azzolini Law (the Department of Legal and Legislative Affairs within the Prime Minister’s Office); in turn, the latter presumably has to go through the Prime Minister’s Private Office or the General Secretary. In the best-case scenario, this clearly delays communication and hence action; in the worst-case scenario, the issue or possible solutions may be presented to politicians in a manner that fails to reflect the agent’s phrasing, or may not even reach them at all.

For my part, I have a different vision of what ought to be the agent’s position.

It is true that agents are their countries’ lawyers before both the Court and the Committee of Ministers during the execution phase. Yet their role is that of a representative of the state rather than the spokesperson of a particular government (I have already explained why the latter view of agents strikes me as inappropriate). This is not all, however: agents are also bound by professional ethics which, being based on the fundamental principles set out in the Preamble to the Convention and Article 1, require them to defend their countries in the higher interest (common to all contracting states) of the mechanism for the protection of fundamental rights. They thereby act as officers of European justice and focus primarily on arguing for their national legal systems – both in the legislation enacted and in the enforcement of that legislation – to be brought into line with the Convention.

Even at the stage of pleadings before the Court, the agent’s position differs significantly, therefore, from that of private lawyers, whose freedom reflects the right of those they represent to defend themselves by all legal means, yet at the same time is also limited by respect for that right, which confines it to strategic and technical choices. Agents must be able to enjoy a different kind of freedom: the freedom to identify in all conscience the point of equilibrium between defending a legal system that claims to respect human rights, on the one hand, and effective protection of those rights as defined by the Convention and its case-law, on the other. They must therefore fully understand the facts of the case brought before the Court (in particular by obtaining all relevant information), take on board the defendant state’s obligation to co-operate with the Court, and “negotiate” with their own authorities – with an appropriate degree of autonomy – the “tenable” position the state is to adopt before the European Court.393

Agents’ autonomy is a more pressing requirement at the execution stage, however.

Agents must be able to take on, with the proper degree of autonomy, the role of interface between national authorities and the Committee of Ministers. In respect of the Committee of Ministers (and in their contacts with the Secretariat, which represent a crucial stage in the technical preparations for meetings), agents must be careful to identify in precise detail the real requirements deriving from the judgment and oppose any demands going beyond the individual and general measures that are actually necessary; indeed, discussion must remain within the boundaries inherent to the nature and purpose of the exercise, without excesses aimed at turning supervision of the execution process into an opportunity to impose general policy decisions in a particular area on the contracting states, since this would overstep the specific obligations laid down in Article 46 of the Convention. At the same time, however, agents must also be able to exert a certain influence on national decision-makers so as to encourage them to take the measures that are actually necessary and overcome the resistance that may – for often understandable reasons, relating for example to the pressure of public opinion or attachment to certain legal or cultural traditions, whose flaws we find it difficult to see – sometimes impede the execution process.

393. Yet without expressing positions contrary to those of their governments, as Ms Tissier has pointed out.
In order to perform the latter task effectively, agents must be able to exert a moral and, to some extent, “political” authority that is not derived solely from their personal and professional standing (although it goes without saying that these aspects are still crucial), but also based on their official status and institutional position.

I am, of course, suggesting that agents be granted any kind of direct power to take the relevant decisions: this would be an anomaly in terms of both their role within the Convention system and the structure of our constitutional systems, based on the fundamental principles of democracy and separation of powers. Accordingly, I would have reservations about a solution whereby the agent’s duties were assigned to a member of the government. At the same time, I do not think that the position of mere ministerial civil servants (irrespective of their level) suffices to enable agents to develop the full potential of their role. Rather, what I have in mind is a middle road in between these two scenarios: agents who can serve as the main direct point of contact for decision-makers, approach the latter without going through intermediaries, be consulted regularly in the course of the execution process (and even, outside this rigorous framework, in connection with any activity aimed at modifying the legal system which might affect its compatibility with the Convention), discuss with them – from a relatively autonomous position – the whys and wherefores of execution and the proposed measures, help resolve problems and, to some extent, freely assert their views and exert “political” pressure (in the broad sense) in support of the required measures.

I am convinced that this would be very useful whenever the required execution measures are executive (regardless of whether they involve the exercise of government prerogatives in the true sense or administrative authorities’ functions) or legislative in nature. A different problem clearly arises where the implementation of the Court’s judgment calls for a court decision. In such cases – which are by no means rare – we must be realistic and show a degree of humility. It is not a question of undermining the foundations of these very principles, in the name of human rights and the rule of law, by trying to diminish the scope of the autonomy and independence of the judiciary. It should be made clear that bringing a domestic court decision into line with the requirements of a judgment of the Court (and, more generally, bringing national case-law into line with the standards laid down by the European Court) inevitably involves lengthy, patient efforts to train and educate judges and prosecutors, persuasion and the deliberate, spontaneous agreement of the courts; there can be no room for short-cuts whereby the executive (which is formally responsible before the international authority) has an influence over the judiciary (which bears fundamental responsibility and alone holds the key to the solution), without serious adverse effects on the principles of the rule of law and the Convention system’s very credibility. Having said that in order to prevent any misunderstanding in this respect, I am nevertheless of the view that the type of agent I have in mind could play a significant role in persuading the courts, while fully respecting the judiciary’s prerogatives.

In practical terms, therefore, what should be done to give form to my image of the “ideal” agent? My goal is not, of course, to provide you with a formula applicable to all our countries and constitutional systems. I can only suggest avenues to explore, drawn from Italy’s experience in other areas that strike me as bearing some similarity to that under discussion.

In my view, the aim should be for agents to possess excellent professional and moral qualities; these qualities should not simply exist, but also be apparent from their professional background, careers and the importance of the posts previously held. In practical terms, I would say, for example, that agents should be selected from among lawyers who have held – or who possess the necessary qualities to hold – the highest judicial functions (in the Supreme Court, the Court of Cassation, the Constitutional Court or the State Council, for instance). Agents should also be formally nominated by a supreme authority embodying the nation as a whole: they could, for example, be appointed by the head of state (as is often the case with high-ranking judges, for example). Prior to this formal nomination, various different authorities should be involved in designating the agent, so as to confer both the stamp of
impartiality and a degree of indirect democratic legitimacy: with reference to Italian practice as regards the designation, for example, of what are commonly known as “independent authorities”, I would envisage consultation between the presidents of the supreme courts (such as the Constitutional Court, the Court of Cassation or the State Council), and between the heads of representative organs (were we to adopt this approach in Italy, we would probably involve the presidents of the two Chambers of Parliament, following consultation with the leaders of the parliamentary groups), finally culminating in collective deliberations within the Cabinet, which would formalise the proposed nomination to be submitted for adoption by the head of state. Other procedures could also be envisaged, of course, such as consultation with relevant civil society groups (associations of legal professionals, NGOs and so on).

To my mind, agents having been appointed in this way would enjoy both a close relationship with democratic institutions and civil society and a degree of independence, as well as authority of their own not derived from their operational attachment to a ministry or executive organ. They would then be in a better position than civil servants (even high-level civil servants who are personally capable and respected) to make their voices heard – although, I repeat, without having the power to take operational decisions themselves – in those arenas in which the political process needed in order to comply with judgments of the Court is played out.

Thank you for your attention.

Discussion

Mr Jakub Wołąsiewicz (Poland)

I was invited by the organisers of the seminar to present the Polish experiences regarding matters related to the execution of judgments of the European Court of Human Rights in cases concerning Poland.

The aim of complaints proceedings before the European Court of Human Rights is to supervise the law and practice of states as regards to rights and freedoms protected by the Convention. If breach of those rights and freedoms is declared, the Court is issuing a judgment and execution proceedings begins. Time to time, execution of the judgment is even more important than proceeding before the Court itself. The main purpose of execution of judgments, except redress on behalf of a claimant, is to identify the cause of breach. If this cause of breach is structural, then it is a clear sign to change wrong law or practice. Only such activity may block new breaches and, in consequence, new judgments. In Poland we came to those conclusions after 15 years.

On 17 May 2007 the Council of Ministers of Poland adopted the "Action Plan of the government for the implementation of the judgments of the European Court of Human Rights in respect of Poland" (Program Działań Rządu w sprawie wykonywania wyroków Europejskiego Trybunału Praw Człowieka wobec Rzeczypospolitej Polskiej).

The elaboration of the Action Plan was proposed by the government agent before the European Court of Human Rights. In this respect, he took into account conclusions drawn from the Report on his activities in 2001-2005. In those conclusions the government agent identified the most important areas which in view of the Court’s case-law in respect of Poland required taking general measures.

This initiative was approved by the Minister for Foreign Affairs who presented it to the Council of Ministers in February 2006.

Bearing in mind that the execution of the Court’s judgments falls within the competence of various Ministers, the government agent
The role of government agents in ensuring effective human rights protection

proposed the establishment of a special inter-ministerial Task Force acting at the Minister of Foreign Affairs which was to be charged with the preparation of proposals for the Action Plan. The initiative was endorsed by the Council of Ministers and the Task Force started its operation in August 2006 upon the Ordinance of the Minister for Foreign Affairs.

The experts appointed by 14 Ministers (for Construction Issues, National Education, Finance, Economy, Maritime Economy, Science and Higher Education, Labour and Social Policy, Agriculture and Rural Development, State Treasury, Justice, Interior and Administration, Foreign Affairs, Transport and Health) participated in the Task Force. Their works were supported also by the General Solicitor of the State Treasury (Prokuratura Generalna Skarbu Państwa), State Electoral Commission and Central Board of the Prison Service.

The draft Action Plan was presented by the Task Force to the Council of Ministers in November 2006. After additional inter-ministerial consultations it was approved by the Council of Ministers on 17 May 2007.

The proposals of actions included in the Action Plan aim at increasing the efficiency of the execution of the Court's judgments in respect of Poland and preventing new violations of the Convention by Poland. Thus, the implementation of the Action Plan will contribute to respect for human rights and rule of law in Poland.

The Action Plan contains proposals of legislative reforms, improvement of practice of application of law and regular dissemination of the Court's case-law among the society, judges, prosecutors, administrative organs and other public officials. The Action Plan focuses on such areas as:

rules governing the application and prolongation of detention on remand;

prevention of the protraction of judicial and administrative proceedings and increasing the effectiveness of domestic remedies to complain about the length of the proceedings;

extension of the access to a court (e.g. creation of procedures of appeal to a court in cases conducted by maritime and medical chambers, improving guarantees for persons benefiting from free legal aid or applying for exemption from court fees);

prevention of censorship of correspondence of persons deprived of liberty addressed at the Court;

increasing the effectiveness of the parental contacts with children ordered by courts;

effective realisation of Bug river claims;

introduction of mechanisms ensuring a proper balance between the interest of private owners of flats and those of tenants in the area of the state-controlled rent.

The Action Plan contains also some crucial provisions concerning the co-operation between the Minister for Foreign Affairs and other Ministers in respect of the proceedings before the Court and the execution of its judgments. In particular, the Action Plan envisages the establishment of permanent inter-ministerial Committee for matters concerning the European Court of Human Rights.

The Action Plan will serve as a basis for further actions aimed at improving Polish law and practice, as well as awareness raising of human rights. It gives an impetus for further works, including legislative reforms that would be undertaken by the relevant Ministers.

The Action Plan contains a follow-up mechanism. The respective tasks are being realised by the relevant Ministers within their competence. The Minister for Foreign Affairs assures assistance and information on the Court's case-law. Special role is played by the aforementioned Committee for matters concerning the European Court of Human Rights. The Committee is charged with preparation of reports on the implementation of the Action Plan. It may also propose solutions in case of difficulties in realising the Action Plan.

The first report was submitted to the Council of Ministers in November 2007.

According to this report, nine draft laws have been prepared in connection with various tasks envisaged in the Action Plan (some of them were introduced to the Parliament). Minister of Justice issued an ordinance which improved regulations concerning personal search of persons deprived of liberty (in connection with the Court's judgment in the case...
of Iwańczuk v. Poland). Works on a special Instruction on the procedures concerning the correspondence of persons deprived of liberty with the Court (and other international organs for human rights protection) are currently underway. An analysis of the possible reforms of administrative procedures has been commenced (e.g. local administration was asked for suggestions based on their experience).

Upon the request of the Ministry of Justice the presidents of the courts of appeal will start a regular supervision of the courts’ practice concerning the prolongation of the detention on remand, granting free legal aid and execution of judicial decisions on parental contacts with children. Ministry of Justice has prepared a comprehensive analysis of the functioning of the 2004 Law on a complaint against violation of the party’s right to have a case examined without undue delay in judicial proceedings. The conclusions of this analysis will serve as a basis for further actions in this field. Furthermore, issues concerning the case-law of the Court will be introduced to the curricula of training courses for judges and prosecutors within a newly established Centre for Training of Staff of Common Courts and Prosecution.

It is also worth underlining that certain actions suggested in the draft Action Plan by the Task Force were implemented even before its formal adoption, e.g. as regards the legislative reforms in the field of the state-controlled rent system.

On 19 July 2007 the Prime Minister established the interministerial Committee for matters concerning the European Court of Human Rights (Zespół do spraw Europejskiego Trybunału Praw Człowieka) as his advisory and consultative organ.

The demand to establish a permanent interministerial organ dealing on a regular basis with issues concerning the Convention for the Protection of Human Rights and Fundamental Freedoms as well as the case-law of the European Court of Human Rights, was formulated for the first time in the aforementioned Action Plan of the government for the implementation of the judgments of the European Court of Human Rights in respect of Poland.

The Committee is tasked inter alia with:

- preparation of proposals of actions aiming at the execution of the Court’s judgments in respect of Poland,
- analysing problems stemming from the applications communicated to the government by the Court and formulating proposals of actions,
- issuing opinions concerning the compatibility with the Convention of the most important draft laws,
- monitoring the implementation of the Action Plan and submitting reports and proposals.

The Committee constitutes a platform for the exchange of information on the Court’s case-law within the government. It raises the awareness of the European Convention for Human Rights system within the government administration.

The Committee is composed of experts of all Ministers, Chancellery of the Prime Minister and the General Solicitor of the State Treasury. It acts under the chairmanship of the government Agent before the ECHR. At present, 42 experts have been appointed to participate in the Committee who represent various departments of all Ministries and the Chancellery of the Prime Minister.

The experts of the Committee provide assistance to the government agent and his staff in connection with the proceedings before the Court and the Committee of Ministers also on ad hoc basis, outside the meetings of the Committee.

The representatives of other administrative organs, courts or Ombudsman may also be invited at the meetings of the Committee e.g. to hold exchange of views. Working groups may be established within the Committee to deal with particular issues. So far three meetings of the Committee were held with the participation of the Council of Europe Commissioner for Human Rights, Polish Ombudsman and representatives of the Council of Europe Department for the execution of judgments of the ECHR. The Committee has also decided to include in its agenda the execution of the recent judgments of the Court.

Interim report of the Committee on the actions taken to execute the Court’s judgments.
and to implement the Action Plan will be presented soon to the Council of Ministers.

Mr Chingiz Askarov (Azerbaijan)

Thanks to their status, the agent and his or her office can enter into direct contact with every national authority and have their say. The agent is appointed by the President of the Republic, and his or her office is attached to the President’s Office; moreover, his or her financial autonomy is guaranteed as part of the state budget. This explains the agent’s involvement in executing judgments of the Court from start to finish and preparing texts; the payment of just satisfaction is guaranteed under a specific budgetary heading.

Mr John Bakopoulos (Greece)

The role of the agent in the execution of European Court judgments against Greece is the one of a co-ordinator between competent ministers. The execution rests within the responsibility of the government.

The office of the agent offers its assistance for the adoption of general measures so as to establish the harmonisation of internal legislation to the Convention. Thanks to his knowledge of the Court’s case-law, the agent performs a consultative function to the Ministry of Justice in order to play a role in the preparation of drafts of law. His role is more active towards the administrative authorities because he can give specific instructions for the execution of a Court’s judgment.

In many ways the experience and the knowledge of the Agent in the protection of human rights, according to the Court’s case-law, is primary for the choice and the implementation of the appropriate general or individual measures. This central role can not only help the Court’s mission in the human rights protection, reducing the workload of the Court, but it can also promote the supervisory work of the Committee of Ministers in monitoring the effective redress, as far as possible, of the effects of the violations found.

As to the contribution of the government agent in the execution of the Court’s judgments, it is important to underline that his not only in contact with the competent authorities sharing his experience on matters of protection of human rights, but also gives concrete instructions to the latter, according to the findings of the Court.

But when it comes to the adoption of general legislative measures the initiative remains with the Ministry of Justice, while the advisory role of the Agent is always of a major importance. On the other hand where the nature of the case calls for the payment of a compensation as remedy for the violation found, it is the Agent’s exclusive competence to give the order for the implementation of the specific judgment and the payment of the awarded sum.

Mr Arto Kosonen (Finland)

The execution of a judgment finding a violation is not made more difficult by the fact that the government agent has argued that no violation occurred; it does, however, reveal the agent in a new light as the upholder of the victim’s rights. This does not differ fundamentally from the role agents play in preventing violations through the opinions they may give on the compatibility of domestic law with the Convention or in defending states before the Court, since both of these activities promote human rights.
Ms Isabelle Niedlispacher (Belgium)

The agent plays a very important role at the execution stage by advising national authorities on the action to be taken. This role is not at odds with that hitherto played as the state’s representative before the Court.

The agent has advised the state on the defence strategy to be adopted prior to the judgment; where this strategy fails as the result of a departure from existing precedents or for any other reason, the agent has a duty to advise the state on the scope for appealing before the Grand Chamber or on measures to execute the judgment. This enables the state to avoid being found by the Committee of Ministers of the Council of Europe to have defaulted, not to mention any findings of similar violations.

The agent does not have to interpret the judgment alone, but can call on the Execution Department and/or request the Court’s opinion via the Committee of Ministers.

Recommendation Rec(2008)2 on the agent’s role in co-ordinating execution is not ambiguous, but flexible enough to ensure an optimum fit with the specific situation of each state while inviting it be as proactive as possible in this area.

Ms Deniz Akçay (Turkey)

According to some of our colleagues, government agents act to uphold human rights at the judgment execution stage, even though they have previously acted as the governments’ lawyers.

I do not think these two aspects are contradictory, but not because the agent takes on the role of upholding human rights at the execution stage. The government is no ordinary “client”; in a democracy, moreover, the agent represents a legal system designed to guarantee individual rights and freedoms. This is exactly why, in my view, there is no contradiction between agents’ role before the Court and the one they subsequently take on during the execution process. At this stage, agents are also expected to help ensure that the governments they represent can fulfil their obligations to comply with the Court’s judgments; here too, there is a public interest to be upheld.

Ms Marica Pirošíková (Slovak Republic)

It is essential to prevent any problems arising in the process of executing a judgment. It is therefore in agents’ best interests to initiate positive contacts with the Council of Europe Secretariat and to make use of any they may have within the Committee of Ministers. In the Slovak Republic, the agent ensures and supervises the proper execution of the Court’s judgments, submits reports to the Committee of Ministers on the general and individual measures taken in the Slovak Republic in connection with their execution, and prepares the necessary documents with a view to the adoption of final resolutions on the termination of supervision of such execution. Since 2003, the agent and a number of staff members have regularly taken part in meetings of the Committee of Ministers’ Deputies of the Council of Europe and in bilateral negotiations with the Council of Europe Secretariat. The fact that the government agent responsible for execution of the Court’s decisions at national level takes part in these meetings and in bilateral negotiations helps to clarify what is expected of the state during the execution phase.
Ms Geneviève Mayer (Council of Europe)

Recommendation Rec (2008) 2 is a crucial means of improving and speeding up the execution of the Court’s judgments. This is something on which we are all agreed. In practice, moreover, the recommendation is already starting to be implemented. I shall take the example of the direct bilateral contacts between the Department for the Execution of Judgments of the European Court of Human Rights, which relays messages from the Committee of Ministers, and government agents; these contacts have been stepped up since 2006, with the agreement of the member states’ Permanent Representations to the Council of Europe, and indeed at their suggestion. Thanks to such contacts, information is received more quickly by both the Committee of Ministers and the authorities concerned in the respective capitals, and the various players in the process have a better understanding of the technical aspects of execution procedures. This has already yielded positive results, as shown by the increase in the number of cases closed in 2007 (+251%); this increase appears to be continuing as at early 2008.

It is not mandatory for government agents to attend the human rights meetings; this is left to national authorities’ discretion. The practice has developed at the states’ behest, and it is clear from today’s discussions that agents themselves regard it in a positive light. To a large extent, experience shows that their attendance at the human rights meetings contributes to effective execution, particularly given that from 2008 the Committee of Ministers has agreed to reduce the frequency of its meetings (from 6 to 4 times a year) so as to allow the states and the Execution Department enough time between meetings to prepare and analyse information on the required measures.

In this connection, it should be noted that the smooth exchange of information is crucial in a number of respects. The Execution Department requests a great deal of information from national authorities during the initial stage of the execution process, that is, when a case is to be examined by the Committee of Ministers for the first time. The defendant state has to execute the Court’s judgment, but can choose the method. The role played by the national authorities concerned is vital with a view to getting the execution process off to a good start. Government agents can make a valuable contribution in this area.

The Execution Department is always available to national authorities to discuss the difficulties encountered at national level and explore ways of overcoming them, for instance through seminars or bilateral or multilateral round-table discussions such as those held in Strasbourg in 2006 and 2007 on the non-execution of domestic court decisions, which were attended by both governments and other national authorities.

In the light of the preceding discussions, it might be very helpful for government agents to organise a round-table discussion on such issues on their own initiative.

Mr Hans-Joseph Behrens (Germany)

The German government agent is attached to the Federal Ministry of Justice. Despite having no power over the Länder, the agent manages to get them to comply with the Court’s judgments concerning them, largely thanks to the status associated with this position and the degree of respect for the Convention; the state’s federal structure has not, therefore, caused any problems with execution to date. The Federal Parliament is a different matter; the government agent does not have to impose anything on it, but it is part and parcel of a democratic political system.
Mr Francesco Crisafulli (Italy)

The changes in the Convention system are such that they have no doubt undermined certain principles. National sovereignty is clearly weakened, but popular sovereignty probably is too. When it comes to the execution of judgments, the state having to honour its international obligations has no choice but to diminish the strength of its own principles: this is certainly true of political legitimacy and local autonomy, and perhaps even, to some extent, the independence of the judiciary. We must be careful, however, to ensure that adherence to the Convention does not have the effect of weakening the very principles it is based on, which form the Council of Europe’s conceptual framework: democratic institutions and the rule of law.

Mr João Manuel Da Silva Miguel (Portugal)

Very briefly, I would like to thank the two speakers for their excellent presentations on this theme, and to join Ms Mayer in emphasising the value added by the agent’s involvement in the execution of the Court’s judgments.

Agents’ experience and knowledge of case-law and the national legal system (especially in the case of those who have previously been judges) place them in the best position to oversee execution.

As regards my national experience, I have to say that the Portuguese agent is guided primarily by the goal of being proactive, given that there is no law stipulating his or her tasks in this area; this goal also derives from the role judges play in the execution of court decisions at the domestic level.

Mr Răzvan Horaţiu Radu (Romania)

Romania’s record in relation to the execution of the Court’s judgments can now be evaluated, since it covers a period of more than 10 years. It has a positive record, and the adoption of general measures deriving from the country’s obligation to comply with judgments is now regarded as a natural legislative development. A few cases have arisen, however, in which the execution of a judgment has been troublesome because the Court had not given sufficient, or sufficiently clear, reasons for its decisions; the adoption of general measures has thus been made more difficult where Romania has found that the Court’s brief rebuttal of its arguments does not contain specific enough indications as to what needs to be done.

Ms Inger Kalmerborn (Sweden)

As far as the execution of judgments against Sweden is concerned, domestic law does not identify the agent as the co-ordinator of this process, except in relation to the payment of just satisfaction; the agent does, however, have a natural role to play.

The agent is involved in the adoption of general execution measures but, being attached to the Ministry of Foreign Affairs, is not in the front line when it comes to drafting bills; on the other hand, it naturally falls to the agent to disseminate judgments to the authorities concerned. As for individual measures, the agent does not have any experience of national execution procedures. The payment of just satisfaction is overseen by the Ministry of Finance, in accordance with a government decision stipulating that the costs are to be
The role of government agents in ensuring effective human rights protection

borne by the ministry responsible for the violation found by the Court.

The idea of meetings between agents and the Council of Europe Secretariat’s Execution Department with a view to facilitating the execution of judgments is an interesting one, which ought to be given further consideration.

**Ms Suela Meneri (Albania)**

A bill on the execution of the Court’s judgments against Albania is being prepared by the government agent at the Minister for Justice’s request. The main aim of this initiative is to show the Committee of Ministers and the European Court the extent to which Albania regards the proper, speedy execution of judgments as crucial. There are also other, purely domestic goals, however. It is thought that a law on execution will overcome a certain reluctance and make it possible to obtain the active support of key domestic institutions, be they independent (the Constitutional Court) or autonomous (municipalities). It will also make life easier for the government agent; action taken under the law on execution will be regarded as reflecting obligations deriving from the law rather than the agent’s personal views.

For the time being, the agent plays a more limited role in the execution process. The agent’s office is responsible for translating the judgment and identifying any problems pertaining to its execution; he or she then obtains various opinions, including that of the authority whose activities led to the violation found by the Court, with a view to preparing Cabinet decisions in execution of the judgment. Lastly, the agent advises national authorities on the need to take general measures in execution of the Court’s judgments and to inform the Committee of Ministers.

**Ms Monika Mijić (Bosnia and Herzegovina)**

The execution of judgments must naturally be in the agent’s hands; having represented the state before the Court, the agent has a better knowledge of the case than other national authorities and knows which authorities to approach with a view to ensuring proper execution. From this perspective, there is no paradox in the fact that, having defended the state, the agent is then involved in the Committee of Ministers’ supervision of the execution of judgments; on the contrary, the contacts the agent makes with the Execution Department in this connection are very useful. However, the extreme importance agents place on this aspect of their work means that they risk having to spend more time on it than on preparing the state’s defence before the Court.
**Theme IV:**

**The government agent’s role in mainstreaming the Court’s requirements and case-law into the daily practice of all state bodies, notably through publication and dissemination**

**Moderator:** Ms Anne-Françoise Tissier, Government agent of France

---

**Mr Frank Schürmann**

**Government agent of Switzerland**

**Introduction**

Firstly, I should like to express my heartfelt thanks to the authorities of the Slovak Republic for their warm welcome and flawless organisation of this seminar.

For the final theme of our seminar, Ms Niedlisbacher and I have tried to share the task somewhat: as a member of the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), my colleague is no doubt the person best placed to talk to you about the relevant recommendation (Rec (2002) 13) and its implementation in the member states, and more specifically in her own country.

For my part, I intend to discuss a number of more general points relating to the practical difficulties associated with the implementation of this recommendation; I too shall refer to my own country’s practice.

**Report of the Group of Wise Persons and the Court’s opinion on it**

In its report, the Group of Wise Persons addressed the subject under the heading, “Enhancing the authority of the Court’s case-law in the States Parties”. The dissemination of the Court’s case-law and – to quote the report – “recognition of its authority above and beyond the judgment’s binding effect on the parties would no doubt be important elements in ensuring the effectiveness of the Convention’s judicial control mechanism” (§66). The Group considered that national judicial and administrative institutions should be able to have access to the case-law of the Court in their respective language, which would assist them in identifying any judgments which might be relevant to deciding the cases before them (§71).

The Court, in its April 2007 opinion on the Wise Persons’ report, fully endorsed these comments and suggestions, making particular reference to the Grand Chamber judgment in the *Scordino v. Italy* case. It said in that judgment, in connection with Article 46 of the Convention, that domestic courts must be able...
to apply the European case-law directly and that their knowledge of that case-law had to be facilitated by the state in question.

Major problems and potential solutions

As you know, the DH-PR has undertaken a detailed review of the implementation of Rec (2002) 13. Ms Niedlisbacher will speak about this shortly at greater length. As regards the publication and dissemination of case-law, the Committee concluded in 2006 that – and I quote – “implementation of the recommendation is generally satisfactory.” This conclusion suggests that significant efforts have been made, but that there is still more to be done.

Further progress in this area is hampered by a number of difficulties, however. In my opinion, there are four major problems. The question arises as to the extent to which national authorities, and particularly the agent, can help to overcome them:

Mass of information

The first difficulty relates to the mass of information. [Too much information kills information.] In 2007, the Court handed down 1 735 judgments and more than 27 000 rulings of inadmissibility, which can also make a substantial contribution to the interpretation of the Convention. Although the recommendation is confined to the Court’s case-law, the Committee of Ministers’ practice in application of Article 46 should also be mentioned here. The general measures adopted by a state in execution of the Court’s judgments may be of significance to other States Parties, particularly their legislatures. In this connection, the publication of the Committee of Ministers’ first annual report on supervision of the execution of judgments can only be welcomed, for it has filled a major gap.

The question arises as to who is supposed to sort through the information, and how. There are clearly a number of options. I shall simply mention the following, which strike me as particularly relevant:

In a February 2008 working document submitted to the Parliamentary Assembly, Professor Lawson suggested that the Court itself, or possibly the Commissioner, draw up a very short annual list of “must read judgments” that any lawyer – or, one might add, judge – ought to have read. This list should be supplemented by annual “specialised lists”, which should also be short, in specific areas such as law relating to aliens or criminal procedure. The idea of limited lists might also reduce translation costs – an issue I shall return to shortly.

Secondly, I would like to mention the manuals produced by the Council of Europe, thanks to successful intergovernmental collaboration and, I hasten to add, the work of the secretariats of the respective committees of experts. In a sense, these handbooks already contain specialised lists of the Court’s judgments. The Manual on human rights and the environ-

---

394. *Scordino v. Italy (No. 1),* [GC], No. 36813/97, §239, ECHR 2006, 29 March 2006.

Proceedings

ment is an excellent example of the benefits of having a summary of the case-law in a specific area. Other such manuals, on hate speech and the wearing of religious symbols in public areas, are about to be published; still others may be envisaged in the future. Once again, translating these texts would significantly increase the extent to which national authorities take them on board.

A third option would be to ensure the regular dissemination of the Court’s case-law by national authorities, and the agent’s office in particular, for instance in the form of an annotated summary. In my country, we have hitherto forwarded judgments and key rulings relating to Switzerland to the federal and cantonal authorities, indicating any action that needs to be taken. From now on, we intend to go one step further: from 2008, the plan is to draw up a list, four times a year, of key judgments of the Court – concerning Switzerland or other states – with a brief description of the judgment and an indication as to the repercussions it may have on the domestic legal system. This information will be disseminated widely, in French and German.

Language issue

This brings us to a second major difficulty: the language issue. It is not new, and nor has it been resolved. Once again, it is primarily judgments concerning other states that call for our attention. In its opinion on the Wise Persons’ Report, the Court emphasised that – and I quote – “the courts in every contracting state must be aware of both the judgments handed down against that state and the most important judgments of the [...] Court. States should therefore ensure that these judgments are translated into the different national languages.” The Court immediately adds that “the scale of the undertaking is substantial”, and mentions co-operation between countries sharing a common language as one of the workable solutions that may be found. This is exactly the type of co-operation discussed in paragraph 8 of Rec (2002) 13.

One such project is about to come to fruition for German-speaking states: the German publisher Engel is about to release a collection of important judgments and decisions of the Court in German. At present, the project has the backing of the German, Liechtenstein and Swiss governments. The first part of volume I, covering the period from 1960 to 1998, is expected to be released in the next few weeks. The benefits of such a collection are obvious, even for Switzerland, which has the advantage of having French as one of its official languages.

Uncertainty about the interpretation of case-law

The starting point of Rec (2002) 13 and of the theme under discussion today is the idea that the Strasbourg Court hands down numerous important judgments that may have an effect on member states’ domestic legal systems and that this case-law ought to be disseminated widely in the states. In practice, things are not so simple. This brings me to the third difficulty. When called upon to apply a line of decisions by the Court, national courts sometimes face the problem of interpreting the judgments in question. Government agents may find themselves in a similar position when they have to advise the legislature as to the measures to be taken in response to a judgment of the Court. In such situations, the agent’s role and duty is to indicate any remaining doubts. In addition, in the context of their special relationship with the Court, agents may point out the need for stable, clear and well-reasoned case-law. In another working document submitted to the Parliamentary Assembly, Professor Sudre recently emphasised the need for such case-law so as to provide the states with a sound base for avoiding and redressing violations of the Convention.

Application of an established line of decisions

Lastly, this brings me to the fourth difficulty. Even where the case-law is clear, well established and translated into the national language, it has to be examined and applied. Once again, this is a delicate, complex issue of
particular relevance to judgments that do not concern one’s own country.

In my view, government agents can play only a limited role in this area. It is up to the supreme or constitutional courts to take the Court's case-law into account in handing down their judgments, thereby genuinely implementing the *corpus iuris strasburgensis*. In this way, the highest national courts can also do a great deal to help educate lower national courts and other authorities. It may be added, in this connection, that regular publication of national courts’ practices in relation to the ECHR might help to make lower courts aware of the Strasbourg case-law.

**Closing remarks**

In conclusion, ladies and gentlemen, dear colleagues, I would like to make the general comment that it is still both possible and necessary to improve the recommendation's implementation, and that government agents have a role to play in this process. The practical form their role takes depends, to a large extent, on the situation in each State Party, particularly the existence of other means of communication and dissemination such as publication in scientific journals, or national human rights institutes. To give just one example, our Austrian neighbours are fortunate to have a publication, the “Newsletter”, produced by the Human Rights Institute in Salzburg. This bimonthly journal publishes summaries of most of the Austrian cases, along with leading cases concerning other countries. Such a publication means the bulk of the work is already done.

Allow me to make one final comment: in my view, even more effective implementation of the recommendation is likely to add to the authority of the Court's case-law and, at the same time, strengthen the principle of subsidiarity, which is critical to the supervisory mechanism's future. Should this prove to be the case, that would be a positive outcome we could all welcome, notwithstanding the fact that better dissemination of the case-law will not necessarily help to reduce the Court's workload. ★

**Ms Isabelle Niedlispacher**

*Co-agent of the Government of Belgium*

My contribution also relates to the government agent’s role in mainstreaming the Court’s requirements and case-law into the daily practice of all state bodies, notably through publication and dissemination. I shall briefly outline the role and duties of the Belgian government agent, with whom I have been working for seven years now, as well as making a few general comments on the implementation of Recommendation Rec (2002) 13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the Court. I shall finish, if you don’t mind, with a few suggestions for the future.

The Belgian Government agent was appointed within the Federal Department (formerly Ministry) of Justice.

The agent is assisted by three lawyers, now co-agents, who take responsibility at national level for co-ordinating the government’s submissions and publishing, disseminating and executing judgments.

The Court’s case-law in relation to our state is systematically disseminated, almost immediately, to the authorities directly concerned, along with a commentary on the judgment and an indication from the agent as to any execution measures that might be necessary.
Until now, every judgment concerning Belgium has been published within three months in the three national languages – French, Dutch and German – on the Justice Department’s website, which also features a direct link to the Council of Europe’s website.

In response to Recommendation Rec (2002) 13 of the Committee of Ministers of the Council of Europe, asking that the Court’s case-law be disseminated widely, we have now opted to put every judgment against our state on the Courts Department’s Juridat site straight away. The national and international case-law concerning our country is thereby centralised on a site with a higher profile than that of the Justice Department.

The keywords, summary and judgment in French are entered into the data base directly by the co-agent having followed the application since its notification.

In the case of less technical judgments, such as judgments relating to the length of proceedings, it is envisaged that only the summary will be translated into Dutch, but the matter has not yet been decided.

The advantage of this system lies in its speed and the accuracy of the information entered, since the co-agent – who follows the case from the time the application is notified until the Committee of Ministers’ final resolution – bases his or her work on the summary of the judgment as it appears on the Court’s website the day it is given; being drawn up by the Registry, the summary is bound to be of high quality.

The Court’s case-law is also disseminated rapidly, but not systematically, via numerous private publications circulated very widely within the legal community, which comment on the Court’s landmark decisions concerning any member state.

The Belgian authorities do not have any formal arrangement for the dissemination of case-law concerning third states, but numerous private publications (including the many publications on legal theory and periodicals such as the Rechtskundig Weekblad, the Journal du droit international, the Journal de droit européen and the quarterly Revue des Droits de l’Homme) translate those judgments that may have an effect on domestic law and publish them, together with substantial commentaries, as part of descriptions of the European Court’s case-law.

Bearing in mind that the national courts have to take treaty law into account, all publications on legal theory and case-law help to disseminate the principles contained in the Convention and the Court’s case-law.

Belgium does not have any formal agreements with other Council of Europe states on the translation and dissemination of the Court’s case-law, since the latter gives its decisions in one of the country’s national languages.

I shall now make a few general comments on the implementation in all Council of Europe member states of Recommendation Rec (2002) 13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the Court.

As part of its monitoring of the implementation of the aforementioned Recommendation, the Steering Committee for Human Rights has concluded that, generally speaking, the European Court’s case-law involving the state in question is widely disseminated by national authorities via ministries of justice and/or foreign affairs, government agents, civil society groups, NGOs and specialised publishing houses.

The Council of Europe assists with the dissemination of the Court’s case-law through its information offices in some member states.

The Court’s case-law, which is generally summarised and translated into the national language(s) or at least disseminated in the Council of Europe’s official languages, is covered in manuals, handbooks and other publications, as is the Convention system.

According to the information received from member states, the address of the Court’s website is widely disseminated and familiar to national authorities, which the states endeavour to provide with the necessary computer equipment to gain access to the case-law via the Internet.

Further efforts are still needed in this direction, however, particularly in Belgium.

**Examples of good practice**

A number of states have set up electronic legal databases to systematise legal information in different areas and facilitate rapid access to it. (Examples include Aspi in the Czech Republic, Finlex in Finland, Libert in Italy and Legifrance in France).

Some states have opened, or intend to open, legal libraries making digests and journals containing the case-law available to all and providing Internet access to the Court’s website.

Many states (including Belgium, Denmark, Finland, Germany, Latvia and Poland) have human rights institutes that disseminate the latest developments in case-law, organise seminars for lawyers, judges and other legal professionals and specialise in research on human rights issues.

In a number of states (including Croatia, the Czech Republic, Germany, the Netherlands and the Slovak Republic), the government agent draws up an annual report summa-rising the main European case-law relating to the state in question and submits it to Parliament and the ministers and/or other people concerned.

Very few states (Belgium, Denmark and Switzerland) appear to send an explanatory memorandum with the judgments forwarded to those authorities directly involved in their execution. Yet such explanations can be useful in that they place the judgment in the context of the Court’s case-law and may indicate the measures needed in order to prevent similar violations occurring.

The ministries and judicial organs of a number of our states (including Austria, Bosnia and Herzegovina, Bulgaria, France, Hungary, Russia and Turkey) publish monthly legal bulletins featuring translated summaries of the most important judgments in a given period.

Manuals and handbooks are published in the member states, and disseminated – in Croatia, for instance – to all courts, ministries, law faculties, the Bar and NGOs active in the human rights field.

The Ministry of Justice’s website in Denmark and the Ankara Bar’s website in Turkey explain the steps to be taken in order to bring a case before the Court, and provide application forms.

In Sweden, for example, the judiciary receives information bulletins featuring a selection of leading cases as well as national decisions applying, or referring to, the Convention.

**Some deficiencies and suggestions for remedying them**

Internet access appears to be restricted to higher courts in some states, and is still inadequate in many states. Those states in which such access is not yet available at all levels of the judiciary should be encouraged to provide the necessary equipment (the HUDOC CD-ROM, for example).

Among states sharing a common language, co-operation with a view to translating and disseminating the Court’s case-law appears to be lacking or too limited in scope. Accordingly, states sharing the same national language are encouraged to consider the possibility of co-operating in order to publish digests of the Court’s decisions or judgments in that language.

While the publication and dissemination of the Court’s case-law relating to the state concerned appear to be fairly satisfactory, the same cannot be said of the case-law relating to third states. Member states should be encouraged to ensure the rapid dissemination of any relevant case-law concerning third states, together with an explanatory memorandum.

Some states appear to have few manuals or other publications in the national language(s) explaining the Convention system and the relevant case-law of the Court. Accordingly, member states are encouraged to work with
the private sector with a view to publishing the practices of national courts applying the Convention and the Court’s case-law.

I invite you to report any deficiencies you yourselves may have identified, or to give examples of good practice that might serve as a source of inspiration during the discussion we are about to have. ★

Discussion

Mr Ferdinand Trauttmansdorff (Austria)

The Court’s case-law is disseminated primarily by three Austrian institutes active in the human rights field; they are university institutes indirectly financed by the state. The public thereby has access to information entered into databases, such as that of the Human Rights Institute of the University of Salzburg. As for dissemination to administrative departments, the Chancellery’s Intranet network provides information on both European case-law and national case-law applying the Convention.

Mr João Manuel Da Silva Miguel (Portugal)

Rather than theorising agents’ roles, it strikes me as important to describe the duties they perform and identify good practices introduced by the states.

First of all, I would like to focus on two aspects.

As far as national cases are concerned, judgments received from the Court are immediately sent to the Minister for Justice with a note asking that they be forwarded to the authorities concerned, where the latter are government bodies; where the case relates to the prosecuting authorities or the courts, a copy of the judgment is also sent to the Principal State Prosecutor’s Office and the Judicial Service Commission so that they can take note of it and disseminate it.

Where appropriate, notices specifying procedures or measures to be adopted are sent to the authorities concerned.

The initial communication of the judgment to the Minister of Justice thereby triggers the procedure for paying the just satisfaction awarded. In fact, although the judgment is not yet final, the government has decided that it is reasonable to embark on this procedure immediately so as to avoid late payments. If, by chance, an application is lodged for referral to the Grand Chamber, the procedure is suspended pending the latter’s decision.

The initial receipt of the judgment also triggers two other measures: firstly, the judgment is published on the Ministry of Justice’s website398 in the original language; secondly, judgments have been systematically translated into Portuguese since the beginning of the year.

In addition to the practices just mentioned, the Court’s case-law is disseminated in three ways: firstly, the agent selects those judgments handed down by the Court the previous year that he or she regards as most significant in the light of current events or the relevance of the case-law; a summary of each judgment is drafted in Portuguese and published on two Internet sites; hard copies of the summaries are also printed and distributed to the courts and all the law faculty libraries free of charge. Secondly, in respect of criminal cases, a summary of the same significant case-law is published in a legal journal. Lastly, the Legal Service Training College organises two annual events that may be regarded as stemming from Recommendation Rec (2004) 5 of the Committee of Ministers, of 12 May 2004: a series of

three training sessions on the Convention and the Court’s case-law for new judges and public prosecutors, and a more specialised seminar on the Court’s case-law for judges, lawyers and other legal experts.

Lastly, the agent’s annual report to the Minister for Justice suggests measures he or she feels ought to be taken in this area, including any legislative amendments that may be necessary.

These are the points I would like to present in relation to this specific aspect of our work.

Mr Jean-Laurent Ravera (Monaco)

In Monaco, the Court’s case-law is disseminated in two main ways: summaries of the most important judgments are sent to the Ministry of Justice, and thematic analyses of the case-law calling for legislative amendments are sent to the ministries concerned.

In our experience, it can be difficult to identify which judgments are important, and dissemination should not be confined to such case-law; the contribution made by legal doctrine is overlooked, often because it is unfamiliar, whereas it could be a key feature of the teaching role assigned to the government agent.

Ms Hanne Juncher (Council of Europe)

The Directorate General of Human Rights and Legal Affairs assists with the dissemination of information on the Convention and of the Court’s case-law. Its assistance already takes various forms, including both the translation of judgments significant to the living interpretation of the Convention and the publication of thematic summaries and practical manuals. The Council of Europe thereby helps to resolve some of the problems faced by national authorities in terms of cost, accurate data and updating of the available information on the European system for the protection of human rights.

Member states were encouraged to invest in the regular dissemination of relevant case-law among the legal community, preferably online, as a means of increasing the capacity of the national judiciaries to implement the Convention.

A wide selection of training tools and materials on the Convention have been developed under the Council of Europe’s European Programme for Human Rights Education for Legal Professionals (the “HELP” Programme). This includes full curricula, lectures/presentations, case studies and moot courts, glossaries, and e-learning courses. They are all available free of charge and in multiple languages on the HELP website: http://www.coe.int/help/.

Ms Marica Pirošíková (Slovak Republic)

The translation of judgments is not the only problem that arises in respect of the dissemination of the Court’s case-law; the others relate mainly to interpreting judgments and ascertaining their precise scope, and thus their impact on domestic law. The dissemination of information on the Court’s case-law consequently calls for projects to be set up, possibly in conjunction with NGOs, with a view to providing training for the judicial professions. In Slovakia, we organise regular seminars for judges, senior court officers, public prosecutors and lawyers. For the last two years, for example, we have set up training projects in conjunction with the Judicial Academy, the Slovak Chamber of Lawyers and NGOs,
funded by allocations from the European Social Fund; my 570-page volume entitled _Comments on Selected Articles of the Convention for the Protection of Human Rights and Fundamental Freedoms_ was published and distributed to seminar participants free of charge. The interpretation and selection of the Convention articles included in this volume are geared to the topics addressed during the seminars; it also highlights those decisions of the Court that are of significance to the Slovakian legal system. The comments on each article, which include interpretations of major principles and legal reasoning, are based on the Court’s decisions and supplemented with the relevant case-law of national courts, particularly the Constitutional Court. As part of these projects, judges, public prosecutors and senior court officers also had the opportunity to take weekly two-hour classes in French or English, depending on their language skills, with the advanced classes focusing on legal terminology. The projects also included seminars on Community law, and some trainees visited the Court of Justice of the European Communities in Luxembourg and the European Court of Human Rights in Strasbourg.

Mr Francesco Crisafulli (Italy)

I should like to tell you about a very recent Italian initiative, which is still in progress.

Italy has a database of national case-law (particularly that of the Supreme Courts, along with some of that of the trial and appeal courts), which has a reputation for being extremely effective.

We are currently working on entering the Strasbourg case-law into the database (that of the CJEC is already included). The database focuses on what we call “massime”, or “maxims”, that is, significant extracts of judgments from which the legal principle(s) affirmed in the judgment may be deduced.

The main difficulty – apart from translation, of course – lies in the structure of the European Court’s judgments; the facts of each case are often of crucial importance, making it difficult to extract principles.

Once this task has been completed, the Court’s case-law will be easily accessible to all judges (free of charge) and lawyers (by paid subscription) in the same place as national case-law; this will simplify the research process considerably.

Mr Răzvan Horaţiu Radu (Romania)

Thanks to his judicial background, the Romanian government agent has been able to try out a new way of disseminating information on the Court’s case-law: by participating in discussion forums between judges, he has been able to keep colleagues better informed about judgments concerning Romania and, more generally, the judicial principles and rules identified by the European Court.

Mr Ignacio Blasco Lozano (Spain)

The end goal of the exercise of mainstreaming the Convention’s requirements into the daily practice of state bodies is none other than to prevent the occurrence of violations of the rights guaranteed. Yet if such prevention is successful, is that necessarily an indication that the European Court’s case-law has been duly incorporated into the domestic system? Such a link is uncertain, for the lower number of violations found may be put down to many other causes as well as the dissemination of the Court’s case-law.
Ms Štefica Stažnik (Croatia)

The European Court’s case-law is disseminated primarily to legal practitioners, the judiciary and lawyers attached to ministries. Up-to-date information on this case-law is provided as part of both initial and in-service training for judges and prosecutors; likewise, ministry lawyers are trained to take it into account in the drafting of bills and the implementation of existing legislation. Their somewhat informal relations with the government agent also help.

Ms Radica Lazareska-Gerovska (“the former Yugoslav Republic of Macedonia”)

Within this topic first of all it was pointed to the importance to disseminate the wide and expert public with the ECHR case-law not only in view of the concrete states but also of the Court’s general case-law, in view of other states.

To that aim, “the former Yugoslav Republic of Macedonia” practice regarding the dissemination of judgments relating to “the former Yugoslav Republic of Macedonia”, their working out and communication to the corresponding bodies and institutions was stressed.

Specifically, judgments are translated into Macedonian and are posted on the Ministry of Justice web portal immediately following their adoption and prior to them becoming effective.

Also, detailed information is prepared which contains the decision by the Court on the violation of the European Convention by the domestic authorities, which is transmitted to the Government of “the former Yugoslav Republic of Macedonia”. In case of systemic problems the Information also indicates what should be taken and which authority is required to do that.

Concomitantly, the processed judgment is also transmitted to all relevant domestic courts and authorities that had been contacted during the defence of the state. In case of a matter for which the procedure is still ongoing before the domestic courts, the related courts are pointed to the need to speed up the matter and to decide at their earliest convenience.

In case there is a request to repeat the procedure due to a decision by the Court (that is possible pursuant to the domestic legislation in all procedures – civil, criminal, administrative) information is transmitted to the competent domestic court indicating the measures that are to be taken by the court in the procedure, and which are determined by the Committee of Ministers that oversees the execution of the Court judgments.

Following the effectiveness of the Court judgment, new information is prepared for the government which indicates that moment, so that the corresponding decision on the payment of the adjudicated funds for compensation may be taken.

An enormous problem for the judges is the language barrier, that is, the judges’ lack of knowledge of English or French – the Council’s official languages – which disables them to have a daily insight into the Convention case-law. They rely mostly on what will be translated and published in the country, which does not follow the Court’s dynamics.

In “the former Yugoslav Republic of Macedonia” judges are trained for the application of the Convention case-law through the Academy for the Training of Judges and Public Prosecutors. An initial training course is carried out for the candidates for judges (with special programmes for all articles of the Convention, moot court, etc.), while continued training has been created and is ongoing for the appointed judges (with a compulsory number of hours during the year). ★
SUMMARY OF DAY TWO

Ms Anne-Françoise Tissier

Government agent of France

All the seminar participants share the belief that the execution of judgments is an important aspect, but it is also clear that there is not merely a single model; to take the example of just satisfaction, there are states in which the cost is borne by the budget of the ministry whose activities caused the violation, as is the case in France, but the complexity of this solution may make it preferable to charge the cost to a single budget.

Depending on national traditions, legal and political approaches have varying degrees of input into the exercise of executing judgments, and the agent’s role varies from one state to another. The legal approach tends to prevail, however; as an indication, within the French Permanent Delegation to the Council, the execution of judgments is now supervised by an administrative judge rather than a diplomat.

The necessary dissemination of the Court’s case-law to judges and ministry lawyers is hampered by practical difficulties. It calls for the government agent to make a sustained, ongoing effort to sort through the mass of information on case-law. As for the recipients of the agent’s selection, making time in one’s day-to-day work to read dozens of pages of judgments is no easy task, and may not even be worthwhile. Other methods should be tried out, such as regular bulletins or memoranda highlighting the Court’s answers to specific questions in particular areas of law; it would then be up to readers how they use the information received. There are other methods, however, some of which involve the Court itself; HUDOC could be reorganised so that it can be used by all legal professionals, not just human rights experts. ★
Mr Philippe Boillat

Director General of the Directorate General of Human Rights and Legal Affairs

Mr Chair, Madam Moderator, ladies and gentlemen, friends,

Firstly allow me to add my sincere thanks to the Slovak authorities for their offer to host this seminar focusing on the important part played by government agents in ensuring effective protection of human rights in Europe. Thank you to all those who helped organise it. Thank you also to all the participants for your many constructive comments, ideas and proposals.

I attach especial importance to these agent meetings. As you may know, I was myself a government agent for many years and I therefore have the greatest inbuilt respect for you and what you do.

You will readily appreciate that it is very difficult for me to sum up in just a few minutes everything that has been said over the last two days and do justice to the breadth and depth of the discussions. I make no claim to be able to do that and will not attempt to, so my remarks are not going to be “conclusions” as such. Rather I will concentrate on certain aspects of the discussions which I see as useful benchmarks in our reflections on the role of agents, which is a multifaceted one. The report of the seminar will be available soon and should provide you with a fuller picture of the issues raised in the last two days.

I will now try to highlight a few salient points concerning the four topics dealt with during the seminar, as possible areas for future discussion.

Government agents: their representative role before the Court

To look primarily at the role of government agents in the Court’s procedure – a role which the President of the Court, Mr Costa, described, and rightly so, as an eminent one – it is the complexity and diversity of their work as representatives of the member states which strikes one first of all. In that context the question was raised as to whether the agents needed to be given proper status, or at least to have their duties and obligations harmonised. Some of you advocate leaving well alone. It needs to be borne in mind here that the European Convention on Human Rights makes no mention of agents and leaves countries total freedom to decide what agents’ duties should be. Agents are in fact only mentioned in the Court’s rules. The Agreement on Privileges and Immunities for Persons participating in Proceedings before the Court refers to “representatives or counsels to the parties” in such proceedings.

It is important to refer back to a question which was raised several times during the last two days: the rank of the government agent within a national administration, a question which, in my opinion, is not necessarily linked to the potential legal status of an agent. It seems to me that the end result of the discussions is that, while taking into account the great diversity of the administrative background of our member states, the high rank of an agent within a national structure would certainly boost the good execution of the tasks he/she has been given. Indeed, the fact that an agent enjoys a high position allowing him/her to have greater autonomy when taking decisions, makes it easier for him/her to have access to other administrative or judicial
bodies and gives more weight to his/her opinions or to the influence he/she has on the administration and national legislation. As was said this morning “personal prestige is not enough!”

In the discussion about agents’ duties, emphasis was put on the agent’s duty to give pertinent intervention to the Court on national legislation and practice. There is no doubt that agents contribute in this way to the quality of the Court’s judgments.

The conclusion of friendly settlements was mentioned on numerous occasions. According to the President of the Court, agents are asked to play a determining role in the outcome of such settlements, which are now promoted more actively than in the past by the Court.

Provisional measures, in accordance with Rule 39 of the Court’s Rules, also require an active role on the part of the agent. It has been said that, in this case, the agent is an “essential interface” between the Court and the relevant national services. Following the judgment in the Mamatkulov and Askarov v. Turkey case, the role of the agent has, of course, became even more important.

I now come to Article 36 of the Convention, both paragraphs 1 and 2. When must an agent intervene? When he/she is called upon to do so by other agents? And if he/she intervenes, on the basis of what criteria must this be done? Should one define these criteria, even informally and in a non-binding way? It is up to you to give these questions some thought. I would like to mention, in this context, that the idea was put forward to create an informal network of agents.

It was also underlined that the task of a government agent is not to win the proceedings at all cost, but to serve the general interest. The role of an agent is often exclusively reduced to that of the applicant’s opponent. Of course, nobody can deny that this is his/her primary mission, and an essential one. A government agent must, in all loyalty, find arguments so that his/her authority’s case carries the day. But the arguments put forward must respect the case-law acquis as well as the fundamental principles, or at least take them into account. It is in the interest of the agent to do so if he/she wants to win over the Court. In fact, the agent’s mission is both that of a lawyer for the state and that, in certain respects, of an official appointed by the state to assist international justice.

Responsibility of the agent for bringing national law and practice into line with the Convention

What is the agent’s role in ensuring that national law and practice are in line with Convention standards? At all events, and whatever the possible role of government agents and their departments, a distinction must be drawn between, on the one hand, checking the conformity of draft legislation and, on the other, checking the conformity of existing law and practice. Checking the conformity of draft legislation – although complex – is in some respects easier as it is part of the legislative process. For checking on compatibility or conformity, several possibilities were mentioned. Should the approach be to set up specialist central-government departments, or specialist decentralised ones? Is the agent’s responsibility here a direct or indirect one? Opinions differ but there does seem to be agreement that it requires specialist lawyers with detailed knowledge of the Court’s case-law, and that they need to be involved in the legislative process from the very outset because it is easier to make allowance for the case-law constraints at the start of drafting than to tinker with the finalised piece of legislation. A further point is that while checks on draft legislation must be systematic, that obviously cannot apply to checks on current law and practice. In the latter case, checks will be ad hoc ones, performed in the light of a particular case-law development.

In this connection, the difficulty of giving a well-founded opinion was extensively stressed: to borrow a metaphor used this morning, are the lights at green, red or amber? In other words, can the person consulted say unreservedly that the piece of draft legislation is compatible with the case-law or incompatible with

Agents’ contributions to the execution of Court judgments

Here I should like to remind you that, among the measures mentioned in Committee of Ministers Recommendation Rec (2008) 2 for reinforcing domestic execution of the Court’s judgments, appointment of a coordinator for the execution of judgments at national level is of special importance. In the last two days’ discussions it has been repeatedly observed that an agent is often best placed to initiate and co-ordinate the adoption of the various measures required at national level for executing a judgment. Various practices were mentioned for facilitating this, and in particular collective decision-making by an inter-ministerial committee or a specialist unit within a ministry.

Several participants underlined the benefit of having the agent participate in the execution of judgments, and in particular of having the agent attend meetings of the Committee of Ministers on supervision of judgments. The secretariat shares that view, though, needless to say, there is no obligation on countries to bring in the agent for such meetings and it is completely up to them whether they do so.

Some participants wondered how compatible the agent’s key function of representing his/her authorities’ position was with having the agent participate actively in execution of judgments. Some of you said, and I agree with you, that the contradiction is more apparent than real, as Article 46, paragraphs 1 and 2 is an integral part of the Convention. There is therefore no reason why the agent cannot, without loss of loyalty, devote as much time to proceedings before the Court as to execution of judgments.

Some of you commented that it might be wise to hold regular government agents’ meetings with the department in charge of supervising execution of Court judgments. I think that is an excellent idea. However, I think that any move of that kind would have to come from the agents themselves.

Finally, whatever the model preferred by a state, the watchwords must be effectiveness and speed of execution.

Role of the agent in incorporation of Court guidelines and case-law

Nobody would disagree that publication of Convention standards and dissemination of them to national bodies are a basic and indeed indispensable requirement for improved knowledge of the Convention and the case-law and for their implementation at national level. In this context, a whole series of questions were asked. How should one deal with the mass of information available? Which judgments is one to select? Who should do the selection? Into which language should they be translated? To whom should they be issued? In all these matters the agent can play a key role, and particularly in deciding which of the Court’s judgments is of main relevance and in enlisting the help of other bodies responsible for raising awareness of Convention standards at national level. The agent can also encourage and facilitate rapid translation and dissemination of decisions and interim or final resolu-
tions adopted by the Committee of Ministers as part of its function of supervising the execution of judgments, as indicated in Recommendation (2008)2. The agent should do likewise in the case of memoranda on particular topics by the Department for the Execution of Judgments. The first annual report on implementation of the Court’s judgments, which has just been published, should be a very important aid for them.

Numerous good practices have been mentioned: closer co-operation between states, in particular those which speak the same language, to facilitate the translation and dissemination of judgments; publication of digests, manuals or handbooks; producing explanatory notes to often complex judgments; cooperation between the private sector and NGOs; and, finally, making optimum use of Internet and computer tools in general.

One last point: professional training for judges, prosecutors and lawyers is essential for developing their ability to apply the Convention routinely in their everyday work. Clearly the agents have all the necessary qualifications and experience to play an active role in such training, drawing, in particular, on their in-depth knowledge of the relevant case-law, whether national or European. As has been pointed out, the Directorate General of Human Rights and Legal Affairs conducts a whole series of programmes in this area, in particular the HELP programme.

Mr Chair, ladies and gentlemen, friends,

This seminar has been an opportunity to consider a range of issues of practical relevance for agents. It has also been a chance to advance the exchange of experiences and good practices begun by the previous meetings of government agents, which were held in Prague in 1995, in Vilnius in 1999 and in the Hague in 2003. The seminar is also very much part of the current process concerning measures for preserving the long-term effectiveness of the European Court of Human Rights, a process which began in Rome at the Ministerial Conference in 2000. As you know, full implementation of the Convention at national level and improving the impact of national mechanisms for speedy execution of the Court’s judgments are and will remain Council of Europe priorities. As we have seen, government agents have a crucial role to play in the pursuit of these goals.

The Directorate General of Human Rights and Legal Affairs is ready, in so far as its responsibilities and capabilities allow, to assist you in what are demanding tasks. Assistance can take in organising special training sessions on the Convention for the lawyers on your staffs, providing written expert opinions at states’ request on the compatibility of draft legislation, and circulating documentation on human rights. Special assistance with execution of Court judgments can also be given. We are more than happy to continue this cooperation with government agents, whether at high-level events such as this or through more informal regular contact, which I personally very much value.

I hope all of you privileged and fortunate enough to be here have a very enjoyable tour of Bratislava this afternoon. I wish you safe home and look forward to seeing you again soon.

Mr Emil Kuchár

Ambassador of the Slovak Republic to the Council of Europe

The proceedings of the Bratislava seminar are undoubtedly topical, and should continue to be so in the future. Indeed, government agents’ concerns coincide with those of the Committee of Ministers and the Secretariat of the Council of Europe, as shown by the very recent publication of the first report on supervision of the execution of judgments of the Court; seminar participants should read it, for it will help to imbue them with the importance...
of their role and the need for honest co-operation between agents and the Execution Department, and to convince them that the difficulties they face are common to all the States Parties to the Convention and their respective agents.

These are good reasons to push for regular contacts between government agents. This seminar is not the first, of course, but it has expressed a need for more frequent professional exchanges. Perhaps a recommendation of the Committee of Ministers on regular meetings of government agents might constitute a welcome invitation, or at least echo the desires voiced by participants at this seminar.
TOWARDS STRONGER IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AT NATIONAL LEVEL

Colloquy organised under the Swedish chairmanship of the Committee of Ministers of the Council of Europe

Stockholm, 9-10 June 2008

Proceedings
Guaranteeing the long-term effectiveness of the monitoring system established under the European Convention for the Protection of Human Rights and Fundamental Freedoms is a main priority for the Committee of Ministers of the Council of Europe. To this end, the Swedish Presidency of the Committee of Ministers organised a Colloquy on the “stronger implementation of the European Convention on Human Rights at national level” (Stockholm, 9-10 June 2008). The Colloquy focused on the improvement of domestic remedies, enhancement of the effect of the Court’s case-law and the assistance given to member states in implementing the Convention.

This event brought together representatives of the member states’ governments and parliaments and the Parliamentary Assembly, the Secretary General, judges of the European Court of Human Rights, including its President, and members of the Registry, and representatives of other Council of Europe bodies working for human rights, including the Commissioner for Human Rights, and civil society.

Among the many ideas discussed during the Colloquy were the possibility of drafting more specific recommendations on effective domestic remedies, in particular concerning the excessive length of proceedings at national level; means for reinforcing the *erga omnes* effect of Court judgments, and the possibility of developing the non-contentious jurisdiction of the Court, notably as regards advisory opinions. These and other issues will be examined in greater detail in the framework of the human rights intergovernmental co-operation work undertaken within the Council of Europe.
Mr Secretary General, Mr President of the Court, Ladies and gentlemen,

It is a great pleasure for me to welcome you all to Stockholm. I consider it an important task for us all to discuss how the Convention for the Protection of Human Rights and Fundamental Freedoms can have a clearer impact at national level and thus promote important efforts to strengthen respect for human rights and fundamental freedoms all over Europe.

But this is also an opportunity for more light-hearted elements. Stockholm is often called the “Venice of the North”, and not without good reason. Throughout history, proximity to water has made its mark on Sweden’s capital city in many different ways. You will have the chance to become better acquainted with one example of this later on this evening. The Vasa Museum – one of Sweden’s biggest tourist attractions – houses the warship Vasa, with which Sweden hoped to achieve domination over the Baltic Sea. However, the ship sank on its short maiden voyage in 1628. After 333 years submerged under water, the Vasa was salvaged in spectacular fashion. The ship is a unique and well-preserved treasure trove, containing almost a thousand dramatic sculptures and ornaments. I would like to welcome you all to this evening’s dinner, set against the backdrop of the exciting history that the Vasa represents.

Ladies and gentlemen,

Sweden has always been a keen supporter of the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms. We were one of ten countries that signed the Treaty in London in 1949 establishing the Council of Europe; and we had already ratified the Convention when it entered into force in 1953.

It has to be said that it took some time for the Convention to have a proper impact in Sweden. This was, of course, partly due to the dynamic interpretation of the rights and freedoms contained in the Convention by the bodies responsible for the Convention; but it must also be acknowledged that, to begin with, we didn’t have an entirely realistic view of how our legal system stood in relation to the Convention’s requirements. This has perhaps been especially clear concerning the right to access to a court of law when examinations of civil rights and obligations are conducted, as laid down in Article 6. For in Sweden, it had long been the case that the government was often the last instance for such examinations. The fact that this wasn’t compatible with the Convention’s requirements was established for the first time in the case of Sporrong and Lönnroth v. Sweden, in which a judgment was delivered on 23 September 1982. This judgment was later followed by several others with the same result. These judgments had an immediate impact on Swedish legislation.

Sweden has chosen two different paths to resolve the problem that the judgments adopted by the European Court of Human Rights highlighted. Firstly, in a large number of cases, appeals have been transferred to courts of law. Secondly, 1988 saw the introduction of a special act on judicial review in a court of law of decisions that would not otherwise be the subject of a court examination following a normal appeal. The act was replaced in 2006 by an updated act on the same subject.

Examples in other areas in which the Convention has had a direct impact on the Swedish legal order include the shortening of the length of time a person may be detained before having
their detention examined by a court of law;\textsuperscript{400} the introduction of stricter rules for children being taken into care by the public authorities;\textsuperscript{401} highlighting the right to oral hearings in courts of law;\textsuperscript{402} and paying increased attention to the right to a court examination within a reasonable length of time. Not least in respect of the latter, focus has been directed towards the right – laid down in Article 13 of the Convention – to an effective national legal remedy to claim that one’s rights and freedoms, as stated in the Convention, have been violated. Later on today, Justice Anna Skarhed from the Swedish Supreme Court will speak a bit more about Sweden’s experience in this area.

So the European Convention for the Protection of Human Rights and Fundamental Freedoms has helped to develop the Swedish legal order in such a way that human rights and fundamental freedoms have continued to gain greater prominence.

Sweden is a dualist state. Any international convention must therefore be transformed or incorporated in order to become a part of Sweden’s internal legal order. When Sweden adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950, it was deemed unnecessary to incorporate it into Swedish law. This view was maintained until 1995, when the Convention was incorporated into Swedish law by means of special legislation. At the same time, an addition was made to the Instrument of Government to the effect that acts or other regulations may not be introduced in contravention of Sweden’s commitments because of the Convention. It can also be mentioned here that the Administrative Procedure Act was adjusted in 2006; it is now clear that the Act’s provisions on appeals to an administrative court always apply, regardless of what is prescribed by other acts or ordinances, if this is necessary in order to satisfy the right to examination by a court of law as laid down in Article 6 of the Convention. Thanks to these measures, the importance of the Convention for the Swedish legal order has been emphasised further.

In view of its broad area of application, it is important that the Convention is discussed in the whole of society, and that citizens are informed of their rights under the Convention, as well as how they should go about exercising these rights. As far as Sweden is concerned, I can mention the government’s website on human rights,\textsuperscript{403} which contains questions and answers about the Convention, as well as other information. Public officials are also required to have sufficient knowledge of the requirements placed on them by the Convention. It can also be mentioned in this respect that the Swedish National Courts Administration publishes regular summaries of the judgments and decisions adopted by the European Court of Human Rights, not just those involving Sweden but also the most interesting of those involving other countries. These summaries are available to everyone on the Internet.\textsuperscript{404} I would also like to make a point of mentioning the courses in human rights issues that are offered by universities and higher education institutions, and that are often a part of compulsory education as well.

Ladies and gentlemen,

The European Court of Human Rights is currently facing major challenges. The number of States Parties is now at 47 – compared with the original ten. There is a large stream of complaints flowing into Strasbourg. If the Court is to continue to be able to perform its important task of interpreting the Convention – thus helping to strengthen human rights in Europe – it’s important for the Court to be able to work with efficient methods that are adapted to the demands currently placed on it. These demands are completely different to those that applied just over 50 years ago. Perhaps I need say no more than to simply remind you that the Convention now protects more than 800 million inhabitants throughout Europe, and that more complaints to the Court

\textsuperscript{400}. See the case of McGoff v. Sweden, judgment of 26 October 1984.
\textsuperscript{401}. See, for example, the case of Olsson No.1, judgment of 24 March 1988.
\textsuperscript{402}. See, for example, the case of Ekbatani, judgment of 26 May 1988.
\textsuperscript{403}. www.manskligarattigheter.se.
\textsuperscript{404}. www.dom.se.
Towards stronger implementation of the ECHR at national level

were registered in 2007 than in the entire period from 1955–1997.

Protocol No. 14 amending the Convention is an important step in streamlining the work of the Court. It’s therefore highly regrettable that after four years the Protocol has still not been ratified by all of the member states of the Council of Europe, and thus has not been able to enter into force.

I hope that our discussions at this Colloquy here in Stockholm will highlight the future potential there is in the Convention system. But we must look after this system. This is why it is important that the principle of subsidiarity be observed. The States Parties must, as far as is possible, provide mechanisms to deal at a national level with claims that the Convention has been violated. The objective must be that citizens in the member states of the Council of Europe who feel that their rights and freedoms, as laid down in the Convention, have been neglected should not have to turn unnecessarily to Strasbourg to obtain redress for any wrongs done to them. And in the cases where this is not possible, the procedure at the Court must be so efficient and at the same time legally secure that an individual citizen can have a decision on his or her complaint from the Court within a reasonable period of time. Unfortunately, this is not the case today.

Ladies and gentlemen,

With these words, I would once again like to wish you a very warm welcome to Stockholm. I am certain that the next two days of discussions will be fruitful for our joint efforts to safeguard and develop the unique system to protect the rights and freedoms that the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights and the Committee of Ministers represent.

Thank you. ★
MEMBER STATES OF THE COUNCIL OF EUROPE AND THEIR RESPONSIBILITIES UNDER THE ECHR

Rt Hon Terry Davis

Secretary General of the Council of Europe

A few weeks ago, Bernard Kouchner, the Foreign Minister of France, was in Strasbourg to inaugurate a new building of the Council of Europe. At a ceremony which took place across the street from the European Court of Human Rights, he made a statement to which I fully subscribe, he said and I quote “In its noble task of protecting human rights and fundamental freedoms, the Court is not, alas, as is often said, the victim of its own success. It is rather the victim of the failures and bad habits of our member states. We all know that the improvement of domestic remedies is part of the solution. We also know that the full and effective execution of Court judgments, of which each State Party has accepted the binding effect, without derogation, will contribute to resolving the problem of overburdening with which the Court is confronted.”

With 80 000 outstanding applications in Strasbourg, one might ask why we are here talking about national measures? The answer, of course, lies in the term “subsidiarity”. The Convention system is first and foremost about protection at national level. The Strasbourg Court is only intended – indeed, its jurisdiction only allows it – to intervene after domestic remedies have been exhausted.

In a perfect world, there would be no violations of human rights, or at least none without remedy at national level. To have so many outstanding applications in Strasbourg – even if 90% of them turn out to be inadmissible – suggests that perfection, whether or not attainable, is certainly a very, very long way away.

I must then make the point that although the roles of national courts and the European Court of Human Rights are extremely important, this does not mean that the Council of Europe is only about Courts. We also try to help member states to reinforce their national systems, through standard-setting, advice, cooperation and monitoring. If widespread or chronic problems persist in member states and floods of cases continue to flow into Strasbourg, calls to increase the budget of the Court will continue. As I said in San Marino two years ago, our zero-growth budget means that our other activities must then be cut – including, sooner or later, those activities which could help to improve the situation in member states and thus reduce the flow of cases. And if this leads to yet further increases in the Court’s share of the budget, well... they call that a vicious circle. In the long term it makes no sense to take money from the fire prevention team to pay for the fire brigade. I would even go so far as to say that member states have an implicit duty and responsibility to ensure that the Council of Europe as a whole is able to promote and support the implementation of the Convention at national level.

It is certainly the case that, by increasingly focusing our activities and resources on human rights, we are doing more and more to help member states to meet their responsibilities under the Convention.

Much of the reflection and standard-setting work is done by the Steering Committee for Human Rights – CDDH – and its subordinate bodies. These bodies have been very active – they drafted most of the instruments contained in the Reform Package of the 2004 Declaration; and since then they have been
Towards stronger implementation of the ECHR at national level

engaged in follow-up to implementation of the five main Recommendations. The examples of good practice identified should be studied carefully by member states in order to make progress in the relevant areas. For example, in most of our member states, criminal proceedings can now be reopened, after a Court judgment, either at the request of the applicant or at that of either the public prosecutor or some other public authority.

The Council of Europe also assists its member states in implementing higher standards of human rights through our programmes of targeted co-operation activities. These programmes complement standard setting and monitoring by translating their results into practice. Of course, successful implementation depends on the co-operation of the national partners, and I am pleased to say that in most cases this works very well. However, human rights assistance programmes can only have a long-term impact if member states are fully committed to ensuring that the results are maintained – indeed, commitment and co-operation should be seen as part of the responsibilities of member states under the Convention.

In other words, strengthening the national capacity to implement the Convention is a task for the member states themselves, with support from the Council of Europe, and not the other way around.

The Wise Persons report envisaged the Commissioner for Human Rights as having an increasingly important role in connection with the Convention system. One suggestion was to enhance his function as an “early-warning” mechanism for acute or systemic problems. In some respects this is already happening through his innovative, growing co-operation with Ombudsmen and national human rights institutions, which has included detailed work on the implementation of some of the Reform Package recommendations.

Other ideas for his role – some well-received, others less so – have been suggested, and as the budget and resources of his office continue to increase, I hope that he will be able to respond to the best of them.

Moving on from standard-setting and support for implementation, we come to monitoring activities.

The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly is currently reporting on the effectiveness of the Convention at national level. Its composition of members from the national parliaments of all member states make it an important partner in our activities – sometimes critical, but always constructive.

Other bodies which are not represented at this colloquy are also playing an important part. I would mention here the European Commission for Democracy through Law (the Venice Commission) and the European Commission for the Efficiency of Justice. Both have worked on improving domestic remedies, in particular the excessive length of judicial proceedings, an especially important issue in terms of the number of applications which arise from these delays.

And, of course, the Court itself helps member states to improve their domestic protection of human rights, by revealing deficiencies and, increasingly, providing guidance for solutions. For example, much more can be done to increase the impact of the case-law like advice which comes straight from the horse’s mouth, if President Costa will forgive the expression. It has been said many times before, but it is a fact that systematic, targeted dissemination of the case-law, translated into ever more languages, for the benefit of national judges, lawyers and civil servants would be very useful. It is for member states to choose the best method, whether full judgments, extracts of judgments or summaries of judgments. But until then, problems which the Court has already sought to remedy continue to generate new applications to Strasbourg, through simple, but avoidable, ignorance on the part of those concerned.

Speaking of the Court, of course, brings me to a related issue which I will mention even if this Colloquy will not consider it in depth.

I refer to the execution of judgments, the down-stream counter-part to the otherwise up-stream process of judgments. Full execution of each judgment, including any general measures, can go a long way to ensuring that
similar or related cases do not subsequently find their way to Strasbourg. Even where it has not been possible, prior to the Strasbourg judgment, to remedy a violation domestically, it should always be possible to learn the lessons of a judgment and ensure that an effective remedy is found for such violations in future. “Clone” or repetitive cases are a major component of the burden on the Court, and it is a burden which can and should be lifted by the member state concerned.

I hope that this Colloquy will live up to its title and, ultimately, lead to more effective implementation of the Convention at national level. The Council of Europe is ready to take up new ideas which I am sure will emerge. Drawing on the programme of the Colloquy – and without wishing either to influence your discussions or to present an exhaustive list – I would suggest that you might consider some of the following questions.

First, domestic remedies, in particular the idea – mentioned briefly at the San Marino seminar – of a new legal instrument, binding or otherwise. The Steering Committee on Human Rights, the CDDH, has already had a first look at this issue and found it to be interesting enough to recommend further work. What would be the purpose of such an instrument? If one is needed, should it be binding? If so, should it have a monitoring or control mechanism? Are the existing standards – in particular those based on Article 13 and the case-law of the Court, along with the Recommendation of 2004 – sufficiently clear so that they can be brought together in a comprehensive legal instrument? Or are they – with the existing 2004 Recommendation – sufficient by themselves?

Second, without doubt more can be done to ensure the compatibility of domestic legislation with Convention standards in order to avoid the creation of avoidable, systemic problems. We should look into what are the roles of the various national authorities – not only the legislature – in doing so, and what can the Council of Europe do to support them?

Third, we must improve execution of judgments, both the judgments of the Strasbourg court and national judgments. Judicial systems are pointless if their decisions are not given full and prompt effect. Much has been done to improve the supervision of execution of judgments by the Committee of Ministers and further work is underway. This Seminar is an opportunity to hear your views and proposals, including your ideas about possible improvements at national level.

Fourth, we should make sure that everyone in our member states should know about the possibilities which the Convention system offers to protect their rights and thereby resolve their problems, including by application to the Court. Of course, we do not want to encourage even more applications which do not have any merit, but a well designed system of information and advice should both deter some of the hopeless applications and improve the quality of those which do merit consideration. Who should provide this information and advice? Is there a role for the Council of Europe or for the Court, which currently has a pilot scheme providing advice through the Council of Europe Information Office in Warsaw?

Fifth, we should look at the possibility of professional training in Convention standards. Again, this was the subject of one of the Recommendations, going hand-in-hand with dissemination of the case-law of the Court, which I mentioned earlier. Without doubt, more can and should be done: when judges and lawyers are better aware of the Convention, then domestic court proceedings and judicial decisions should be less likely to generate applications to Strasbourg. I would like to hear your opinion about what member states can do to improve the situation, and how the Council of Europe can help.

One form of help, of course, is the "HELP" Programme or, to give its full title, the European Programme of Human Rights Education for Legal Professionals, which assists member states in training judges and prosecutors with reference to the Convention. This programme has produced all the necessary tools and materials, making them available online, free of charge, in many different languages, using the latest interactive methods. Member states really should make the fullest possible use of this important resource.

Regrettably, the HELP programme is only guaranteed funding until the end of this year.
Towards stronger implementation of the ECHR at national level

That is why I invite member states to make the financial commitments necessary to ensure its continued existence – by doing so, you will in effect be investing both in your own judicial systems and in the proper functioning of the European Court.

And finally, we need a clear and comprehensive vision of the pilot judgment procedure of the Court, with sufficient detail to indicate the type of cases it could cover, the way it will operate and the results it is intended to achieve? What are the respective roles of the Court, respondent states and the Committee of Ministers? How do we protect the interests of applicants, which must come first – they are, after all, the raison d'être of the Court?

And – I don’t want you to be limited in your thinking – anything else your collective experience, wisdom and creativity may generate over the next two days is welcome.

With these, I hope, encouraging words, I thank you all for your attention and your participation on this Colloquy, and I look forward to the debate and its outcome.
Proceedings

NATIONAL ASPECTS OF THE REFORM OF THE HUMAN RIGHTS PROTECTION SYSTEM: THE EXPECTATIONS OF THE ECtHR

Mr Jean-Paul Costa

President of the European Court of Human Rights

Madam Minister, Mr Secretary General, Mr Ambassador, Ladies and Gentlemen,

I wish first of all to thank the Swedish authorities for the warmth and quality of their welcome. Sweden has held the Presidency of the Committee of Ministers of the Council of Europe for one month, and it is a great pleasure for me to participate in the colloquy held in the context of this presidency, as I did in the events organised by the previous Chairmanships in San Marino, Belgrade and Bratislava.

My presence bears witness to the strong links I have sought to establish since the beginning of my mandate with the various Council of Europe bodies – the Committee of Ministers, the Parliamentary Assembly, and the Secretary General, not forgetting the Commissioner for Human Rights, with whom we maintain close contacts.

The Court is moreover very well represented here since my colleagues and friends, Elisabet Fura-Sandström and Giorgio Malinverni, the judges elected in respect of Sweden and Switzerland respectively, will be taking the floor. The most senior officials of the Registry are also present, first and foremost our Registrar, Erik Fribergh, for whom, as you all know, Stockholm is not exactly terra incognita, and Roderick Liddell, Director of Common Services. I think it not inappropriate to seize this opportunity to pay tribute to our Court’s Swedish Registrar, whose qualities and competence are unanimously acknowledged.

Sweden has always shown proof of its commitment to human rights, for example by devising the word and the institution of “Ombudsman”, and by its support for the Court. A founder member of the Council of Europe, Sweden recognised the right of individual petition very early on; the first judgments pronounced by the Court in Swedish cases in fact date from 1976!

It is to be welcomed that Sweden has placed at the forefront of the priorities of its Chairmanship the achievement of a fundamental objective of the Council of Europe – to make human rights a reality and, in particular, to strengthen the implementation of the European Convention on Human Rights at national level.

This colloquy on the subject will, I am convinced, be a highlight of the Swedish presidency.

Implementation of the European Convention on Human Rights at national level is an essential theme but, at the same time, the national aspects are so closely linked with the international aspects that I cannot dispense with a brief overview of the latter.

Everyone here knows the situation at the Court. For several years now, we have experienced exponential growth in the number of applications and, in 2007, there was a sharp increase in the number of cases referred to a judicial organ for decision or judgment.

Although the number of cases settled in 2007 was close to 29 000, the annual deficit was
Towards stronger implementation of the ECHR at national level

close to 13,000 cases. As to our current caseload, it is around 80,000 pending cases. This situation, which I have described to the Committee of Ministers on many occasions, notably at the last ministerial session, is difficult to bear.

As we all know, one of the solutions lies in the rapid entry into force of Protocol No. 14, signed by all Council of Europe member states, but of which we are awaiting the ratification of the Russian Federation. Without solving all the problems on its own, the Protocol’s entry into force will, thanks to a reform of the internal procedures laid down in the Convention, lead to a substantial increase in the Court’s efficiency and the number of its decisions, even with a constant budget.

Once more, I call on Russia, party to the Convention for over ten years, which participated in the drafting of Protocol No. 14 and signed it without reservation, to show its respect for the law and for international law by ratifying it without delay.

Dare I say I am confident that the institutional authorities of this great country will heed my call? My answer is yes.

Moreover, only the Protocol’s entry into force can make it realistic to follow-up the report of the Wise Persons, who took Protocol No. 14 as their starting point, in accordance with the terms of reference given to them at the 3rd Summit of the Council of Europe. The Wise Persons’ report, which contains several avenues for reflection, some of which most interesting, cannot really be implemented for the time being, and that is a great pity.

From this, I come to the core theme of this colloquy, implementation of the Convention at national level and the Court’s expectations.

The expectations of the European Court of Human Rights can be summed up under three main heads:
1. Due application of the principle of subsidiarity and complementarity.
2. Close co-operation with governments and parliaments.
3. Appropriate training of judges and lawyers.

Due application of the principle of subsidiarity and complementarity

The particularity of the European human rights protection system lies first in the fact that, under Article 1 of the Convention, the High Contracting Parties undertake to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention. The Court, which was set up under Article 19 to ensure respect for the states’ commitments, above all expects of the latter that they should not infringe these rights and freedoms, or as little as possible. In other words, that they honour the negative and also the positive obligations they entered into on acceding to the Convention and its protocols. In a world as unlikely as it would be ideal, the Court would serve no purpose because the Convention would be fully respected. In the real world, it is in any case to be hoped that it will be as much so as possible. We must all acknowledge that reality is still far from this ideal.

Fortunately, protection is nonetheless assured at both the national level, at least to a certain extent, and the international level. If the system is to be fully effective, all of its components must work perfectly.

Clearly, the Court cannot compensate for the total deficiency of a national system. This is, moreover, the reason why, in order that they must be exhausted before lodging an application, domestic remedies must be effective. Conversely, even a protection well-assured by the national judicial system does not prevent the Court from playing its supranational role. The system thus supports itself, in combining the essential role performed by the national authorities, in particular the courts, with European oversight, which is, in the last analysis, incumbent on the Court.

This mechanism is therefore by definition of a subsidiary nature, but one could also talk of complementarity, a term more reminiscent of the dialogue between national judicial systems and the Court and ultimately, through this process, of an informal but real co-operation. The national aspects of protection are thus
crucial, and it is right that this colloquy should recall this.

Since the Convention system is subsidiary in nature, the national courts have the right and the duty to ensure the supremacy of the Convention. I naturally believe in preventing litigation: apart from the fact that it is always preferable to prevent human rights violations, rather than subsequently repair them, subsidiarity is essential to the proper functioning of the human rights protection mechanism embodied in the Court: many applications, often of a repetitive nature, would become pointless and would not need to be lodged in Strasbourg, if effective mechanisms to prevent and remedy breaches of human rights existed at national level.

To mention only Article 6 of the Convention, concerning a fair trial, which is by far the provision most frequently invoked in applications to the Court, the reasonable-time requirement could be far better guaranteed by the national authorities if only they had the will to do so and gave themselves the means.

That is far from being the case, although it is a cause for satisfaction that the national courts, in particular Supreme and Constitutional Courts, are implementing the Convention increasingly well, this being a proper application of the subsidiarity principle.

Constructive co-operation with governments and parliaments

The national courts are not the only players the Court expects to intervene. In addition to the simple individual case in which the national courts apply the Convention, solutions to the structural problems that inundate our Court are increasingly being found at national level. This is where co-operation with the executive and parliaments takes on its full importance.

This is notably the case for the compensation schemes introduced in several member states to sanction proceedings of undue length. These solutions must be extended. The same applies to pilot judgments, which Erik Fribergh will talk about this afternoon.

All the branches of power thus have a role to play in the prevention and reparation of violations. Moreover, things are heading in the right direction. On each of my official visits or during visits to the Court by politicians or judicial officers, I can see that they are totally convinced of the need to amend their countries’ legislation and case-law to bring them into line with the Court’s decisions, thereby avoiding the need for the Court to issue new judgments of a repetitive nature. Perseverare diabolicum!

I am also struck by the fact that judicial reform – which has in fact become a permanent process, so great are the demands on justice systems – is on the agenda everywhere, particularly as a result of the conclusions that states draw from our leading decisions.

Effective execution of the Court’s judgments is an essential aspect of our co-operation with the member states. The executive plays a key role here, and I wish to commend the Committee of Ministers, which supervises execution and without which the system could not work properly. Both before and after the entry into force of Protocol No. 11, the Convention has always provided that the Committee of Ministers shall supervise execution of judgments. This original mechanism, to which the relevant department of the Council of Europe contributes with great competence, has proved its worth over the years.

But the executive and the judiciary are not the only parties involved. It is true that the legislature also plays an essential role in the implementation of the Convention, especially after the Court has rendered judgment and it is a matter of execution.

The Court is not empowered to repeal legislation or to set aside national decisions. It is for the respondent state to adopt the individual or general measures that allow it to remedy findings of violations and thereby avoid further rulings against it in future.

In certain cases, to bring national law into line with the European Convention on Human Rights, it is the legislature that must introduce amendments modifying legislation and making it, if I may say so, “euro-compatible”. Sometimes, it does so in a preventive capacity, to avoid condemnation in Strasbourg. Sometimes, and perhaps more often, its aim is to
Towards stronger implementation of the ECHR at national level

Take into account the implications of our case-law, whether concerning the state in question directly or another respondent state experiencing similar problems (what might be termed the *erga omnes* effect of our judgments).

These must, therefore, be better known to parliamentarians. For this reason, enhanced dialogue between the Court and the national parliaments is far from futile. It is always a pleasure for me to receive parliamentary delegations, an ever-growing number of which visit the Court and wish to know our institution better. We have noticed the usefulness of these visits, which help ensure that legislators are better informed.

The Court also maintains regular close contacts with the Parliamentary Assembly of the Council of Europe, emanating from the parliaments of all our member states, and of course with its President and its Secretary General. I moreover hail the presence here of Ms Bemelmans-Videc, a member of the Parliamentary Assembly’s Committee on Legal Affairs and Human Rights, whom I also had the pleasure to meet along with her fellow committee members in The Hague, and I will be interested to hear what she has to say in her address on the effectiveness of the parliamentary dimension of the Convention at national level.

To underline the importance of exchanges with the legislative branch of national authorities, may I recall the fact that last March, in Lithuania, I spoke, for the first time, before a parliament in plenary session. I was able to draw the attention of members of this parliament to the legislative reforms expected of them in the wake of certain of our judgments. It was a very enriching experience to hold a direct, uncompromising dialogue with a legislative assembly, and I hope to be able to repeat it in other states.

In any case, mechanisms to monitor the decisions handed down by the Court should be set up in the national parliaments, so as to react as quickly and as effectively as possible to the Court’s findings of violations. Similarly, where a state has mechanisms, as is more and more often the case, for codifying laws, it would be very useful if knowledge of the Convention and our case-law could be included.

Appropriate training of members of the judicial and legal professions

Strengthening subsidiarity also entails that states should co-operate with the Council of Europe and the Court so as to enhance knowledge of the latter and its case-law, in order to train judges, prosecutors and lawyers. Efforts have already been made in this direction and must continue.

We expect states to emphasise, in training programmes for the judicial professions, knowledge of the European Convention on Human Rights. The aim is, of course, to train judges so that they can apply the Convention more effectively and lawyers so that they can prepare applications with better prospects of acceptance in Strasbourg. The states also make a considerable effort to make the case-law better known in the national languages and not only in English and French. This is also very helpful.

Certainly, judicial training must be carried out at national level, but the Court contributes to it and is willing to receive judges and lawyers from all over Europe (and even beyond) so that they can familiarise themselves with our system.

It also receives human rights defenders, whose role is essential. In this connection, although “civil society” is by definition independent of the state, our expectations of the latter also extend to NGOs and non-state actors. In many countries, consultative or advisory bodies on human rights play a valuable role in promoting and reinforcing protection of human rights. Ombudsmen also make a strong contribution.

Apart from simple study visits by judges to the Court (hundreds of which take place each year), we have decided to take things further and to establish an exchange scheme, which will make it possible, under the auspices of the European Judicial Training Network, for European judges to spend a year in the registry.

This will indeed represent an effort for the member states, which will have to do without their judges for a relatively long time, but this interchange between the national system and
the Court is absolutely necessary if the aim is for the domestic courts’ judges really to consider themselves as European judges.

Another approach that we are developing, in accordance with the wish of the Steering Committee for Human Rights – whose Chair, Ms Deniz Akçay, present today, I salute – is the temporary secondment of member states’ judges to the Court. Several states have already taken up this possibility, for which I thank them. We are going to continue with this process. As we are in Stockholm, may I mention Sweden, which has already tried the experience with success and wishes to repeat it. Such secondments take place in strict compliance with the principles of independence and impartiality, for whose disrespect the Court reprimands national courts, and which it must therefore apply to itself.

The European Court of Human Rights is now the largest human rights court in the world, with 47 judges and more than 600 Registry staff. It is experiencing difficulties but, without the Court, the human rights situation in Europe would undoubtedly be less good or worse, even much worse.

Faced with the problems that confront it, the Court expects the member states to continue to provide it with support, as they always have done, but even more than in the past. I am not unaware of the economic and financial difficulties being experienced in Europe and the world. This might seem the wrong time to ask our member states to make additional budgetary efforts. However, if, in the long term, prevention, enhanced subsidiarity, better training and other measures will eventually bring about a decrease in the number of applications, in the short and medium term an increased budgetary effort is indispensable. I hope it will be granted, without any detrimental impact on the Council of Europe, which, under the terms of the Convention, bears the Court’s operating expenses. It is not utopian to expect states to see the big picture and make this effort.

Ladies and Gentlemen, what the Court expects of the states is, if not a permanent revolution, at least ongoing reform of human rights protection in Europe. We are thus calling for virtue in a far from always virtuous world. Virtue requires great patience. Strengthening implementation of the Convention at national level is itself a lengthy undertaking. All the more reason to thank the organisers of this colloquy, which enables a frank dialogue with states.

Thank you. ★

Proceedings
A REMINDER OF THE MAIN ELEMENTS OF THE REFORMS AGREED BY THE COMMITTEE OF MINISTERS

Ms Deniz Akçay

Chairperson of the Steering Committee for Human Rights (CDDH)

The Committee of Ministers’ role as actor and “strategist” in the “national” application of the Convention

The need for a global strategy pursued on three fronts, namely increasing the efficiency of the Court, improving the execution of Court judgments and taking action at national level, is a relatively recent strategy.

Furthermore, each of the three aspects emerged during different periods and evolved progressively. Towards the middle of the 1980s, the notion of a form of international justice more concerned with judicial safeguards and, at the same time, more rapid and less costly began to take shape. At the beginning of the 1990s, an interim response to this concern was found by making the Commission permanent.

Protocol No. 11, establishing the single Court, offered a relative, but brief, calm to the debate on this aspect.

As early as the end of the 1990s, continuation was ensured with a more intensive reflection on the execution of judgments, culminating in the Rome conference.

But the explosion in the number of applications was already directing thoughts towards a more “integrated” action at national level.

Of course, the importance of the national aspect has always been recognised since the beginnings of the control mechanism. However, discussions became polarised around monist and dualist theories and on the methods for applying the Convention at domestic level. The concept of subsidiarity, moreover, gave rise to numerous debates on interpretation.

It was only from 2000 on that we saw a new political awareness emerge, with the Council of Europe, and more specifically the Committee of Ministers, accepting a more general responsibility.

Since 2004 we have witnessed the implementation of a concerted strategy by the Committee of Ministers to “get a grip” on the question of national measures to reduce the number of alleged violations. To put it another way, this new concern is linked not only to the obligation to comply with the Convention in the national setting, but also to its critical importance for ensuring the long-term effectiveness of the control mechanism.

The 2001 report prepared by a group of three – President Wildhaber, the former Deputy Secretary General, Mr Hans Christian Krüger, and the Irish Ambassador, as the Chair-in-office of the Ministers’ Deputies – was already arguing for the need to take national measures.

The turning point came in 2004, by which time there had been a series of recommendations that formed the basis for action directed towards the member states.

This body of five recommendations was followed by the Committee of Ministers’ Declaration adopted on 12 May 2004 at its 114th session: “Ensuring the effectiveness of the implementation of the European Convention
on Human Rights at national and European levels”, which set the tone for the new approach.

The declaration faithfully reproduced the triple approach agreed since 2000, namely effectiveness of the Court, improved execution of Court judgments and the national level.

One might say that the first – effectiveness of the Court – already benefited from a major instrument, namely Protocol No. 14, and that the execution of Court judgments, as a responsibility of the Committee of Ministers, was largely within the powers of the Committee itself. But a new process was starting concerning the national level.

For the first time, the Committee of Ministers saw itself as being directly involved in the application of the Convention by member states.

The preamble of the declaration clearly stated its objective: “considering that it is indispensable that any reform of the Convention aimed at guaranteeing the long-term effectiveness of the European Court of Human Rights be accompanied by effective national measures by the legislature, the executive and the judiciary...”

The Committee’s involvement has been structured around five recommendations that, according to the declaration, were supposed to “help member states to fulfil their obligations.”

These recommendations are:

- Recommendation Rec (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights;
- 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 European Convention on Human Rights;

The Committee issued these five recommendations with an invitation addressed to member states to implement these recommendations speedily and effectively.

It also asked the Ministers’ Deputies to undertake a regular and transparent follow-up of their implementation.

Four years later, it is clear that this part of the declaration was the most original, and even the most advanced, which bore, and must still bear, the greatest promise for the future.

The 2004 declaration not only received the support of the Warsaw Summit, but had a number of practical and tangible consequences in the form of a further series of Committee of Ministers’ decisions in 2006.

The declaration on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels, adopted by the Committee of Ministers at its 116th session in May 2006, did not content itself with simply calling on all the member states to implement the five recommendations effectively. It extended and deepened the Ministers’ Deputies’ original mandate by instructing them to:

- continue their review of implementation of the five recommendations with a view to obtaining a better assessment of the actual impact of implementation measures on the long-term effectiveness of the Convention;
- deepen this review by focusing henceforth on verification of the effectiveness of implementation measures and filling outstanding information gaps, particularly in three priority areas: improvement of domestic remedies, reexamination or reopening of cases following judgments of the Court, and verification of compatibility of draft laws, existing laws and administrative practice with the Convention;
- involve in this review other Council of Europe bodies as set out in their report, such as the Parliamentary Assembly, the Court and the Commissioner for Human Rights.
Towards stronger implementation of the ECHR at national level

With the CDDH Activity Report recently presented to the Committee of Ministers’ 118th session, the first phase of the exercise appears to have come to an end, at least for the time being.

We are faced with two questions:

1) What has been the direct impact of the exercise?
2) What might be the future of the exercise; might it continue as such at national level or should it receive fresh impetus from the Committee of Ministers?

Real, potential and possible future impact of the first cycle

It seems to me impossible to establish any quantifiable relationship between the first review cycle of the five recommendations and the number of applications to Strasbourg. On the other hand, I think that from the point of view of our respective authorities, the impact of this first attempt to secure a certain consistency between the various applications and interpretations of the recommendations has had a considerable impact, all the more so in that it has been spread over several years.

First, the exercise has made member states acutely and simultaneously aware of the fact that the Court’s potential cannot be extended indefinitely and of our responsibility, as member states, to deal with this problem.

Second, we have had an opportunity to take broad stock of the situation at the level of our respective authorities, who themselves have had to look to other sources. There has thus been a great deal of “hustle and bustle” at various levels and with a huge goal, in the sense that we aimed at effective application of five recommendations at the same time.

Third, we have been able to have a clear and comprehensive idea of all the relevant legislation and legal practices relevant from the point of view of the Convention. We have thus had the possibility to compare our legislation and even our legal systems, and also to have an idea of how other member states react, which has created a sort of imitation.

Fourth, the review of the five recommendations, by requiring all member states, without discrimination and simultaneously, to supply very detailed information, may create a sense of collective responsibility and even solidarity, in the face of the risk of the system’s implosion.

Fifth, often the very fact of requesting information gives rise to a reflection on whether existing provisions are sufficient and adequate. Relevant authorities faced with a “simple” request for information may sometimes be persuaded to launch a process of improvement of the existing rules. In all cases, it has been possible to bring out examples of good practice that could serve as models for others.

Sixth, other Council of Europe bodies have been able to participate in the exercise and contribute, in accordance with their functions, competencies and expertise. Thus:

– The Commissioner for Human Rights, for his part, has been able to contribute to the exercise through his contacts within national structures;
– The Venice Commission has produced a report on the effectiveness of domestic remedies;
– The CEPEJ has identified indicators for a better understanding of judicial time frames;
– The Parliamentary Assembly has prepared a report on the effectiveness of the Convention at national level.

Furthermore, we have extremely valuable information on the practical impact of the five recommendations from the Court Registry, which has noted that in the countries where new remedies have been introduced, the Court’s workload has been reduced, even if the total number of applications has risen.

Limits of the Committee of Ministers’ role in connection with the review of the five recommendations

The control mechanism of the Convention is subsidiary to national legal systems, whether at the level of the Court or the Committee of Ministers, when it is acting under Article 46 of
the Convention. However, this is not the case when the latter is reviewing the implementation of the five recommendations.

The Committee of Ministers has neither the power nor the means to require states to implement its recommendations in a uniform manner, and this would in any case be impossible, given the specificities of each legal system. Legally, moreover, this would also amount to equating recommendations to binding instruments, which would go against Article 15 of the Statute of the Council of Europe.

Furthermore, the continuation of such an exercise would lead to exhaustion on the part of member states, frequently solicited with requests for information.

Nor would the continuation of the monitoring exercise have the real effect sought by the Committee. Scrupulous application of the Convention requires case-law benchmarks from the Court, and more specifically its Grand Chamber. The most “respectful” interpretations by states risk being superseded by the evolution of the Court’s case-law.

Given, therefore, the inherent limits to the role and competencies of the Committee of Ministers, on the one hand, and the relative nature of any permanent validity of the Court’s case-law on the other, it was necessary to rethink the effective role that the Committee of Ministers could play at national level to assure the long-term effectiveness of the control system of the Convention.

The future of the Committee of Ministers’ role in strengthening respect for the Convention at national level

To begin with, for as long there is no significant improvement in the Court’s situation, the Committee of Ministers cannot finally and, from one day to the next, cease to be involved in the process of implementation of the five recommendations. It must be borne in mind that these reflect the most important concerns of member states about the very future of the Court.

The fact that Protocol No. 14 has not been able to come into force has made these concerns even more pressing. When consideration of the recommendations started in 2004, it was thought that by 2006 there would already be a new instrument to expedite Court proceedings.

In fact, today, two years beyond 2006, the expected positive impact of the Protocol is still not being felt and we are now reaching the limits of the usefulness of the review process, which threatens to become trivialised by a stream of repetitive, and eventually even exhausting, information.

Yet the problems remain the same and, more than ever, the Committee of Ministers cannot ignore them.

How, then, can we imagine and configure the new role of the Committee of Ministers at national level?

The CDDH activity report adopted by the Committee of Ministers suggested that “the Ministers’ Deputies come back to the issue of the national aspect of the reform in 2-3 years’ time”.

It is true that solemn occasions such as the sixtieth anniversary of the Council of Europe in 2009 and of the Convention in 2010 could constitute target dates for a new reflection on the Committee of Ministers’ role with regard to the national level.

But how to proceed; and on what basis and using what methods to resume an exercise on the “national level”?

One cannot deny that the five recommendations reflect the “national interface” of the range of problems faced by the Court as a result of the rising number of applications.

However, do they necessarily constitute an indivisible whole in 2008?

It is a question that we must ask ourselves. Does the recommendation on the reopening of cases present the same relevance in 2008 as in 2000? Although it is important in certain individual cases following the finding of a violation, its impact in terms of general measures whose absence would generate applications to Strasbourg has not been established.

The recommendations on university teaching and the dissemination of the Convention and the Court’s case-law are certainly still...
important, but do we need to resume a review exercise when there is no quantifiable correlation with the increased number of applications?

By contrast, the recommendations on improving domestic remedies, complemented by the recommendation on compatibility of draft laws, existing laws and administrative practices, concern matters that are closely linked – almost in a causal relationship – with the number of applications.

In the context of a new reflection on the Committee of Ministers’ role, we must also await the measures retained by the CDDH in its exercise of examination of the Wise Persons report, the Woolf report and other reform proposals, which will be submitted to the Committee on 30 April 2009.

In conclusion, the more in-depth, and even exhaustive, review of the five recommendations, supplemented by contributions from other Council of Europe bodies and to a certain extent from civil society, was an exercise that confirmed the Committee of Ministers’ determination to ensure the effectiveness of the Court.

It has also induced member states to a general appraisal of their legal systems and their scope for reducing the number of applications to Strasbourg, by taking account both of their own potential and of examples of good practice from all the other countries.

In the future, particularly in the event that Protocol No. 14 does not come into force, there could be an evaluation of the Committee of Ministers’ setting up similar or analogous exercises, or otherwise taking responsibility for the national aspect.
The introduction to my contribution is made much easier by what has just been said. The Committee of Ministers’ demarcation of the national aspects of what we here call the Reform, which aimed at guaranteeing the long-term effectiveness of the Convention system, was doubtlessly not exhaustive and we continue to discuss as much the European aspects of the Reform as the complementary national measures. However, to simplify the situation, I shall talk about the implementation of five recommendations of the Committee of Ministers addressed to the member states between 2000 to 2004, which the Committee of Ministers itself placed in the framework of the Reform when it adopted the last three of them in May 2004.

These five recommendations cover quite varied subjects:

- *restitutio in integrum* for wronged applicants who have succeeded before the Strasbourg Court,
- translation and dissemination of the Convention and of the Court’s case-law,
- teaching of Convention standards,
- verification of the compatibility of legislative and administrative action with Convention standards, and
- improvement of domestic remedies capable of redressing violations of the Convention.

In May 2004 the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) to undertake a follow up the implementation of the five recommendations. This task was assigned more specifically to a working group composed of governmental experts who studied these questions for almost four years.

To study the implementation of a reform promoted in an organisation of 47 member states at national level necessarily means analysing the situation in the 47 member states, each of which is supposed to submit information with regard to the five recommendations. It naturally results from this that the process has not gone ahead without encountering difficulties. These have been linked chiefly to a fairly large volume of information being collected (compiled by country in a document of several hundred pages) which then had to be compared and digested in order to draw the appropriate conclusions, themselves to some extent subject to caution as the information did not come from a single source, however true to the exercise it may have been.

We began by sending general questionnaires to all experts, and subsequently went on

---

405. I thank the team of the CDDH secretariat, whose various members have been closely associated over time in monitoring the implementation of the five recommendations of the Committee of Ministers, for their suggestions bringing improvements to the text of my contribution.

406. Cf. the recent work of the Reflection Group DH-S-GDR.

407. The recommendations are mentioned in the footnotes on pages 6-9.

Towards stronger implementation of the ECHR at national level

However, again by way of example, some points are still worthy of attention:

- the reopening of civil proceedings after a Court judgment may be excluded even outside situations where refusal to reopen them is justified by imperatives of legal certainty or the protection of third parties in good faith;
- by force of circumstances, there are reservations as to dissemination of the Court’s case-law concerning third states, language barriers still preventing many practitioners’ access to knowledge of Convention standards;
- development of training for trainers and testing the knowledge acquired during professional training sessions are not yet well established practices in our member states;
- evaluation of the effectiveness of mechanisms for verifying the compatibility of draft legislation or regulations or of administrative practice with Convention standards is largely lacking;
- verification of the effectiveness of domestic remedies is not always applied as an instrument of prevention, that is before an application communicated by the Court raises doubts.

Secondly, it should be noted that some recommendations substantially correspond to states’ legal obligations, and their non-fulfilment may be pointed out, even sanctioned, by an appropriate body. Thus the possibility of reviewing or reopening certain cases at domestic level following Court judgments and the introduction of effective remedies at domestic level are routinely considered by the Committee of Ministers in the context of its supervision of the execution of the Court’s judgments, the Court itself being obliged to find an absence of domestic remedies and thus a violation of Article 13 of the Convention. Other recommendations have only an indirect link to states’ obligations and we lack a Council of Europe body which could check on a case-by-case basis whether this or that recommendation has in fact been followed up. However, in all probability, this is not necessarily a criticism of the system; only a real “inspection” would be capable of filling this apparent gap.

to put more targeted questions to certain experts in order to make the material to be analysed comparable and comprehensive. Efforts were made to present civil society with the information submitted by the governmental experts, with a view to satisfying ourselves that we were in the process of obtaining a true-to-life picture. Seeing that these efforts proved somewhat in vain for want of adequate response from the many non-governmental organisations that we approached, we had to look more towards the other Council of Europe bodies, including the Commissioner for Human Rights for whom, I feel able to say, an idea of this kind was well-matched to his desire to build a stronger network of cooperation with the national human rights protection structures.

Thanks to all these inputs, we have been able to make a number of findings, of which I shall now try to give a summary.

Firstly, the interest raised among the member states is undeniable. They have seriously considered the implementation of the recommendations, “played the game” and submitted information in this respect, even if sometimes to an unequal degree of precision. Although this aspect marks one of the inherent limitations of the exercise, it seems that the state of implementation of the recommendations is fairly satisfactory overall. Thus, on a purely illustrative basis:

- in virtually all states, there is the possibility of requesting the reopening of criminal proceedings after a Court judgment finding a violation of the Convention;
- the Convention is available in all official languages of the member states and has often been published in an official journal; the Court’s case-law undergoes dissemination thanks to public or private initiative;
- the provisions of the Convention are taught in law faculties and are part of professional training for lawyers, judges, prosecutors or police officers;
- in many states, drafters of bills are required to examine the compatibility of their drafts with the Convention;
- the existence and effectiveness of domestic remedies is verified on various occasions, at a minimum “if certain concerns arise”. 
We think there is scope here for other Council of Europe agencies or initiatives, whether the Office of the Commissioner for Human Rights, the European Commission for the Efficiency of Justice (CEPEJ), the European Commission for Democracy through Law (Venice Commission), the Department for the Execution of Judgments on the one hand, or the HELP programme for professional training of judges and prosecutors or the Council of Europe assistance programmes, on the other.

Thirdly, measuring the positive impact of the implementation of the recommendations on the long-term effectiveness of the Convention has proved a difficult if not impossible task in the current circumstances. The word “impossible” does not, in principle, hold good when it comes to the impact of certain practical measures on the trend in the number of applications to the Court: particularly when faced with a systemic problem that is at the origin of a high number of applications, introduction of an effective domestic remedy of a compensatory nature and with an at least partly retroactive effect almost always has an impact on the Court’s caseload. But even here, the Court does not have available statistical tools that would allow accurate measurement of the decrease in number (or even workload) that the introduction of a new remedy would represent. We are even less well equipped in other areas. The impact of implementation of the recommendations remains unclear. For example, better knowledge of the Convention, sought by one of the recommendations, may easily translate into an increase in the number of applications addressed to the Court, which is shown by the quantitative analysis often considered easier to undertake, and the positive impact according to a qualitative analysis, that is in terms of better preparation of the applications submitted for the Court’s examination, remains difficult to affirm.

Our work has produced two series of documents, one dating from 2006 which covers all of the so-called “Reform” recommendations, after which the Committee of Ministers considered it expedient to continue the exercise, and the other from 2008, which completed a more in-depth phase of examination of the implementation of three recommendations which were considered to have priority, namely the one concerning review or reopening of certain cases following Court judgments, that on improvement of domestic remedies and that relating to verification of the compatibility of national standards with the Convention. These documents are both synoptic fact-sheets for each recommendation and compendia of information collected by country. Now, even though it is not possible to consider as final the second phase, completed this year, the need for a break is felt in the context of intergovernmental cooperation, unless the work is continued under other arrangements. The CDDH has nonetheless reiterated the importance of this major issue and its willingness to keep it on its agenda: in the light of the work to be done by other bodies, it will regularly exchange views on the follow-up to the recommendations.

As I have already indicated, intergovernmental co-operation, albeit at a level of experts, has limitations that only a change in the nature of the exercise (passing from follow-up to monitoring) would, theoretically, allow to be overcome. The recommendations are undoubtedly not implemented one hundred per cent, and we have the feeling that the degree of proactivity which they sometimes advocate is not attained in practice. It should

409. Typically, cases involving undue length of judicial proceedings.


be recalled that to the mind of the Committee of Ministers, these legal instruments are part of the general configuration of the Reform and that, from this point of view, they are more than mere recommendations in the ordinary sense of the word, although without becoming precise legal commitments.

There is great scope for work on improvement so that the treaty system, almost sixty years old, may still have a long life before it. Indeed, I am afraid that, despite an overall good standard of human rights protection in Europe, we cannot yet do without it.

Theme I: Ways and Means of Strengthening the Implementation of the European Convention on Human Rights at National Level

Keynote speaker: Mr Giorgio Malinverni

Judge elected in respect of Switzerland to the European Court of Human Rights, Emeritus of the University of Geneva

There are many possibilities for examining the ways and means of strengthening the implementation of the European Convention on Human Rights at national level.

One of them – among many others – is to examine these ways and means from a dual perspective. The first would be devoted to the ways and means of strengthening the implementation of the Convention as a general obligation of every contracting party, irrespective of any judgment pronounced against it. The second approach would focus on the obligations arising for each contracting party after a judgment is pronounced against it and a violation found.

Ways and means of strengthening the implementation of the European Convention at national level as a general obligation of the States Parties

1. The principle of subsidiarity of the European supervision

It is hardly necessary to recall here that the mechanism of control instituted by the European Convention rests on the principle of subsidiarity. This principle, which is implicitly enshrined in Articles 1, 13 and 35 of the Convention, means that the obligation to apply the guarantees of the Convention lies primarily with the national authorities.

The Court itself has often reiterated that it exercises its supervisory role subject to the principle of subsidiarity and has underlined the subsidiary character of the machinery of individual complaint, pointing out that by virtue of Article 1 of the Convention, “the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities”.

2. The obligations deriving from Article 13

The best expression of the principle of subsidiarity is probably to be found in Article 13 of the Convention. This provision aims at affording a means whereby individuals may obtain relief at national level for violations of their Convention rights before having recourse to the Strasbourg Court.

Indeed, it may be said that the effectiveness of the European Convention of Human Rights largely depends on the effectiveness of the
remedies which are provided at national level to redress its violations. In other words, the international guarantee of a remedy, as enshrined in Article 13, implies that a state has a duty to protect human rights and freedoms first within its own legal system.

In its Lukenda judgment the Court has described the obligations deriving for the states from Article 13:

"By becoming a High Contracting Party to the European Convention on Human Rights the respondent state assumed the obligation to secure to everyone within its jurisdiction the rights and freedoms defined in Section 1 of the Convention. In fact, the states have a general obligation to solve the problems that have led to the Court finding a violation of the Convention. This should therefore be the primary goal of the respondent state. Should violations of the Convention rights still occur, the respondent states must provide mechanisms within their respective legal systems for the effective redress of violations of the Convention rights."

To be considered effective and thus conform to Article 13, a domestic remedy must allow the competent national authority both to deal with the substance of the relevant Convention complaint and to grant “appropriate relief”. This can entail, for example, the termination, modification, non-application or annulment of the act complained of or reparation for damage resulting from the violation.

The principle of effectiveness also implies that the procedure for obtaining domestic remedies must not be unjustifiably hindered by acts or omissions of the authorities of the state concerned.

3. The “revitalisation” (reinforcement) of Article 13 in the Court’s recent case-law

I don’t want to go into detail here about the complicated history of the interpretation given by the Court to Article 13, which is one of the most mysterious provisions of the Convention.

What I would like to stress here is that there is a clear trend in the Court’s recent case-law towards reinforcing the scope of Article 13.

This new trend can be seen in at least two fields: the first is the role of Article 13 in respect of allegedly unreasonably lengthy proceedings; the second is the importance of Article 13 in cases in which the Court finds a procedural violation of Article 2 or 3 of the Convention.

The relationship between Article 13 and Article 6 of the Convention

In general

Until fairly recently, when a claim concerned the absence, within a national legal system, of a body competent to examine the claim that the length of proceedings was excessive, or of any means to shorten or terminate the excessive length of the proceedings, the Court considered that, since the requirements of Article 6, paragraph 1 are stricter than those of Article 13, where a violation of Article 6, paragraph 1 was found, it was unnecessary to determine whether there had also been a breach of Article 13, the requirement of the latter being entirely “absorbed” by those of the former.

The change in reasoning with regard to the right to an effective remedy in respect of excessive length of proceedings came in 2000, with Kudla v. Poland.

In that judgment the Court considered, “in the light of the continuing accumulation of applications before it concerning the alleged violation of the right to a hearing within reasonable time”, that “the time has come to review its case-law” according to which, in case

419. Altun v. Turkey, judgment of 1 June 2004, para. 70.
420. See, for example, Giuseppe Tripodi v. Italy, judgment of 25 January 2000, para. 15, and Bouilly v. France, judgment of 7 December 1999, para. 27.
of a violation of that right (Article 6, paragraph 1), there would be no separate examination of an alleged breach of the right to an effective remedy (Article 13). In support of this view the Court noted the “important danger that exists for the rule of law within national legal orders when excessive delays in the administration of justice occur in respect of which litigants have no domestic remedy”.

The Court’s change of position must certainly have been inspired by concerns of judicial economy, as a radical effort to find an antidote to its ever increasing backlog.

- The assessment of the existing national remedies by the European Court of Human Rights

Since the requirement of Article 13 constitutes an obligation of result, the contracting states have some discretion as to the manner in which they provide the relief required.\(^\text{422}\)

Until recently, the Court, respecting the margin of appreciation given to the contracting states, refrained from indicating a specific form or type of “effective remedy” with respect to an alleged violation of the right to a hearing within a reasonable time.

The Court has recently adopted a more directive approach regarding what remedy is to be considered as effective within the meaning of Article 13. In its Scordino judgment,\(^\text{423}\) it has given explicit indications as to the characteristics which an effective domestic remedy in length-of-proceedings cases should have.

The Court has thus expressly encouraged certain respondent states to proceed speedily with proposals to enact laws\(^\text{424}\) or to amend the existing range of legal remedies or add new remedies so as to secure genuinely effective redress for violations of the right to a speedy trial, in accordance with the indication as to the characteristics of an effective remedy given by the Court itself in the judgments.\(^\text{425}\)

According to the Court’s case-law, some remedies are found to be effective while others are considered to be ineffective.\(^\text{426}\)

In the case of Italy, for example, the Grand Chamber delivered a number of judgments concerning the effectiveness of the Pinto Law. It found that the proceedings under that Law were not entirely sufficient and therefore did not deprive the applicants of their victim status for the purpose of bringing a case to Strasbourg.

In assessing the effectiveness of various domestic remedies, the Court has formulated several criteria and guidelines. It has even given certain explicit indications as to the characteristics which an effective domestic remedy should have.

According to the Strasbourg Court, states have to

i) organise their legal system so as to prevent unreasonable procedural delays from occurring;

ii) if excessive delays occur, acknowledge the violation of Article 6 and provide adequate redress;

iii) when their legal system is deficient in terms of reasonableness of the length of proceedings, provide an acceleratory remedy;

iv) if they choose not to do this, and also in cases where excessive delays have indeed already occurred, provide a compensatory remedy in the form of either financial compensation or other forms of compensation such as mitigation of the sentence and discontinuance of the prosecution.

The relationship between Article 13 and Articles 2 and 3 of the Convention

Another area where the importance of Article 13 has been increasing in recent years is that of the relationship between this provision and Articles 2 and 3 in their procedural limbs.

Usually, when a violation of the procedural limbs of Articles 2 and 3 has been found, the Court does not deem it necessary to examine

---

422. Kaya v. Turkey, judgment of 19 February 1998, para. 106; Chahal v. UK, par. 145.
424. Sürmeli v. Germany, judgment of 8 June 2006, para. 139.
425. Lukenda v. Slovenia, para. 98.
Towards stronger implementation of the ECHR at national level

whether there has also been a further violation of Article 13. There is, however, an exception to this rule. The Court deals with the issue of Article 13 when the applicant alleges that the domestic procedures for receiving an indemnity are either inexistent or ineffective.\footnote{427. See, for instance, Bozaru v. Romania, judgment of 26 July 2007; Dölek v. Turkey, judgment of 2 October 2007.}

Thus, in all the “Tchetchen cases” against Russia, it has become the rule to examine the applications under both the procedural limb of Article 2 and under Article 13.\footnote{428. See, for example, Bitieva v. Russia, judgment of 21 June 2007; Alikhadjiyeva v. Russia, judgment of 5 July 2007.} In all these cases, the reasoning used by the Court to justify the cumulative approach is the following:

> “It follows that in circumstances where, as here, the criminal investigation into the deaths was ineffective and the effectiveness of any other remedy that may have existed, including the civil remedies suggested by the government, was consequently undermined, the state has failed in its obligation under Article 13 of the Convention.”\footnote{429. Moussaïev, para. 175.}

\textbf{Ways and means of strengthening the implementation of the European Convention at national level once a judgment has been delivered and a violation found}

The jurisdiction of the Court under the Convention is a very important legal mechanism for the promotion and protection of human rights. The effectiveness of that mechanism depends to a large extent on the execution of its judgments. A timely and complete execution of the Court’s judgments is of vital importance for the authority of the Court, for an effective legal protection of the victims of violations and for the prevention of future violations.

Any judgment of the Court has a double characteristic. It has the character of \textit{res judicata} for the respondent state and the character of \textit{res interpretata} for all the other states.

\textbf{1. The Court’s judgments as res judicata}

\textbf{General obligations}

Pursuant to Article 46, paragraph 1 of the Convention, member states must abide by the Court’s judgments in any case to which they are parties.\footnote{430. See Jörg Polakiewiez, \textit{Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofes für Menschenrechte}, 1993, p. 251; Peter Leuprecht, “The execution of judgments and decisions”, \textit{R.St.I. Macdonald, F. Motscher and H. Petzold (eds), The European system for the protection of human rights}, 1993, p. 792; F. Matscher, “Le système de la Convention et le fonctionnement du mécanisme de contrôle”, \textit{RCADI}, Tome 270 (1997).} The obligation to “make reparation” is threefold.

When the Court has deemed it necessary to award just satisfaction, it is the state’s duty to pay the applicant the relevant sums.

The adoption of individual measures for the applicant’s benefit may be necessary to ensure that the latter is put, in so far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention.

In addition, states may have to take general measures, such as legislative amendments, in order to prevent further violations of a similar nature.

States have a particular responsibility regarding the execution of the Court’s judgments in relation to repetitive applications, because these applications would never have seen the light of day if general measures to prevent further violations had been taken or taken more promptly by the state concerned.

\textbf{Enactment of legislation allowing for review or reopening of domestic proceedings}

A further measure that states should take is the enactment of legislation allowing for review or reopening of domestic proceedings following the finding by the Court of a violation of a Convention provision.

This is a priority which should be pursued in all possible venues and on all possible occasions. The importance of such legislation has
been stressed and reiterated by the Committee of Ministers.\footnote{Recommendation R No. (2000) 2, of 19 January 2000. See Elisabeth Lambert-Abdelgawad, “Le réexamen de certaines affaires suite à des arrêts de la Cour européenne des droits de l’homme”, Revue trimestrielle des droits de l’homme, 2001, pp. 715-42.} The Court has implicitly endorsed the practice of the Committee of Ministers of pursuing the reopening of domestic proceedings in cases of infringements of the right to a fair trial.\footnote{Pisano v. Italy, judgment of 24 October 2002, para. 45.}

2. The Court’s judgments as res interpretata

The Court’s judgments, in fact, serve not only to decide those cases brought before the Court, but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the states of the engagements undertaken by them as contracting parties.\footnote{Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25, para. 154 in fine.} This means that States Parties, besides having to abide by judgments of the Court pronounced in cases to which they are party, also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice.

This means that at the national level legislation should ensure that they have appropriate procedures for verifying that all new legislation which could potentially interfere with human rights complies with the Convention.

Governments should take the necessary action for executing the Court’s judgments as swiftly as possible. Judges should work towards giving direct effect to the Court’s judgments.

To make their task easier, the Court’s judgments should be available in the relevant national languages.\star

\footnote{See Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25, para. 154 in fine.}
Towards stronger implementation of the ECHR at national level

The effectiveness of the ECHR at national level: The parliamentary dimension

Ms Marie-Louise Bemelmans-Videc
Member of the Parliamentary Assembly of the Council of Europe

I would like to thank the organisers for inviting me to speak before you today. I am honoured to be able to participate in this Colloquy on a topic that is very dear to me: the stronger implementation of the European Convention on Human Rights at national level and in particular, the role of national parliaments in verifying state obligations to comply with the ECHR, including Strasbourg Court judgments.

We all agree – as is clear from the title of this Colloquy – on the need to reinforce national implementation of the ECHR, thereby putting back into focus the “subsidiary nature” of the Strasbourg control mechanism. It is also evident that national parliaments should, where possible, play a significant role in ensuring a substantial reduction of individual applications to the Strasbourg Court.

So let me first state the obvious. States are responsible for the effective implementation of human rights and it is incumbent on all state organs, be they the executive, the courts or the legislature, to prevent or remedy alleged human rights violations at the national level. This is principally, but not exclusively, the responsibility of the judiciary. In so far as the legislature is concerned, this may entail, for instance, rigorous “Strasbourg vetting” of draft legislation. Only when the domestic system fails, should the Strasbourg Court step in. Subsequently, if and when there is an adverse finding by the Strasbourg Court, emphasis shifts back to the domestic arena when the state is required to execute the judgment under the supervision of the Committee of Ministers (Article 46 of the ECHR). At this stage too, parliamentary involvement may be necessary, as the rapid adoption of legislative measures may be required to ensure compliance with the Court’s judgments.

As a result of the foregoing, it is also obvious that the double mandate of national parliamentarians – as members of PACE and of their respective national parliaments – can be of fundamental importance in ensuring that human rights guaranteed by the ECHR and the Strasbourg Court are effectively protected and implemented domestically without, in the vast majority of cases, the need to seek justice in Strasbourg. There is a heavy burden on us, parliamentarians, especially those with such a double mandate, to ensure stronger implementation of the Convention at national level.

It follows that member states, including their legislative bodies, must be more rigorous in ensuring regular verification of the compatibility of draft and existing legislation with ECHR standards, as well as the existence of effective domestic remedies. Indeed, as concerns draft legislation, such verification has in the last few years been systematically undertaken by parliamentary committees in several member states. The extent to which this is also carried out – specifically in the context of the ECHR – by the legal services of legislative bodies, I am simply not able to answer. Probably (hopefully?) quite often, but I lack empiri-

434. This point has been very aptly underscored in the title of an article just published on this subject by C.Paraskeva “Returning the protection of human rights to where they belong, at home”, in the June 2008 issue of The International Journal of Human Rights, vol. 12, pp. 415-448.
cal evidence to back up this statement. That said, the compatibility of existing laws with ECHR standards often crops up within the framework of parliamentary debates. Likewise, oral or written questions are put to the executive when, for instance, the execution of a Strasbourg Court judgment is at issue. [For an overview of different parliamentary practices on this subject, I refer you to the background document prepared for this colloquy, and in particular its addendum.]

As explained in the background document prepared for the presentation I am making today, a questionnaire entitled “Parliament’s role in verifying state obligations to comply with the ECHR, including Strasbourg Court judgments”, was sent to the parliaments of all 47 Council of Europe’s member states in February of this year. To date, 39 have replied. This questionnaire was preceded, in November 2007, by a separate initiative taken by the former Assembly President, Mr René van der Linden, who invited the Speakers/Presidents of all parliaments of Council of Europe member states to submit information on the follow-up to PACE Resolution 1516 (2006) on the establishment of internal parliamentary systems to monitor the implementation of the Court’s judgments.

The result product of this, admittedly incomplete survey is, on the one hand, not too encouraging as concerns the lack of a pre-established and systematic parliamentary procedures of “Strasbourg ECHR vetting”, and on the other hand, the readiness of an increasing number of parliaments to take a more proactive approach to help ensure that appropriate and rapid following-up is given after an adverse finding by the Strasbourg Court.

Very few parliamentary mechanisms exist with a specific mandate to verify compliance with ECHR requirements; one could probably include the work of the UK Joint Committee on Human Rights in this rubric. Most replies indicated that “Strasbourg vetting” is carried out within existing “normal” parliamentary procedures (see, e.g., replies from Albania, Andorra, France, Poland, Portugal, Serbia and Slovakia). In other countries, the reply often given was that, as the ECHR is part of domestic law, this in itself necessitates the need to regularly check compatibility of national laws with Convention standards. In Austria, where the ECHR has “constitutional status”, special attention is indeed given to this. But in the vast majority of states this is not a function with respect to which national legislators appear to take a “lead role”.

In so far as the need to comply with the judgments of the Strasbourg Court is concerned, a different “scenario” can be detected. This is due to the growing “interaction” between national parliamentary bodies and the Parliamentary Assembly. I am fully aware that, in so far as implementation of Strasbourg Court judgments is concerned, the principal task of supervising the execution of such judgments – by virtue of Article 46 of the ECHR – is the responsibility of the Committee of Ministers. Nevertheless, the Parliamentary Assembly has, since 1993, played an increasingly important role in the process of implementation of the Court’s judgments. Six reports and resolutions and five recommendations have been adopted by the Assembly since 2000 to help member states overcome structural deficiencies and to accelerate the process of fully complying with the Court’s judgments. In addition, various implementation problems have been regularly raised by other means,

436. No replies have as yet received from the parliaments of Azerbaijan, Luxembourg, Malta, Moldova, Monaco, Montenegro, San Marino and Slovenia.

435. For a recent overview see Committee of Ministers doc.CM (2008) 52, of 4 April 2008: CDDH Activity Report “Sustained action to ensure the effectiveness of the implementation of the ECHR at national and European levels”, especially Appendix IV (which refers to improvement of domestic remedies; including mechanisms within the legislature, at §§ 11–19), and Appendix VI (which concerns the need to verify draft and existing laws, including parliamentary verification at §§ 13–18). See also my AS/Jur working document “The effectiveness of the ECHR at national level”, doc. AS/Jur (2007) 35 rev 2 (declassified by the Committee on 26 June 2007).

436. No replies have as yet received from the parliaments of Azerbaijan, Luxembourg, Malta, Moldova, Monaco, Montenegro, San Marino and Slovenia.

437. See, e.g., Committee of Ministers 1st annual report on the supervision of the execution of judgments of the European Court of Human Rights 2007 (Council of Europe, March 2008), passim.

notably through oral and written parliamentary questions. A number of complex implementation issues have been solved with the assistance of the Assembly and of the national parliaments and their delegations to the Parliamentary Assembly. Indeed, in the context of his sixth report on the implementation of ECHR judgments, Mr Erik Jurgens, Rapporteur, visited five states where the most difficult and/or long-standing implementation issues arose (namely Italy, the Russian Federation, Turkey, Ukraine and the United Kingdom).439 He used these visits to examine, with fellow parliamentarians and national decision-makers, the reasons for non-compliance with Court judgments and to stress the urgent need for solutions to problems raised. Subsequently, in its Resolution 1516 (2006) – based on Mr Jurgens’ sixth report – the Parliamentary Assembly emphasised that “member states methods and procedures should be changed to ensure immediate transmission of information and involvement of all domestic decision makers concerned in the implementation process, if necessary with the assistance of the Council of Europe.”440 The Resolution further “invites all national parliaments to introduce 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.”441

What is probably again worth emphasising is the privileged status which we parliamentarians have in our dual capacity as members of the Assembly and national legislators, and that we can be in a position to help facilitate the implementation of Strasbourg Court judgments.442

Please permit me, at this juncture, to inform you of my “disappointment” with respect to two matters, before I provide you with a more optimistic picture for the future.

I am disappointed by the fact that the Committee of Ministers (in effect, the Steering Committee for Human Rights, the CDDH) has not taken sufficient account of the importance of the “parliamentary dimension” in its recent Recommendation on the efficient domestic capacity for rapid execution of judgments of the Strasbourg Court. Here, I have in mind the outcome of discussions Mr Jurgens (one of the most active members of the Assembly’s Legal Affairs and Human Rights Committee and recently retired colleague of mine in the Dutch Senate) had with the CDDH in November 2007 when the CDDH proposed – despite Mr Jurgens’ strong objections – that national parliaments be informed, “as appropriate”, of measures taken to execute Strasbourg Court judgments. In other words, national parliaments are to be informed if and when the state’s (administrative? executive?) authorities feel like doing so. There is something fundamentally wrong in this approach, as I will illustrate to you later on in the specific context of the Dutch experience. [For further information about this rather unfortunate development, I refer you to a text prepared by Mr Jurgens on this subject at the end of last year.443]

My second “disappointment” concerns lack of regular parliamentary “Strasbourg vetting” in most parties to the Convention. This observation is based on a “constat”, a “finding” based on information gathered by the PACE Legal Affairs and Human Rights Committee. In a recent overview of “parliamentary verification of state compliance with ECHR standards” – prepared for this colloquy – it has been

439. See § 5 of PACE Resolution 1516 (2006). In addition, problems of non-execution were also analysed with respect to eight other states, namely Bulgaria, France, Germany, Greece, Latvia, Moldova, Poland and Romania. 440. PACE Res 1516 (2006), § 19. 441. Idem, § 22.1. Emphasis added. 442. See, in this connection, § 116 of report of Mr Christos Pourgourides (the successor of Mr Jurgens, as rapporteur) on “Implementation of judgments of the European Court of Human Rights”, doc. AS/Jur (2008) 24 (declassified by the Committee on 2 June 2008).

noted that [and I cite from paragraph 11 of the said text]:

“Despite [a few examples] it would appear that parliaments in very few states exercise regular control over the effective implementation of Strasbourg Court judgments.”

As my French colleagues say: nous avons du pain sur la planche!

Now, with your permission, I would now like to evoke my own national parliament’s system as a positive mode and then cite a few more positive examples from other countries. In the Netherlands, the government agent before the Court makes a yearly report on cases and judgments brought against the Netherlands, which is sent by the government to both houses of parliament. The parliamentary justice committees examine this report, ask questions, and make suggestions if they are not satisfied by the government’s actions. In 2006 the Senate requested that an overview of implementation of Strasbourg Court judgments be added to the report. As a result, this broadened report contains not only judgments against the Netherlands, but any judgment which could have a direct or indirect effect on the Dutch legal system. I understand that a similar procedure has been instituted in Switzerland, as of the beginning of this year, where regular reports to parliament now cover all Strasbourg Court judgments which may have a bearing on the Swiss legal system.

From a very cursory overview of the replies to the questionnaire sent out in February, as well as to the letter of the former PACE President, Mr van der Linden, a few examples stand out:

- The Finnish government submitted a first report on the Finnish human rights policy to the Parliament in 2004, affirming that such reports, which shall include an assessment of the implementation of Strasbourg Court’s judgments, shall be regularly produced, with the next one being scheduled for early 2009.

- A particularly comprehensive model is the one recently established in Luxembourg: the Legal Committee of the Chamber of Deputies adopted a new mechanism to the control the implementation of Strasbourg Court judgments. At the beginning of each year the Ministry of Justice will report on the Court’s judgments with respect to Luxembourg. When so doing, the Ministry will inform the Luxembourg Parliament what action, if any, has been taken following any adverse findings by the Strasbourg Court.

As regards national parliamentary procedures foreseeing not only the monitoring of the implementation of Strasbourg Court judgments but also the prior screening of domestic legislation, the United Kingdom model appears particularly noteworthy (this work will be presented to you this afternoon by a member of the UK Joint Committee for Human Rights, the Earl of Onslow). The “UK model” is a rare example of the existence of a special parliamentary body with a specific mandate to verify and monitor the compatibility of national law and practice with the ECHR. I should also mention, in this connection, a recent development in the Romanian Parliament. As a direct result of “prodding” by the Parliamentary Assembly (PACE Resolution 1516 of 2006), the Romanian Chamber of Deputies has set up a Sub Committee of their Committee of Legal Affairs which is specifically mandated to ensure a better and faster implementation of Strasbourg Court judgments.

Other interesting procedures include the one put into place by Italy (based on “the Azzolina law”, Law No. 12, of 2006), and the Ukraine, law of 2006 which focuses on domestic procedures to enforce and apply the case-law of the Strasbourg Court. Also worth a mention, perhaps, is the Swiss long-standing practice of the government agent regularly briefing Swiss members of the Assembly’s delegation on

444. This document, entitled “Role of national parliaments in verifying state obligations to comply with the ECHR, including Strasbourg Court judgments: an overview” was issued on 23 May 2008.
important developments before the European Court of Human Rights.

I could go on, but I will stop here, and refer you to the detailed replies available in the Addendum of the PACE Secretariat background document. However, what is certainly worth noting is the fact that the vast majority of parliamentary initiatives undertaken on this subject, are relatively recent initiatives. And I take pride in emphasising that more often than not, they stem from initiatives taken by the Assembly, and in particular its Legal Affairs and Human Rights Committee.  

Thank you all for your attention. ★

445. See also, in this connection, the concluding remarks made by PACE President de Puig at the recent European Conference of Presidents of Parliament, held in Strasbourg on 22-23 May 2008, cited in § 8 of the PACE AS/Jur’s Secretariat’s background document prepared for this Colloquy. The complete text of the PACE President’s concluding remarks can be accessed at: http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=779.
DOMESTIC REMEDIES: THE AUSTRIAN EXPERIENCE

Ms Ingrid Siess-Scherz

Head of the Legal, Legislative and Research Service of the Austrian Parliament, former Vice-Chair of the Steering Committee for Human Rights (CDDH)

Ladies and Gentlemen, colleagues and friends,

First of all I would like to thank the authorities of Sweden wholeheartedly for the organisation of this colloquy and their kind invitation. I am very proud and honoured that I was asked to present the Austrian experience on domestic remedies.

Introduction

Austria acceded to the Convention in 1958. Since then we had to change our constitution, our structure, our remedies as well as our legal landscape several times due to the Convention and the jurisprudence of the Court.

In the following I would like to discuss with you our constant struggle and attempts to comply with the requirements of the Convention and the case-law of Strasbourg. My first intention while preparing my presentation was to list as many successful domestic remedies that have been introduced as a direct consequence of cases directed against Austria as possible. But then I thought what is much more important for us, for colleagues, for those, who are constantly engaged in the battle to improve their respective human rights situation in their home country is to share our experience. It is important to share the problems we all have to face when we inform our ministers of the latest case-law, of the requirements, of the possible implications, including the financial ones; the problems in the negotiations with all important players and stakeholders in our country.

So I will refrain from trying to impress you with our success stories. I will present to you some few examples for the introduction of domestic remedies in Austria of the past; and here I decided to present also those which required a very long period to be implemented. Secondly, I would like to discuss with you recent attempts to improve the human rights system in Austria. Finally, I will turn to some ideas how we try to manage to overcome problems within a short time-period.

Examples for the introduction of domestic remedies

I would like to state that Austria – when the Court has found Austria in violation of the Convention – is always willing to do its utmost to remedy the situation, to pay the just satisfaction, to improve the situation of the applicant and to set the required general measures. As promised, I will refrain from trying to sum up all domestic remedies we established because we are member of the European Convention of Human Rights. I will only cite some carefully selected examples:

A real story of success was the establishment of the so-called independent administrative tribunals in 1988. These tribunals were introduced because of judgments by the Court against other member states. The case of Benthem v. the Netherlands,46 which stated that certain administrative, public, measures
Towards stronger implementation of the ECHR at national level

had to be regarded as “civil rights” within the meaning of Article 6 of the Convention, prompted Austria to start the process of completely changing the structure of our system of domestic remedies, including the structure of public authorities, in this field. Instead of an appeal before a public authority, appeals against decisions of first instances, including on criminal charges by administrative authorities, should now be brought before independent tribunals that should fulfil all requirements of Article 6 of the Convention. The process of introducing the necessary amendments in our constitution started in 1985, and in 1988, these provisions were already adopted by parliament. After three further years of preparation, these tribunals started to operate on 1 January 1991. I would assume that only three years of discussions, deliberations and negotiations with all relevant stakeholders, including all nine Länder are a very short time for such a far reaching change in the constitutional structure of a member state.

But sometimes it takes a long time to improve the domestic legal system after judgments in Strasbourg:

In the case of Erkner and Hofauer v. Austria, the underlying facts were the following: The applicants complained of consolidations proceedings taken in respect of their land since 1969. In 1979 Mr and Mrs Erkner addressed the Commission in Strasbourg and complained of the length of proceedings. They also alleged a breach of Article 1 of Protocol No. 1 of the Convention. The Court finally reached its decision on the 23 April 1987 – the proceedings in Austria were still pending and exceeded at that moment sixteen and a half years! Other aspects in which the Court found a violation concerned aspects of the protection of property.

After delivery of the judgment of the Court it took us six further years to achieve the adoption of the necessary legal provisions: The regulation of land consolidation is a difficult matter in Austria: First, it requires a federal law laying down principles, the Federal Agricultural Land Planning Act. It is then necessary to adopt implementing laws by all nine Länder. Furthermore, the Agricultural Proceedings Acts, again federal law, had to be amended as well as the Federal Agricultural Authorities Act, in order to take into account the problems which had arisen under the Convention. So, in order to achieve the necessary adjustments, negotiations with all Länder had to take place. These negotiations can be, as one might imagine, very time-consuming. But, and this was the positive aspect, the lacking legal provisions did not lead to further cases before the Court within the six years between the judgment and the entry into force of the new provisions.

In another area which I would like to present to you, the Court had to deliver six further judgments on the same aspects before we were able to amend the necessary legal provisions. And I dare to state that it was the pressure exerted by the number of violations found on the same aspects and even more cases to come in the future that finally led to the amendment of the Criminal Proceedings Compensation Act:

Already in August 1993, with the delivery of the judgment in the case of Sekanina, in which the Court found Austria in breach with Article 6, paragraph 2 of the Convention, we knew about the problem. The applicants were not able to obtain compensation for their imprisonment on remand following the discontinuance of or the acquittal in criminal proceedings. The criminal court deciding on the question of compensation had dismissed claims for compensation by arguing that there still had been a reasonable suspicion against the applicant, which had not been dissipated. This reasoning was found to violate the presumption of innocence. After this first judgment, the Federal Ministry of Justice submitted a circular note containing relevant information and recommendations to the competent courts aiming at avoiding the repetitions of the violation of Article 6, paragraph 2 of the Convention. The Austrian Government was of the opinion that these measures were sufficient and was also able to convince the Committee of Ministers to be content. But

following cases brought to Strasbourg revealed that the recommendations how to interpret the relevant legal provisions were not apt to prevent further violations:

Further judgments were adopted by the Court in the cases of Szücs\(^{450}\) and Werner\(^{451}\) of November 1997 (on a somewhat different question, but nevertheless an amendment of the same law was then necessary), Rushiti\(^{452}\) of March 2000, as well as in the cases of Lamanna\(^{453}\) of July 2001, Weixelbraun\(^{454}\) of December 2001, Vostic\(^{455}\) of October 2002 and Demir\(^{456}\) of November 2002.

The following discussions were difficult. Many different proposals were tabled, some of them were regarded as not being necessary according to Article 6 and therefore too generous towards persons who were acquitted. An idea, which was finally found to be acceptable, was to transform the decision on the question of compensation from the criminal court to the civil courts.

Finally, the new Criminal Compensation Law (“Law on compensation of damages resulting from criminal-judicial detention or condemnation – StEG 2005”) was issued on 15 November 2004 and entered into force on 1 January 2005.

Recent attempts to improve the human rights system in Austria

In the following I would like to present to you the most recent efforts Austria is undertaking in order to further improve its human rights situation.

1) Establishment of administrative courts of first instance

Austria definitely has a problem with length of proceedings, especially before the Administrative Court.\(^{457}\) A second problem concerning again the Administrative Court are cases in which Austria is found in violation of the Convention because this Court of last instance has not held a public hearing.\(^{458}\) The background of this situation is the fact that still in some administrative proceedings the Court of last instance, the Administrative Court, is the first and only tribunal according to Article 6 of the Convention, because all other, lower, instances are administrative authorities.

All relevant bodies, be it ministries, regional governments, politicians, are aware of the problem and there is widespread consen-

449. Resolution DH (94) 49.
457. See, e.g. Stempfer v. Austria, 26 July 2007, Application No. 18294/03, §37f.
458. See, e.g. Abrahamian v. Austria, 10 April 2008, Application No. 35354/04.
Towards stronger implementation of the ECHR at national level

According to the government’s program concluded last year in January, the government is intending to adopt a draft law bill, including reforms on the human rights sector, based on the proposals of the Covenant.

In May 2007, the Federal Chancellery sent out a draft containing constitutional reforms, including proposals for regional administrative courts. At the moment, experts in the ministry of finance are working on the financial implications of this constitutional reform. And we do hope that the process of improving our system of domestic remedies is soon in the final phase so that the draft bill can be presented to the parliament. But, still, even if we manage to adopt the necessary legal provisions, I would assume that the preparations to enable these new courts to come into operation would take some further three years. So, until then, many more cases directed against Austria, on the very same aspects, will be brought to Strasbourg, contributing to the workload of the Court; and not in all cases we will be able to settle the case by concluding a friendly settlement.

2) Efforts to improve the human rights appeal

In autumn 2007 the Ministry of Justice started an attempt to improve the human rights situation in the field of civil and criminal law by amending the regulations in respect of the already existing “human rights appeal”. So far, this appeal only allows for claims on alleged violations of the right to personal freedom. The idea was to extend the possibilities to complain against judgments and other decisions by judges, whenever these decisions violate further human rights: the right to a fair trial, Article 8 of the Convention, the protection of property (Article 1 of the first protocol). But the criticism and the opposition were considerable: The reasons were different, but it was not the case that the lack of will to improve the human rights situation in Austria was the secret motivation. Some criticised that the proposal was not far reaching enough. The Supreme Court was afraid that the new proposal might restrict its latest jurisdiction concerning violations of human rights which improves the already existing domestic remedy. And then the Constitutional Court was criticising these proposals because it itself asked to be mandated with this task. To keep the story short: So far, no consensus could be found on the proposal.

3) Failures and disappointments

Now I would like to turn to a different aspect: Even if a domestic remedy has been successfully established, the application according to the requirements of the Convention must be guaranteed:

On 1 January 1990, a new provision entered into force which should address the problem of the length of proceedings in criminal and civil proceedings before the courts. By that the Austrian legislator intended to respond to a lacuna in the Austrian civil and criminal procedure where the parties did not have any possibilities to combat delays in the conduct of proceedings. This new provision should enable a person to complain about an excessive length of proceedings. Article 6 and Article 13 of the Convention were expressly mentioned in the explanatory report of the law bill.

This provision enables all parties to the proceedings to submit a request notwithstanding any other remedies within the legal system. The judge may take the requested procedural steps within four weeks. If he or she is not in a position to respond to this request, the request will be determined by the superior court. This court has to decide whether the alleged delay is reasonable or not. If the lower court has been dilatory, the superior court will impose a time-limit.

A similar domestic remedy is available in respect of administrative proceedings:

The Austrian Administrative Procedure Act imposes on authorities the obligation to give a decision within six months. If the decision is not served on the party within this time-limit, the party may file an application for the transfer of jurisdiction. If the administrative authorities fail to abide by this obligation finally an application against the administration’s failure to decide can be brought before the Administrative Court in accordance with Article 132 of the Federal Constitution.

Both domestic remedies have been regarded as being effective within the meaning
of the Convention system: In the case of Holzinger v. Austria the Court conceded that the domestic remedy concerning courts’ proceedings must be considered an effective and sufficient remedy which the applicant has not used. Accordingly, domestic remedies were not exhausted in the instant case.\footnote{Holzinger No. 1 v. Austria, 30 January 2001, Application No. 23459/94.}

The same holds true for the domestic remedy available for administrative proceedings: In the judgment in the case of Basic v. Austria, the Court held that the applicant should have made use of the application under Article 132 of the Federal Constitution and therefore bring the case before the Administrative Court. By failing to use this domestic remedy he had not complied with Article 35 of the Convention and therefore had not exhausted the domestic remedies.\footnote{Basic v. Austria, 30 January 2001, Application No. 29800/96, §40.}

One might conclude that Austria has fulfilled its obligations to introduce effective domestic remedies. But a case which happened last year revealed that the struggle to overcome shortcomings never stops:

In the case of Achleitner v. Austria, the Court of Strasbourg held that Austria had violated – again – Article 6 of the Convention because of the length of proceedings.\footnote{Achleitner v. Austria, 23 October 2003, Application No. 53911/00.} The case concerned water-rights of the applicants who ran a fishing farm. The proceedings had started in 1969 and were still pending at the time of the delivery of the judgment of the Court in October 2003. So the proceedings have already lasted for twenty seven years. After the delivery of the judgment, in 2005, the applicant brought the case before the Administrative Court. The Court of last instance could have decided on the merits of the case, but found the case to be too complex – a public hearing would have been necessary, experts would have to be entrusted to examine the situation – and therefore in 2007 the Court decided to refer the case back to the authority of first instance. So, the case is still pending. This decision was severely criticised by human rights experts.

To conclude, I would like to underline that the introduction of domestic remedies is sometimes time-consuming, it requires many negotiations, deliberations, discussions. But even after the establishment of domestic remedy, the battle is not over, also the application has always to be in accordance with the requirements of the Convention.

Another series of cases, which also concern the necessity to introduce domestic remedies concerning length of proceedings, were the source of much discussion last year and have not been solved yet:

In the judgment in the case of Jancikova, April 2005, Austria was for the first time confronted with the fact that the Court in Strasbourg also asks for domestic remedies against a delay in the conduct of proceedings at a court of last instance.\footnote{Jancikova v. Austria, 7 April 2005, Application No. 56483/00.} The Court reiterated the same interpretation of Article 13 of the Convention in the case of Hauser-Sporn in December 2006\footnote{Hauser-Sporn v. Austria, 7 December 2006, Application No. 37301/03.} by stating the following:

“The present proceedings exceeded the reasonable-time requirement under Article 6 of the Convention as delay occurred while the case was pending before the Constitutional Court and the Administrative Court (see paragraph 32 above). Since the government have not shown that any form of relief – either preventive or compensatory – was available for the delays caused by these authorities, there has been a violation of Article 13 of the Convention in that the applicant had no domestic remedy whereby he could enforce his right to a hearing within a reasonable time as guaranteed by Article 6 § 1 of the Convention. (paragraph 40)”

The Austrian government asked for a referral to the Grand Chamber, which was rejected. The same questions were again raised in the judgments in the cases of Schutte,\footnote{Schutte v. Austria, 26 July 2007, Application No. 18015/03.} Stempfer\footnote{Stempfer v. Austria, 26 July 2007, Application No. 18294/03.} and Vitzthum,\footnote{Vitzthum v. Austria, 7 December 2006, Application No. 37301/03.} all issued in July 2007.
Towards stronger implementation of the ECHR at national level

The Federal Chancellery sent out a draft law bill in March 2006, addressing exactly the issues raised by the judgment in the case of Jancikova. The proposed new provisions would have foreseen that both the Administrative and the Constitutional Court have to decide on questions which fall under Article 6 of the Convention – as far as possible – within one year. The applicant, awaiting such a decision would have been entitled to issue a complaint after the expiry of this time-limits before the president of the respective court. The reactions during the general examination procedures were unexpectedly fierce, especially by the Administrative and the Constitutional Court. The Administrative Court stated that the solution must be found by introducing administrative courts of first instance, the Constitutional Court questioned whether the proposed measure might be able to address the problem. So far we were not able to find a solution. And I am afraid that the cases will be pending for some time before the Committee of Ministers; in the meantime more cases will be brought – successfully – before the Court. At the moment we try to conclude friendly settlements in the majority of cases, but in the near future we might not be able to set the general measures.

Some ideas to overcome problems in introducing domestic remedies

As stated earlier, the establishment of new domestic remedies sometimes requires a far reaching re-structure of the domestic system which takes time, sometimes even many years. So, in order to achieve quicker results, it is sometimes advisable to explore other means:

I have presented to you our domestic remedies allowing to accelerate the conduct of criminal and civil proceedings which have been introduced in 1990. The problem of this – in principle effective remedy – is that it is rarely used by applicants.

Generally speaking the instrument is more often used – for obvious reasons – in civil proceedings. In civil proceeding around 100 requests are submitted per year. The number is much lower in criminal proceedings.

I have heard that lawyers normally do not advice to lodge this request because it might put the competent judge into a bad mood if he or she will be given a time-limit by the superior court.

So, as a complementary measure, on 1 November 2007, new ombudspersons were established at the courts of second instances. The first evaluation is encouraging and promising: In the first 5 months around 3,500 persons contacted the ombudspersons. 20% of cases that are brought before these ombudspersons concern complaints because of the length of proceedings before the civil and criminal courts. The ombudspersons offer competent information as well as mediation between all parties involved, including the judge. So, the first impression by the ministry of justice is that of a well-functioning measure.

Austria has gained notoriety concerning the violation of freedom of speech, the most popular cases in this field are Austrian. Last year the Austrian Supreme Court took highly respected and very important decisions. The Court raised the question of the high numbers of judgments against Austria in which the Court in Strasbourg has found a violation of Article 10 of the Convention. In addressing this problem, the Supreme Court extended the possibilities to take up and decide on allegations of violations of Article 10 of the Convention.

In addition to this improvement in the jurisdiction, the Minister of Justice instructed the “Generalprokuratur” (Procurator General, meaning the highest level of prosecution) to screen judgments raising aspects of Article 10 of the Convention and bring them before the Supreme Court.


467. Decision 1 August 2007, 13 Os 135/06m; see also decision 23 August 2007, 12 Os 36/07.
Conclusion

To conclude my presentation, I would like to sum up.

I am convinced that the task to introduce a necessary domestic remedy is a very challenging one. For obvious reasons, the establishment of new domestic remedies might create problems: in cases where the legal structure of a given member state has to undergo major amendments; in cases where many “players” are involved; in cases where many different legal provisions have to be amended; in cases where financial implications are raised.

With the examples I gave to you I wanted to convey the message that failures and problems that might arise can sometimes not be attributed to the lack of political will. Sometimes surprising opposition comes up from unexpected players. And sometimes a given member state might have successfully introduced a domestic remedy which helps to win cases in Strasbourg but which does not help to improve the human situation.

And I also wanted to encourage all of us to be flexible, to be innovative. I would like to state that the challenge to further improve our human rights system never stops.

I thank you for your attention. ✪
Introduction

The promotion and protection of human rights are prerequisites for peace and stability. A democratic society based on respect for human rights and the rule of law is one of the fundamental goals of the Council of Europe. By identifying problems in the member states and suggesting solutions, the Council helps to strengthen the judicial system and democracy. This is why special emphasis must be given to the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in all member states.

In Sweden, as in other member states of the Council, the primary aim must be to ensure that the shaping of our legislation and the practice of the law are such that no violations of the Convention occur. However, to ensure this, a well-functioning system for monitoring the implementation of the Convention must be in place. This is necessary both in order to guarantee injured parties their human rights in practice and to provide the means for every individual to claim their right to effective legal redress.

The activity of the European Court of Human Rights is crucial for monitoring the implementation of the Convention in all member states. With an increasing number of individual applications, the caseload of the European Court has grown to such a level that it is now of utmost importance to find solutions that can facilitate the functioning of the Court. It is important here to bear in mind that international monitoring by the European Court is meant to be a guarantee, while the primary responsibility for the implementation of the Convention at national level lies with the member states themselves. To create an equitable situation for the Court, it is necessary for every member state to strengthen the implementation of the Convention at national level.

I will now try to give a brief description of how this is done in Sweden today.

Domestic remedies: the Swedish experience

When Sweden ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1952, the Convention was not incorporated into Swedish law. This meant that the Convention was not considered to be part of Swedish legislation. Over time, however, the Swedish courts developed principles according to which Swedish law should be interpreted so as to be consistent with the Convention.

Today, the Convention is part of Swedish legislation. In 1995 a special law was passed that incorporated the Convention into Swedish law. The overall aim was to strengthen the protection of human rights and fundamental freedoms for all Swedish nationals. To this end, the government stated that if the protection given by the Convention were found to be stronger than the protection given by the Swedish constitution, which contains provisions on fundamental rights and freedoms in Chapter 2 of the Instrument of Government (Regeringsformen), the Convention should be applied.
Initially, the incorporation of the Convention did not bring about any dramatic changes, but over the last few years the importance of the Convention has increased radically in the Swedish courts. The two supreme courts in Sweden – the Supreme Court and the Supreme Administrative Court – have both shown to be unwilling to interpret domestic law in a way that could risk their decisions being rejected by the European Court. To avoid this, they have attached special importance to the Convention in their application of the law, and they have been prepared to take measures in order for their decisions to accord with the provisions of the Convention.

This has been the case even when the applicable Swedish law has recommended a different solution or when the result has meant that the plaintiff has been awarded a right that was not grounded in Swedish national law.

Let me give you four examples:

1) In order to ensure the right to a fair and public hearing in matters concerning civil rights, as laid down in Article 6 (1) of the Convention, the Supreme Administrative Court has decided that plaintiffs should have a right to appeal decisions, in spite of the fact that no such right existed under the applicable Swedish laws (RÅ 1997 ref 65 and RÅ 2001 ref 56).

2) In order not to violate the prohibition against discrimination, as laid down in Article 14 of the Convention, the same court set aside a demand for registration for census purposes which was a prerequisite for a certain tax reduction according to Swedish law (RÅ 1997 ref 6). The decision by the Supreme Administrative Court was made after the European Court had ruled that such a demand was discriminatory and not in accordance with the Convention.

3) When a conviction for racial agitation, with respect to the facts of the case, would have been disproportionate and likely amount to an infringement of Article 9 or 10 of the Convention, the Supreme Court dismissed charges against a pastor for racial agitation (NJA 2005 p. 805).

4) The Supreme Court has also dismissed charges against three men charged with handling stolen goods on the grounds that they had been incited to commit the crime and that hence their right to a fair trial had, from the very outset and definitively, been irremediably undermined (NJA 2007 p. 1037). The Supreme Court in its judgment referred to the cases of Teixeira de Castro v. Portugal and Vanyan v. Russia, among others.

In this way, domestic laws are interpreted so that decisions will comply with the Convention, all with a view to avoiding violations of the Convention and safeguarding the rights of individuals. These examples cannot be described as remedies, but I have found it important to describe how Swedish courts have tried to steer clear of non-observance of the Convention.

When it comes to the right to an effective remedy, as defined in Article 13 of the Convention, there have been a number of cases before the Supreme Court in recent years concerning the possibility for individuals to claim financial compensation in a Swedish court based directly on the Convention. The main reason for these claims has been that, according to the Swedish Tort Liability Act, compensation for violations of human rights and fundamental freedoms as defined in the Convention does not include compensation for non-pecuniary damage and also requires “fault or negligence” on the part of the state. It can be mentioned that an inquiry has proposed that changes be made in the Tort Liability Act to make it consistent with the stipulations in the Convention (Skadeståndsförfrågor vid kränkning (Compensation for non-material damage), Ds 2007:10).

I will give you four examples. These are all cases that have been tried by the Supreme Court after the judgment of the European Court in October 2000 in the case of Kudla v. Poland.

1) A man who had been charged with and convicted of a fiscal offence claimed compensation according to Article 6 (1) of the Convention on the grounds that he had suffered as a result of the proceedings taking almost seven years from the time he had been informed of the suspicions against him until the case had been tried in a final judgment. The lower courts rejected
Towards stronger implementation of the ECHR at national level

his claims but the Supreme Court found them admissible and remitted the case to the district court. (NJA 2003 p. 217).

2) A man was indicted for a fiscal offence and acquitted after seven years. He claimed compensation under Article 6 (1) of the Convention on the grounds that his case had not been tried within a reasonable time. The Supreme Court in its judgment remarked that according to Articles 6 (1) and 13 of the Convention, and as the European Court had stated in the case of Kudla v. Poland, the state has an obligation to supply its nationals with an effective remedy when their rights, as set forth in the Convention, are violated. The Supreme Court first tried the claims under the provisions of the Swedish Tort Liability Act and found that the man could be awarded financial compensation for loss of income. The Supreme Court then ascertained that since no crime had been committed against him, it was not possible, under Swedish law, to award compensation for the infringement. Despite this, the man was awarded SEK 100 000 as compensation for non-pecuniary damage. The Supreme Court concluded that in light of the practice established by the European Court in the case of Kudla v. Poland, it should be possible for a Swedish national court to award such compensation when doing so would guarantee the right to an effective remedy. (NJA 2005 p. 462).

3) A man who had been detained, with restrictions imposed on his right to communication for 16 months before the main hearing, claimed compensation on the grounds that the state had violated Article 5 (3) of the Convention and that he was therefore entitled to compensation according to Article 5 (5). The Supreme Court stated that in order for Sweden to meet the conditions of Article 5 (5) of the Convention, the state could have an obligation to pay more compensation, over and above what the application of national Swedish laws would require. (NJA 2007 p. 295).

4) Some children who were suspected of having been abused by one of their parents were subjected to a medical examination decided by the police. The decision to examine the children was unlawful and also found to be at variance with Article 8 of the Convention. The Supreme Court found that the parents and the children were entitled to compensation for the infringement, which should be determined in accordance with the practice established by the European Court.

These are examples of court decisions. It should be noted that in Sweden all claims for compensation of this kind do not have to be tried in court. The Swedish Chancellor of Justice has the power to award compensation, and in fact does so in many cases.

As has been laid down by the European Court, the remedy need not necessarily be in the form of financial compensation. In criminal cases where the right to a fair trial within a reasonable time has not been met, Swedish courts have reduced the penalty as a way of ensuring the right to an effective remedy.

Finally, I would like to mention that an official report has recently been presented which proposes that Sweden, so as not to breach Article 6 (1) of the Convention, should allow the chief judge of a court to decide that a case which has been delayed shall be given priority (Förtursförklaring i domstol, SOU 2008:16).

I hope these examples have served to give you a picture of how the Swedish courts and the Swedish legislature try to take responsibility for the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms on a national level.

Thank you for your attention.
EXECUTION OF NATIONAL JUDGMENTS: 
THE RUSSIAN EXPERIENCE

Ms Veronika Milinchuk

Representative of the Russian Federation at the European Court of Human Rights, Vice-Minister of Justice

Failure to execute, or delays in execution of, court decisions was one of the pressing issues addressed by Russian nationals filing applications with the European Court of Human Rights until recently. The major problem at that concerned execution of decisions adopted by Russian courts against the state (treasury), federal bodies of the state power and bodies of the state power of the Russian constituent entities, self-government bodies, state and municipal institutions, etc.

The issue was caused by tight budgetary resources within certain time periods, on the one hand, and, which is of prime importance, by the lack of proper regulation of intergovernmental fiscal relations, deficiency of Russian laws as regards the procedure for payment of various categories of compensation, indexation and remuneration of non-pecuniary damage, as well as unwillingness of the leadership of some state authorities and self-government bodies to promptly handle arising problems and their attempts to shift the burden of "social debts" onto the federal centre, on the other hand.

Notwithstanding all the efforts taken (including the allocation by the Russian Ministry of Finance of purposeful large-scale transfers), at the beginning of 2007 there were thousands of non-executed court decisions on settlement of "old" debts, especially indexation of tardy monetary payments, at the expense of the Russian constituent entities' budgets.

The leadership of the state authorities of the Russian constituent entities did not even conceal that, taking note of the fact that it is the Russian Federation as a whole that bears full responsibility for non-execution of all such court decisions within the framework of the European Court's procedures, regional authorities benefited from their failure to execute court decisions while expecting the execution thereof by the Russian Federation by means of the federal budget by virtue of a decision of the European Court.

The references of the leadership of the constituent entities’ state authorities to the tight regional budget were often farfetched since the experience of the Russian Agent's Office as concerns particular cases shows that necessary resources were easily raised in the shortest possible time due to an active intervention of the Russian President’s plenipotentiaries and involvement of the Russian Federal Bailiff Service and the Russian Prosecutor General's Office in solution of the issue.

Upon lively discussion of relevant issues at the level of the agencies concerned involving the Registry of the Council of Europe, the failure to execute court decisions with respect to various categories of payments was thoroughly analysed and a set of measures was developed, the implementation of which was ensured by, in particular, the Russian Agent's Office.

In the above context, immediate efforts for redress of the situation by the Russian state authorities were considered. It is noteworthy that the Russian Agent is not only authorised to represent Russia before the European Court but also “ensures, in co-operation with federal executive bodies, development of bills and makes proposals as to enjoyment of the right to a legislative initiative in line with law provided
Towards stronger implementation of the ECHR at national level

that compliance with the European Court’s judgments requires that the federal laws be somehow amended; facilitates, in cooperation with the federal executive bodies, development of draft regulatory documents and submits them for consideration to relevant state authorities in case execution of the European Court’s judgments involves amendment of certain statutory acts of the Russian President, the Russian Government, and other statutory documents.” Taking account of the above terms of reference, profound change of the situation and general measures for prevention of similar violations in future were considered during meetings at a federal and regional level.

It is necessary to underline that there are three main points the Russian state authorities were focused on, namely:

- improvement of the legislation;
- general organising measures;
- measures aimed at further improvement of the system of enforcement proceedings in particular court decisions.

Improvement of the Russian legislation concerning primarily the budget contributed greatly to enhancement of the efficiency of the system of enforcement of judicial acts in respect of the claims against public associations.

The Constitutional Court of the Russian Federation referred in its Decision No. 8-P of 14 July 2005 to the necessity of adoption of the above points by virtue of a federal law and making them binding upon the Russian constituent entities and municipal units.

In pursuance of the above Decision, the Russian Government developed amendments, subsequently adopted by the state Duma of the Federal Assembly of the Russian Federation, to the Russian Fiscal Code, the Russian Civil Procedure Code, the Russian Arbitration Procedure Code and the Federal Law on Enforcement Proceedings that entered into force on 1 January 2006. The Russian Fiscal Code was supplemented by Chapter 24.1 setting out the order of execution of judicial acts with respect to public associations and budget-funded institutions.

Thus, a number of significant amendments made to the Russian legislation collectively contributed to the creation of a co-ordinated mechanism of ensuring intergovernmental fiscal relations between the Russian budget system entities.

The effective budget legislation provides for the procedure for enforcement of judicial decisions, order of co-operation between the budget system bodies in execution thereof, time-limits for each stage of the enforcement procedure, requirements for the resulting effect of each stage.

As concerns the execution of judicial decisions on discharge of liabilities of budget institutions by means of the budget, as well as the subsidiary responsibility of public associations for compliance with pecuniary obligations of budget institutions, the Russian Fiscal Code provides for the right of the Russian Federal Treasury’s bodies to suspension of monetary spending transactions on personal accounts as a measure of unconditional and timely enforcement of judicial decisions with respect to all the instances of violation of the order of execution.

Thus, the number of judicial acts executed grew up by 30% in 2007 if compared to the similar time period in 2006. Such an efficiency progress in execution of judicial acts was facilitated, first of all, by a more active application of coercive measures aimed at compliance with judicial acts by the debtors through suspension of the transactions on their personal accounts.

The courts took efforts for development of a unified law enforcement judicial practice as regards determination of a proper defendant on the part of public associations supposed to participate in court proceedings in respect of claims against public associations and budget-funded institutions.

Thus, the Russian Supreme Arbitration Court provided clarifications as to determination of a subject to be levied on monetary funds.

Moreover, the Russian authorities discussed establishment of a special federal fund and/or special reserve budget lines with a view to ensuring discharge of financial obligations of execution of judicial acts. However, the agencies concerned concluded that it was inexpedient to set up a special federal fund and/or special reserve budget lines in order to
secure prompt payment of amounts to a debtor in pursuance of judicial acts for the reasons as set forth hereinafter.

Such measures would fundamentally reconstitute the practice of execution of judicial decisions being in force in the nineties of the last century in Russia through direct debiting of monetary funds on the budget accounts of the Russian budget system. This practice was one of the grounds for destabilisation of the budget system and ensuing decrease in confidence in the state.

As far as organising and technical measures are concerned, it is noteworthy that a unified information system for execution of judicial acts (AIS “Finances”) was created and Order No. 271 of 15 August 2006 on organisation of activities in the Ministry of Finance of the Russian Federation on execution of judicial acts on recovery of pecuniary means as a measure sought by claims against the Russian Federation under the Russian Fiscal Code providing for the information to be include in the said system was adopted. The above Order enabled to ensure explicit supervision over consideration and adoption of judicial acts.

Furthermore, the Russian Federal Bailiff Service puts an emphasis on the analytical work aimed at raising efficiency of fulfilment of powers of this Service, detection of deficiencies in the enforcement proceedings system with a view to eliminating the prerequisites for violation of the terms of execution of judicial acts. In this connection, territorial bodies are made aware on a permanent basis of the legal standpoint of the European Court of Human Rights as set forth in its judgments as regards execution of judicial acts with respect to claims against public associations and budget institutions, and this legal standpoint is a subject of workshops.

Moreover, on 22 October 2007 the Russian Federal Bailiff Service transmitted to the executives of the territorial bodies of the Service an analytical review titled “On the results of the activities of consideration of requests of the Russian Agent at the European Court of Human Rights within the first six months of 2007” and a number of instructions seeking to improve the efforts for prevention of delays in execution of judicial decisions and increase of personal responsibility of functionaries.

Recognising the measures taken by the Russian state authorities as noticeable, it is reasonable for the time being to conclude that there is a progress in execution of judicial acts adopted in claims against public associations and budget institutions.

The number of the executed judicial acts on discharge of financial liabilities of federal budget institutions by means of the federal budget adopted by the Federal Treasury bodies amounted to 90% in 2007. This number equated to 80% in 2005 and 87% in 2006.

The effective budget legislation does not stipulate payment of an automatic compensation for delays in execution of a judicial decision to a claimant in case of an unlawful delay in execution of a judicial act provided by the latter.

If a claimant believes that execution of a judicial act submitted by him (or by a court) has been unlawfully delayed, he is entitled to claim compensation in court under the Russian civil legislation in the form of the interest amounting to the sum as defined in a judicial act for the use of others’ monetary funds due to the delay in their payment, as well as in the form of compensation for the pecuniary damage (Article 395 of the Russian Civil Code) and non-pecuniary damage inflicted upon him (Article 151 of the Russian Civil Code).

The Russian legislation provides for feasible indexation of monetary amounts recovered for compensation of non-pecuniary damage by virtue of a court decision as a remedy for delays in execution of court decisions adopted in favour of a national.

This is an efficient and easy-of-access remedy. The establishment of the fact of lengthy execution of a court decision (without looking into a relevant authority’s guilt) entails unconditional application by a court of indexation of the monetary amounts previously awarded.

Furthermore, another remedy allowing for compensation for both pecuniary and non-pecuniary damages caused by delays in execution of a judicial act is a responsibility of state authorities, self-government authorities and
Towards stronger implementation of the ECHR at national level

Property responsibility of public associations is stipulated in Decision No. 60-O of 24 February 2005 of the Constitutional Court of the Russian Federation. In its Decision, the Constitutional Court maintained that a special nature of legal capacity of public associations does not release them from property responsibility and oblige a federal lawmaker to look for ways and instruments for proper discharge of obligations and execution of budget powers of state authorities.

With a view to improving the national compensation mechanisms applied, in particular, for failure to execute (improper execution) of judicial acts, there was a working group for the arbitration procedure legislation improvement set up within the Russian Supreme Arbitration Court. The working group is authorised to introduce a bill on amendments to the Russian Arbitration Procedure Code as to the mechanism of compensation at a national level for the damage caused by the conduct of functionaries. The creation of such a mechanism will significantly supplement the available compensation instrument tailor-made for failure to execute a court decision in the form of indexation of the monetary amounts awarded, the provision for which was included in the above Code in 2002 (Article 183 of the Russian Arbitration Procedure Code).

Moreover, the Russian Supreme Arbitration Court has an intention to include legal propositions on compensation for the damage caused by failure to execute judicial acts, as well as the remedies available to the parties to a dispute (indexation of amounts by virtue of judicial decisions in case of failure to execute, appeal against the conduct of a bailiff, and payment of compensation for the damage caused, etc.) in the draft decision of the Plenum being developed, as referred to hereinbefore.

The Supreme Court of the Russian Federation is planning to ensure that the issue of compensation by the state of the damage caused by violation of the rights to court proceedings within reasonable terms and the right to execution of judicial acts that entered into force within reasonable terms, the work over which is underway.

Thus, there are currently two approaches to regulation of responsibility for lengthy failure to execute judicial decisions that entered into force within the framework of the effective legislation, namely: through making amendments to the procedural legislation and updating the law enforcement practices of the Russian courts, or by means of adoption of a special statutory document governing compensation for the damage caused by violation of the right to execution of a judicial decision that entered into force within reasonable terms.

The entry into friendly settlement with applicants of the European Court of Human Rights is worth special attention. Friendly settlement is actively entered into by regional authorities with respect to applications pending before the European Court of Human Rights likely to be unfavourable to the Russian authorities and to result in excessive additional legal costs (incurred in lengthy court proceedings).

In conclusion, I would like to address the issue of co-operation between the Russian Agent and various state authorities in securing timely and comprehensive execution of the European Court’s judgments and ensuring responsibility for any violations. In order for the Russian Federation to be able to take efforts related to nationals (payment of monetary compensation thereto), or state authorities of the Russian constituent entities or self-government bodies (e.g., facilitation of their execution within three months of a court decision or compliance with the terms and conditions of a friendly settlement agreement in full) when required by virtue of a judgment of the European Court, active support, assistance of, and co-operation with, both prosecuting authorities and agencies of the Russian Federal Bailiff Service are required. The Russian Agent’s Office is in a position to handle most of such issues in co-operation with the above state
authorities only for lack of its own representatives in the regions.

Thus, in 2007 the Prosecutor General’s Office of the Russian Federation carried out a check-up as to the compliance with the provisions of the budgetary legislation in execution of judicial acts on payment of amounts by means of budgets of the Russian budget system. As a result, violations of the budgetary legislation, civil and arbitration procedure laws, and enforcement proceedings legislation by the Russian Ministry of Finance were discovered. Executive officers of the Russian Ministry of Finance were therefore brought to disciplinary responsibility, and general measures were taken.

The Russian Agent’s Office is continuing its active work in close co-operation with the Russian Federal Bailiff Service and Russian prosecuting agencies, while sometimes enjoying direct support of the Russian President’s plenipotentiaries to the federal districts, on monitoring unconditional execution by authorities of the Russian constituent entities and self-government bodies of relevant court decisions. At that, special emphasis is placed on the systemic approach to setting the budget by representative bodies at a regional and local level granting pecuniary means for the next fiscal year in order to ensure execution of judicial decisions. ★
Mr Chair, ladies and gentlemen.

I am very happy to be here. Allow me to take the opportunity to congratulate the organisers and to say how grateful I am for the invitation to address you in the town where I was born and which will always occupy a special place in my heart.

All views expressed are my own and do not necessarily reflect the ones of the Court.

Let me make my position clear right away – there is no *erga omnes* effect *de jure*. Article 46: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case *to which they are parties*” (emphasis added). But hopefully there is an *erga omnes* effect *de facto*.

Enhancing the authority of the Court’s case-law beyond the judgment’s binding effect on the parties would be a most powerful tool to ensure the effectiveness of the protection of human rights in Europe. If we think this is an important goal in itself – not mainly because we want to get to grips with the overwhelming and growing caseload in Strasbourg – we have to discuss how this can be achieved as a matter of urgency.

Allow me to put a few (provocative) questions to you and later make some suggestions:

- Do we want the Court to expand its authority above and beyond the parties in a particular case?
- Do we need a European Constitutional Court of Human Rights dealing only with cases raising a new issue of principle, making decisions of principle with a binding effect *erga omnes* leaving the rest of the caseload for the domestic courts and authorities to deal with in accordance with the principle of subsidiarity and the Convention as interpreted by the Court?
- Would it be right to allege that this could be achieved without changing the Convention? The principle of subsidiarity is already there and could be reinforced as I will try to show you.

The benefits of such an approach is that there will be a clearer “division of labour” between the national courts and the Strasbourg Court, that will hopefully get a manageable caseload without a backlog. But more importantly it would enhance the protection for the individual because it would mean less delay in the administration of justice since it will be done domestically. There is already today an obligation for states to comply, see Article 1. Justice delayed is justice denied – or, using a positive formula – quicker justice is better justice.

In a doctoral thesis defended a week ago in the faculty of law in Copenhagen I found a new idea that might be helpful. Jonas Christoffersen suggests that the Court should stop repeating the subsidiarity to focus instead on the primary responsibility of the contracting parties to implement the Convention in domestic law. He introduces a new concept he calls the principle of primarity based on the binding effect of the Convention (Articles 1 and 3) and mirrored in the principle of subsidiarity.
Proceedings

He advocates a new interpretation of Article 13, making it applicable on domestic legislation, law and general policy.

“The Court might be more alert to interpreting the Convention in a manner that can strengthen its position in domestic law.” (page 503, "Fair Balance")

Should we be so bold as Dr Christoffersen suggests and move focus away from the international enforcement machinery towards the primary role of national decision-makers?

The Court highlights the judgments and decisions of principle on its website. There is no precise definition of what is to be regarded as a judgment or decision of principle so this is not rocket-science but it is hopefully a help in as much as it indicates what is important and new in the eyes of the Court. However most of the case-law is not made up of judgments of principle.

Some judgments are of great importance without having the quality of a judgment or decision of principle with an *erga omnes* effect. In *Leyla Sahin v. Turkey* (Judgment (Merits) of 10 November 2005, No. 44774/98) where a young female student was barred from continuing her studies of medicine since she refused to take off her headscarf, the Court did not find a violation of Article 9, arguing that in the specific Turkish context the ban was proportionate to the aims pursued, namely to protect the secular state. This judgment cannot be interpreted as giving *carte blanche* to domestic authorities in other signatory states to ban the use of the Muslim head-scarf in schools or similar public institutions. A series of complaints against France and UK for instance will be examined by the Court in due course, in their particular context which is not necessarily similar to the one in Turkey.

One way of achieving an effect *erga omnes* within the current system would be to invite, on a regular basis, states to intervene as third parties in the Grand Chamber. They would not be bound by the judgment legally speaking but the states will be aware that the Court will follow the leading judgment and this will motivate them both to participate in the proceedings and to observe them afterwards.

Easy and speedy access to the Court’s case-law in the domestic language is of crucial importance to obtain an *erga omnes* effect. While the responsibility for publishing judgments and decisions rests with the Court, whose publications committee makes a careful selection of the cases that merit inclusion in the official Reports, published in English and French, translation into the other languages of the Council of Europe states is a task that must be taken up by national authorities. There is a current deficit in this respect and the Court held in *Scordino v. Italy* (No. 1) GC, No. 36813/97, paragraph 239, ECHR 2006—...

“...domestic courts must...be able, under domestic law, to apply the European case-law directly and their knowledge of this case-law has to be facilitated by the state in question “.

The Court further held in its response to the Report of the Wise Persons (see Opinion of the Court on the Wise Persons’ Report, as adopted by the Plenary Court on 2 April 2007):

“Although its judgments do not, strictly speaking, have *erga omnes* effect all states should take due notice of judgments against other states, especially judgments of principle, thereby preempting potential findings of violations against themselves.”

Much has already been done but there is still room for improvement. Some states translate and publish Court judgments in their official journal, but this usually concerns cases taken against that particular country. Yet the courts in every contracting state must be aware of both the judgments handed down against that state and the most important judgments of the Strasbourg Court. states should therefore ensure that these judgments are translated into the different national languages. The scale of the undertaking is substantial, but workable solutions can be found, e.g. case-law digests, newsletters like the Swedish newsletter from the Court Agency, distributed to judges on a monthly basis with brief summaries of relevant case-law, joint funding by countries sharing a common language, alternative sources of funding, participation of commercial or professional publishers.

If speed is of the essence (timely and accurate information) so is filtering. It is simply not realistic to believe that judges of domestic courts or other decision makers on the domes-
Towards stronger implementation of the ECHR at national level

A constitutional complaint was lodged against the decision of the Naumburg Court and the Federal Constitutional Court of Germany reversed that decision and referred the matter back to the local court noting that the local court “did not take sufficient account of the judgment of the Court when making its decision, although it was under an obligation to do so”. The Federal Constitutional Court went on to say “the judgments of the Court are binding on parties to the proceedings and thus have limited substantive res iudicata […] restricted by the personal, material and temporal limits of the matter in dispute”. In other words; the judgments of the Court do not have a straightforward erga omnes effect, according to the Federal Constitutional Court.

Human rights and the Court’s case-law must be a part of the curriculum at all law faculties. The Group of Wise Persons held that the basic principles of international and European law should be compulsory subject in both secondary and university level education. I would add that moot courts should be encouraged and supported financially, if need be. Students are the best promoters of human rights and it simply does not matter what professional path they choose; the principle of subsidiarity is best served if the knowledge and awareness of human rights is spread to all areas of life, not just in public life through the administration of justice proper, but also in the areas of education and health care to mention some other examples. Business, banking, insurance as well as the financial sector becomes more and more relevant to consumers and their rights might be jeopardised if they are not aware of their existence.

The possible introduction of some kind of preliminary reference procedure for advisory opinions like the one used in the ECJ should be seriously studied. If the main problem is the lack of implementation of the Convention into the national systems then the success story of the advisory opinion procedure for implementing community law in national systems merits a thorough study. It is not a new idea but never examined in depth so far. It fits well with the quasi-constitutional role of the Court, to interpret a text generally with an erga omnes effect.

My conclusion, Mr Chair, is that we do need a European Constitutional Court and that the time has come to take such a bold step, maybe by first introducing a procedure for preliminary rulings. If we do not act now we risk...
getting overtaken by the ECJ since the protection of fundamental rights within the EU is becoming more important and the ECJ will be called to interpret for example the Charter. Even if the European Court of Justice continues to refer to the Court’s case-law, the fact remains that, being more of a constitutional court its preliminary rulings on fundamental rights might ultimately seem more accessible and instructive to national courts than the decisions from Strasbourg, all the more so because they are translated into all the official languages of the member states. So the time has come. The learning period is over. The Strasbourg Court should become a constitutional court on human rights deciding cases of principle with an *erga omnes* effect, leaving all the other cases to the domestic courts. These courts are much better placed to adjudicate alleged violations of human rights and fundamental freedoms than an international court.

To the defenders of the individual right of application to the Court I would say that this principle, so cherished by human rights activists all over the world and rightly so, is today somewhat illusory, at least in many cases because of the Court’s back-log. When an individual has to wait for a number of years before receiving an answer from the Court that her case has not been tried on the merits because it was lodged out of time, this is not justice. The right for the individual to apply should be maintained but the right to an individual answer from the Court in the form of a reasoned judgment or decision will no longer be absolute. In my opinion the Court must be provided with the possibility to choose among the applications lodged to address the new serious problems and develop its case-law where it is needed. Only then can the Court continue to fulfil its role in the system of the protection of human rights in Europe.

**Some relevant background material:**


Opinion of the Court on the Wise Persons’ Report (as adopted by the Plenary Court on 2 April 2007)

Screening Domestic Legislation

The Earl of Onslow

Member of the House of Lords, Joint Committee on Human Rights, UK Parliament

Legislative Scrutiny in the UK: who we are and what we do...

Introduction

Ladies and gentlemen.

You may think it is odd that you should be lectured on human rights by someone who is in parliament as a result of his forbear being speaker of the House of Commons in the early part of the 18th century who got drunk with our first prime minister, but God and the British constitution move in mysterious ways. Those mysteries are also the progenitors of common law. That common law was as you all know the foundation of the European Convention on Human Rights. Its authors were heavily influenced by common lawyers, the late Sir David Maxwell Fyfe later the Lord Chancellor, the first Viscount Kilmure and David, Lord Renton. I say this in opening because it explains a little why my country was so late in adopting into domestic law the Convention. It felt that common law and parliament were good enough and was I admit not particularly keen to adopt it. I realised that it was not doing an adequate job and I have now become a keen supporter and I believe that the Human Rights Act, which incorporates most Convention rights, now plays an essential part in the governance of the United Kingdom.

I also agree with Ms Bemelmans-Videc who emphasised the duties of Parliaments to reinforce governments obligations under the ECHR. The UK has its Parliament appointing a joint committee of both Houses to scrutinise the government and the state of human rights in the United Kingdom. I urge other contracting parties to do the same. Our Joint Committee on Human Rights consists of 12 members, with an equal number of members from each House of Parliament. We are mixed politically, with 5 Labour Party members, 4 Conservative, 2 Liberal Democrats and one cross bencher. It is chaired by a Labour member of the House of Commons, Andrew Dismore MP, for whom I am standing in today. Andrew is participating in a debate, raising our concerns about the compatibility of the UK Governments current proposal to extend the possible period for pre-charge detention of terrorist suspects from 28 days to 42, so I hope you will forgive him for being absent today.

We have broad terms of reference which mean we set our own priorities.

Legislative scrutiny has been part of the Committee’s work since 2001.

Similarly we’ve made it our business to scrutinise the government’s responses to key Strasbourg judgments against the United Kingdom.

In our thematic and ad hoc work we consider the practical effect of existing legislation and administrative practice in particular areas on the human rights of individuals, including the implications for Convention compatibility.

We have had a clear head start on helping the UK meet its commitments under the 2004 Committee of Ministers recommendation on screening draft laws, existing laws and admin...
Reforming the European Convention on Human Rights

The Chairman has been guiding the Committee to make our work on screening domestic practices and remain committed to this part of our work. The Johannesburg Declaration is an example of positive obligations. We encourage the government to adopt the same view of the Convention and of their positive obligations. We encourage the government, where appropriate, to include human rights enhancing measures in new legislation and new policy initiatives. Not only will this help to give better effect to the Convention, but it will make human rights more understandable to people in the UK.

We submit every draft law proposed by the government – every Government Bill – to scrutiny for compatibility with the Convention (and with the UK’s other international obligations). The UN Convention on the Rights of the Child and the Torture Convention are recent examples.

With the assistance of our Legal Advisers’ view on significant human rights issues, we write to the government with our concerns.

We take the government’s view on compatibility as a starting point, but we express our own view on compatibility and on any amendments which we think are necessary to make a Bill compatible with the UK’s human rights obligations. We have started to draft amendments to legislation for individual members of the Committee to move in either house. When I, and another member, Lady Stern, moved amendments to the Criminal Justice and Immigration Bill recently, the fact that we could speak as members of the Committee gave great weight to our opinions and I am happy to say that the government accepted many of them or we were convinced that they were unnecessary.

We are incidentally hearing rumours that in the bowels of government there is irritation at our recent activities. Good.

We aim to Report on every Bill in time to inform parliamentary debate and to give parliamentarians an opportunity to challenge the
government’s view that a Bill is compatible with the Convention.\(^\text{470}\)

Our scrutiny of legislation work is becoming increasingly integrated with our other strands of work and this is making our work more effective. For example, we might recommend an amendment to a Bill to make the change required by a court judgment\(^\text{472}\) or to give effect to a recommendation made in one of our thematic inquiries.\(^\text{472}\)

Originally when I heard that we were to do an inquiry on the influence of the HRA on the treatment of older people in health care (we came here to Sweden and were very impressed by what we saw but the problems of ageing populations are pan European), I thought that the Act was irrelevant as looking after people was a matter of proper care and common sense but I soon found out that the Human Rights Act was regarded by the professional carers as a very useful tool in keeping staff and institutions up to scratch.

Does our work really make the Convention more effective?

The government has relied on our work as part of its implementation of the Committee of Ministers recommendations on the effectiveness of the Convention, and we’ve been praised for our work on the implementation of Strasbourg judgments by the Parliamentary Assembly of the Council of Europe Legal and Human Rights Committee.

Parliamentarians are becoming more human rights literate and this leads to real democratic discussion of how to implement the Convention effectively.

Courts increasingly use our reports to inform themselves about the human rights issues being litigated before them, encouraging a domestic dialogue on how the UK should meet its Convention obligations.

What happens when the government listens...

Our recent work on the new Criminal Justice and Immigration Act 2008 shows what happens when government listens to us. The authority of the JCHR forced, as I have said previously, this degree of attention.

In that Bill, the government proposed the Violent Offender Order, a new civil preventative order which could be obtained against individuals who had committed a violent crime in the past and who were suspected of being liable to commit similar offences or posing a risk of similar offending in the future.

We raised significant concerns about the government’s proposals. We considered that without additional safeguards, the draft legislation proposed a significant risk to the individual’s right to a fair hearing and his or her right to respect for their private and family life, as guaranteed by Articles 6 and 8 of the Convention.

We proposed a number of amendments to the Bill, moved by members of our Committee and other members of the House of Lords. This prompted the government to introduce a number of significant additional safeguards and procedural protections before the Act became law.

We consider that these safeguards make it less likely that the Act will lead to breaches of individual rights and will reduce litigation not...
only in our domestic courts but will lessen the load on the European Court of Human Rights.

What happens when they don’t...

Control Orders and the Prevention of Terrorism Act 2005 concern us – and continue to raise concerns – about the compatibility with the government’s counter terrorism policy with Convention rights. The cornerstone of this policy includes Orders for the control of individuals suspected of terrorism by the Home Secretary. These Orders may include confinement and electronic tagging, restrictions on contact with specified individuals and restrictions on access to communications equipment and computers. A number of cases have involved Orders for confinement to a particular address, usually home, for 18 hours a day. We have raised particular concerns about the compatibility of these Orders with the individual right to liberty, to a fair hearing and to respect for private and family life.

These Control Orders are subject to the oversight of the High Court. During hearings the High Court may consider sensitive information in secret, which may not be disclosed to the person subject to a Control Order or to his legal representative. We have raised concerns about the compatibility of these provisions with the right to a fair hearing over the course of the past three years. This story is not yet over.

Earlier this year, the judgment of the House of Lords in MB confirmed a number of our concerns and “read down” the effect of the Prevention of Terrorism Act 2005 in order to ensure that it is applied in a Convention compatible way. The House of Lords referred to our reports in their judgments.

We are currently attempting to persuade our government to use their new Counter Terrorism Bill to amend the law to give statutory effect to the decision of the House of Lords and to make the existing law Convention compatible. We hope they are listening.

On the new Counter Terrorism Bill, we have just issued a very forthright report on the error of the government’s ways over pre-charge detention for 42 days and on that point, our conclusions were unanimous.

The ECHR will continue to be an enormous help in protecting the ancient liberties of the subject which are so much older than, and the parents of, the relatively new doctrine of the rights of man.

Clearly checking legislation before it becomes law strengthens the implementation of the Convention by the UK. This checking has had the beneficial effect of increasing the influence of both Houses over the executive. All a plus for Parliament.

We think it makes better the law and reduces the likelihood that individuals are likely to have to make the trip to Strasbourg to have their rights and liberties under the Convention protected.

That said, we will always work to be more effective and more relevant. I hope that we can use this conference to share our new working practices and to learn from yours.

Improving our work: What we can do?

- **Get in early**: We plan to increase our scrutiny of pre-legislative documents, draft Bills and government policy papers. This is not only more likely to meet the broad approach envisaged by the Committee of Ministers in their recommendation, but it is more likely to highlight problems at an early stage and before government Ministers become committed to a policy set in stone.

- **What really matters**: We are working towards a narrower focus on key human rights issues. We do this by setting a “significance threshold” for issues which we consider raise important Convention concerns. We review this threshold regularly and focus on the importance of an individual right, the likely number of people that a provision will affect and the vulnerability of those people.

- **Keep checking**: More and more of our legislation gives government the power to make administrative regulations. Although the Bill may appear to be HRA compliant, the
regulations may not be and these are more difficult to police. We are increasing our work on delegated legislation and on post-legislative scrutiny. This is not only in keeping with the Council of Ministers recommendation to scrutinise administrative practice and existing legislation, but can highlight serious human rights concerns which only arise some time after the government have passed their original Bill into law.

The Convention is not just for lawyers: We hope to engage more parliamentarians by shaking up our working practices a) by making human rights relevant and using amendments to trigger debates; b) using thematic inquiries to engage NGOs and members of the public in scrutinising the practices of central and local government for compliance with the Convention. There is a tendency in some parts of the press to sneer at the HRA and some parts of the public take similar views, this must be countered.

So, for example instead of talking about a “potential incompatibility with Article 6 of the ECHR” we try to get people interested by talking about the possibility that people accused of a crime might not get a fair hearing. Instead of talking about “the possibility that existing legislation on public order offences may be implemented in a way which breaches the right to freedom of assembly”, we will launch an inquiry on policing and protest and ask people to tell us whether the police are doing their job well with the tools they’ve got.

As part of this work, we’ve begun following up our formal inquiries and committee reports with informal mini-conferences. This practice is in its infancy, but we’ve been working to bring representatives of NGOs, charities and other interested groups to meet government Ministers to explore our concerns about the effective protection of human rights in the UK. Our last two conferences – on health and social care and counter-terrorism – have encouraged Ministers to change proposed government legislation to provide enhanced protection for Convention rights.

Improving our work: What can the government do?

Our government has the power to make our work most effective. By engaging actively with the screening process, the government can make us work with the Convention. No other individual may need again to go Strasbourg, if every civil servant and every Minister, every service provider and every local authority will stop before taking action and ask “What would Strasbourg say?” But they must be do this from the heart and not with tick-boxes in mind.

We’re working to make sure that Convention compatibility – and more importantly, respect for human rights – becomes second nature in public service. Remembering ancient British liberties and creating a human rights culture in the UK are work in progress. We think the government is on our side, but we’re pushing it to do more.

They can and should:

Tell us what they really think: The government need to provide fuller human rights memoranda explaining the reasons for their view that draft laws are Convention compatible.

An increasing amount of our law is made by delegated legislation. These statutory instruments are not subject to the full scrutiny of parliament and government must provide full statements of compatibility with Convention rights with any delegated legislation which may engage human rights.

Talk to us: Government departments must engage more constructively with our analysis and proposals for improvements to legislation; and give us their draft policy, consultation papers or legislation at an early stage. In order to provide a foundation for this constructive approach, we plan to produce Guidance for government Departments on our approach to legislative scrutiny.

And the hardest of these guides, admit when you get things wrong... ⭐
Pilot judgments from the Court’s perspective

Mr Erik Fribergh
Registrar of the European Court of Human Rights

Introduction

I am very pleased to be able to address the issue of “pilot judgments from the Court’s perspective” at this important meeting.

As we know the Court’s main problem today is the high number of cases waiting for a decision by the Court. Today the number is almost 90,000 cases.

At the Court, we are continuously working to find ways to reduce our burden of cases. One way is to make our internal procedures simpler and more efficient. Another way is to improve national implementation of the Convention rights. The theme of this conference is therefore, as the President of the Court underlined this morning, extremely important and supported fully by the Court.

Nevertheless, a more fundamental reform is probably necessary for the longer-term.

The pilot judgment procedure (PJP) is one of the tools which the Court has developed to maximise the effect of its judgments by creative use of its procedures.

What do we mean by PJP?

The PJP combines the familiar with the innovative. The familiar component is that the Court determines that a particular situation in a state constitutes a violation of the Convention. Along with that, it identifies the shortcomings in the legal order – the systemic problem – that is the cause of the violation and which affects a whole class of individuals. These persons would in principle be entitled to seek individual justice from the European Court. There may already be many essentially identical applications pending, or likely to be filed after the pilot judgment.

Rather than deal with these cases in the standard, individual way, the object of the procedure, right from the start, is to help create the conditions at national level in which all of these pending and potential claims can be settled. The specific feature of the PJP is that instead of dealing with each individual case, the Court singles out one or a small number of applications for priority treatment and adjourns all other applications until the pilot case has been decided.

In the judgment in the pilot case, the Court gives advice to the government on how to solve the systemic problem. One of the main elements is that when implementing the pilot judgment the government should in particular address the situation of applicants who already have a case pending before the Court. The basic idea is that the Court should be dispensed from dealing with all the follow-up cases, which would be dealt with through a new domestic remedy introduced as a result of the implementation of the pilot judgment.

The origin of the PJP

The PJP has developed through cooperation between the Court, the Committee of Ministers (assisted by the Steering Committee on Human Rights) and the governments. The Court first described the concept of PJP in 2003 in a document approved by the Plenary
Court and submitted to the Steering Committee for Human Rights in the context of the drafting of Protocol No. 14. It proposed that the Convention be amended so as to provide for such a procedure. But the Steering Committee took the view that the Court would be able to apply such a procedure on the basis of the then existing text of the Convention, (i.e. the Protocol No. 11 configuration).

The basic concept of engaging in a broader analysis of the roots of a violation was endorsed by the Committee of Ministers in its Resolution DH Res(2004)3 on judgments revealing an underlying systemic problem. This text was part of the package of measures – adopted at the same time as Protocol No. 14 – to guarantee the future effectiveness of the Convention machinery. After emphasising the interest in helping the state concerned to identify the underlying problems and the necessary execution measures, the Committee of Ministers invited the Court “to identify in its judgements finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments”.

The Court took up this invitation very quickly in the Broniowski judgment, delivered the following month, which was the first PJP applied by the Court. It concerned enjoyment of a property right under a legislative scheme in Poland, the so called Bug River cases.

The Court stated that one of the principal reasons for devising and applying that procedure has been “the growing threat to the Convention system resulting from large numbers of repetitive cases that derive ... from the same ... systemic problem” and said that the role of this procedural tool is “to facilitate the most speedy resolution affecting the protection of the Convention right in question in the national legal order”.

I have spoken so far mainly about the perspective or interest of the Court. But the procedure actually aims to reconcile three important interests: (1) the interest of those whose rights have been violated (cessation of violation and redress); (2) the interest of the national authorities in tackling the underlying problem (guidance from the Court and a certain breathing space); (3) the interest of the administration of justice (Court not required to process large number of identical cases once the legal issues have been clarified).

The PJP is very much a pragmatic response to repetitive cases. As such it needs to be flexible and adaptable. It will not be the solution to all cases, but it has given the Court a new option in the management and resolution of large groups of cases and thus improved the prospects of ensuring effective respect for the Convention.

Critical comments about the PJP

The legal basis for the PJP has been the subject of some controversy. The Court has grounded it on Article 46 of the Convention (binding force and execution of judgments). Paragraph 1 of that Article provides that states must abide by final judgments to which they are party. Paragraph 2 tasks the Committee of Ministers with supervising the execution of judgments. The PJP in fact combines both provisions in a new way. The state is required to

---

473. The Court said: (It would be a) procedural tool for dealing with repetitive well-founded applications. (It) would involve empowering the Court to decline to examine cases ... where the Court has identified the existence of a structural or systemic violation in a pilot judgment. Such a judgment would trigger an accelerated execution process before the Committee of Ministers which would entail not just the obligation to eliminate for the future the causes of the violation, but also the obligation to introduce a remedy with retroactive effect within the domestic system to redress the prejudice sustained by other victims of the same structural or systemic violation. Whilst awaiting the accelerated execution of the pilot judgment, the Court would suspend the treatment of pending applications raising the same grievance against the respondent state, in anticipation of that grievance being covered by the retroactive domestic remedy. It was stressed in the Court’s discussions that, in the event of the respondent state’s failing to take appropriate measures within a reasonable time, it should be possible for the Court to reopen the adjourned applications.

implement a judgment that, while based on a single application, identifies the broader underlying problem. The execution stage ultimately remains under the authority of the Committee of Ministers, but the Court will conduct its own initial assessment of the state’s response so as to be able to strike out the remaining pending cases in that group.

The legal context also includes Committee of Ministers’ Recommendation 2004:6 on the improvement of domestic remedies, which insists on the need for states to put remedies in place to deal with systemic problems.

There has, however, been criticism, both within the Court and from at least one government, regarding the legal basis of the procedure.

Commentators have moreover drawn attention to potential weaknesses of PJP. It has been argued that the adjournment of cases of applicants in similar situations leaves those applicants in an uncertain position and vulnerable to delays awaiting resolution of the pilot case. But the reality is that even if the Court did not adjourn these cases it would take years before they were individually adjudicated, as the experience with clone cases in the past shows.

It has also been argued that the end result for the applicants will be more proceedings at national level, which, if not effective, could see them returning to the Court some time later, thus extending the length of the proceedings.

Experiences so far of the PJP

It is now almost four years since the Broniowski judgment was delivered. The PJP has been applauded by people outside the Court on many occasions. And a lot of hope has been placed in this procedure with a view to helping the Court resolving its considerable caseload.

I would recall that Lord Woolf in his report on the Court recommended that the Court make more use of the PJP. The Group of Wise Persons, in their final report of November 2006, made a similar recommendation. Regarding the legal basis, the Group questioned whether, in the interests of greater effectiveness, the PJP should at some point be explicitly provided for in the Convention.

A year ago the Court set up an internal Working Group to reflect on the PJP and how its potential may be further realised. Its report on the matter is expected before this summer and the Plenary Court will then discuss the issues again.

Four years down the road from Broniowski, I think one can say that there have been both encouraging and disappointing experiences.

The disappointment lies in the fact that, after all the fanfare that greeted Broniowski, there have been so few PJPs. One would have thought that in the light of the many cases of a repetitive nature pending before the Court, the PJP would have been more widely applied. In fact, the only other true or full PJP that was successfully concluded is Hutteng-Czapska v. Poland, which was struck out last April.

What has been encouraging is the positive result achieved in the two Polish PJPs. Thanks to the government’s constructive and cooperative attitude, the follow-up cases have been (or are likely to be) dealt with within a time-frame that compares favourably with the classic case-by-case approach. It is of course early to speak about the result of the Hutteng-Czapska judgment, where much depends on the future actions of the Polish authorities.

The past 3 to 4 years have also witnessed the emergence of variations of the original PJP template. The common denominator is these cases is that they identify a systemic problem in the state concerned and give advice, even in...
Towards stronger implementation of the ECHR at national level

general terms, to the government about how to solve it.

One of the reasons why these alternatives have emerged is that under the Court’s own procedures the full PJP should normally be done in the Grand Chamber and not in a Chamber of a Section. There is, for obvious reasons, some reluctance on the part of Cham-
bers to refer cases to the Grand Chamber and, since the parties may object to the proposal to relinquish a case in favour of the Grand Cham-
ber, this complicates matters. But given that the implications for the state of a full PJP may be considerable, it is perhaps right that the judgment should benefit from the enhanced authority of the Grand Chamber.

Some examples of variants

In 2005 a judgment was issued in *Lukenda v. Slovenia* 478 concerning excessively long domestic court proceedings. There were some 500 Slovenian “length of proceedings” cases pending before the Court. This was identified as a systemic problem resulting from inadequate legislation and inefficiency in the administration of justice. 479 The Court urged the Slovenian Government either to amend the existing range of legal remedies or to introduce new remedies, in order to secure genuinely effective redress for such violations. The judgment contains all of the characteristics of the PJP with the exception of formal adjournment of similar cases. In fact, the Court took the opposite approach – as soon as it had delivered the pilot judgment, it rapidly processed approximately 200 further judgments against Slovenia concerning allegations of excessive length of proceedings before domestic courts. This demonstrates the adaptability of the PJP – it would be hard to justify adjourning cases complaining of length of proceedings. In 2006 new legislation was adopted to protect the right to trial without undue delay. 480 By May 2007 there were about 1 700 applications pending at the European Court against Slovenia in which the applicants alleged a violation of the “reasonable time” requirement in domestic proceedings. The Court then decided in the *Korenjak* case that the new remedy was effective and that therefore the applicants were obliged to invoke the new domestic mechanisms, before lodging a case in Strasbourg.

There isn’t enough time to go through the other examples in detail, but one sees elements of the PJP applied to issues such as:

– access to property in Northern Cyprus 481
– length of proceedings and *de facto* expro-
priation in Italy 482
– the system of property restitution in Alba-
nia 483
– compulsory letting and compulsory sale of property in the Slovak Republic 484
– inadequate procedures in prison discipline regimes in Turkey 485.

These cases show the truly essential fea-
tures of the PJP – identification of the underly-
ing problem and indications or guidance to the state.

I think it can already be said that the phrase “systemic problem” has acquired a special con-
notation in Convention proceedings. When the Court uses this expression in a judgment, the state is put on notice that the Court’s con-
cerns are not limited to the individual case. With this approach, the Court complies with the Committee of Ministers’ request in Reso-

479. Para. 93.
480. The Act on Protection of the Right to a Trial without Undue Delay (Zakon o varstvu pravice do sojenja brez nepotrebnega odlaganja, Official Journal, No. 49/2006), which was enacted on 26 April 2006. It came into force on 27 May 2006 and became oper-
ational on 1 January 2007.
See: *The effectiveness of the European Convention on Human Rights at national level*, Working document (Rapporteur: Ms M-L. Bemelmans-Videc), Com-

In accordance with the Committee of Ministers’ own rules of procedure, the execution of the judgment will be supervised as a matter of priority.

**Comments**

Although it has drawn some criticism, the PJP clearly has the potential to help solving the problem of high numbers of similar applications coming before the Court.

When the Court is faced with a large number of cases raising the same issue, the PJP – in some form – should be tried. It goes without saying that the Court should deal with the case selected as the pilot as a matter of priority and as quickly as possible. All the related cases should be adjourned in the meanwhile, and the applicants informed clearly of the Court’s strategy. Hopefully, the procedure will go forward smoothly and produce the desired outcome – an adequate domestic remedy with retroactive effect.

However, what should the Court do in situations where it has already delivered a large number of judgments concerning the same issue and only later does it pinpoint the systemic problem? It is rather difficult to take up a systemic problem in case number 55 for example and use it as a pilot case, while adjourning the remaining cases.

What we face here is in fact the issue of enforcement of the Court’s judgments. In the situation I just described, the first 54 judgments will have been referred to the Committee of Ministers for enforcement. The fact that case No. 55 is still outstanding simply shows that the previous judgments have not been fully executed.

To give a concrete example: when the Court delivered judgment in the case of *Burdov v. the Russian Federation* in 2002, the problem of non-enforcement of civil judgments in Russia was apparent and it should have been solved by proper measures at the stage of implementation of the judgment before the Committee of Ministers. Since then the Court has delivered more than 120 similar judgments.

And it is this which makes me question whether in the future reform work we should not embark upon a more radical solution which would see the Committee of Ministers’ authority and capacity considerably increased.

What one could envisage is that, instead of delivering judgments in repetitive cases, the Court would simply certify that the case is to be settled in light of the previous decisive judgment. The follow-up cases would be referred directly to the Committee of Ministers, not as decided cases but certified claims to be enforced on the basis of that existing judgment.

Admittedly, one could object that the Committee of Ministers has neither the competence nor the resources to function in this way. But if, as I argue, these cases should not be processed by the Court, then it is time to look at how the Committee of Ministers could be given the legal competence to take on this role and equipped to do so.

Enforcement issues are becoming more and more judicial and it would seem to me that in the future reform work, one issue that could be taken up is whether the enforcement issues should not be entrusted to a more quasi-judicial organ. This could be a separate body, or one operating under the auspices of the Committee of Ministers. I think a lot could be achieved to solve many enforcement issues if for instance a Panel of five to seven legal/judicial experts were entrusted with that duty.

**Concluding remarks**

The Court has developed a PJP which, in its full form, been used in only a few cases so far. But, taken along with the variants, these cases show an increasing willingness on the Court’s part to identify systemic problems and give guidance to the respondent states, which
Towards stronger implementation of the ECHR at national level

is a substantial departure from the purely declaratory approach that the Court has followed for more than four decades. The development so far is perhaps somewhat uneven: there are more variants to the proper PJP than actual PJP.

We are likely to see more variants in the future.

Whatever their exact form, all these cases have the same object: they try to identify systemic problems and try to help the respondent state get to grips with the situation. They also all try to help the Court manage its workload more effectively.

We need to acquire more experience in the operation of the PJP. It has a clear potential which the coming years will certainly show.

Nevertheless, I have argued that the PJP is really an indication of a problem of enforcement and implementation of Court judgments. So instead of making the judicial stage of Convention proceedings the focus of the next round of reform, should we not strengthen the enforcement stage? Ultimately repetitive cases are the symptoms of the failure to take appropriate general measures as part of enforcement process. By giving the Committee of Ministers the mandate and the means to ensure more enforcement, the whole Convention system may function more effectively.

Thank you very much.
Excellencies, Ladies and Gentlemen,

I am very pleased that this Colloquy provides us with an opportunity to exchange views on the developments which – as the title of this session implies – concern amplifying the effect of the Court’s case-law. It comes as no surprise that the concept of pilot judgments is at the heart of the debate relating to the stronger implementation of the European Convention at the domestic level. This is exactly what the pilot judgment procedure is aimed for: to implement the European Convention in a domestic legal system in a situation of systemic problem underlying the violation of the treaty.

Let me remind that the European Court of Human Rights applied the pilot judgment procedure in two cases against Poland: Broniowski and Hutton-Czapska. In both cases the underlying causes of the violation of the European Convention of Human Rights were found in systemic deficiencies of the legislation in connection with dysfunctional domestic practice. Having regard to the systemic cause of the violation, the Court held that its consequences concerned not only the applicants in the above-mentioned cases, but also the applicants who already lodged their complaints to the Court or could potentially lodge such complaints.

The pilot procedure and the judgment identified the character of the violation and implied that the government would reach a friendly settlement with the applicants as regards the just satisfaction, however, if the negotiations between the government and the applicant failed, the Court would have to decide on the just satisfaction on its own motion. The friendly settlement between the applicant and the government was supposed to include both the individual as well as general measures. Also, the Court decided that until the conclusion of the friendly settlement and its acceptance, the proceedings in similar cases would be suspended. In view of certain difficulties with the procedure of negotiating the friendly settlement in the Broniowski case, the Polish Government addressed the Registry of the Court and invited it to mediate between the parties. As a result of mediation, a friendly settlement has been reached which defined the conditions of individual and general measures.

The applicants agreed that they would be concerned by individual measures and would not submit new claims based on general measures. Subsequently, the Court delivered judgments which approved the friendly settlements and struck the main applications out of its list. The applicants in the clone cases were informed by the Registry that they should avail of the domestic measures and the domestic proceedings would be monitored. In that framework the Court was expected to deliver decisions on striking the clone cases out of the list if the applicants in these cases received appropriate relief. In case of the Broniowski v. Poland the above procedure has been completed.

Also, please note that the pilot judgment procedure within the European Court of Human Rights was pending irrespective of the proceedings at the Committee of Ministers’ Deputies regarding the supervision of the execution of the judgment pursuant to Article 46 § 2 of the Convention.

As a Polish Government agent before the Court I appraise highly the concept of pilot
judgments. Allow me to dwell a little longer on the Broniowski cases – in order to draw conclusions from the way agreement was reached between the applicant and the government side. And so, both the size of the individual compensation for Mr Broniowski and the attempt to define a systemic model of Bug River compensation for thousands of persons in a similar legal situation, were the subject of negotiations, with the participation of representatives of the Court’s Registry. During the Warsaw Seminar “The European Court of Human Rights (June 23-24, 2006) I said inter alia:

“The attainment of a friendly settlement in the pilot case resolved the individual problem of Mr Broniowski, but did not result in the transfer of the other Bug River complaints to the national system. Clearly, the pilot cases need a procedure for achieving legal peace. Such legal peace would have as its objective the negotiation of terms between the Court and the government for dismissing clone cases and referring them for resolution to national courts. Thus, we are talking about a new negotiating procedure between the government and the Court Registry. – Let me stress: between the government and the Registry – and not between the government and the applicant. The participants in such negotiations could also include the Council of Europe Commissioner for Human Rights, representing the interests of the applicants in clone cases, and a representative of the Committee of Ministers, which would subsequently act as guarantor of the correct fulfilment of the terms of legal peace. The negotiations would result in the elaboration of an agreement with the government on a general remedy to be introduced into internal law to prevent further violations. Such a remedy should also establish a path for settling clone cases, the latter being conditionally struck from the Court’s roster of cases. The government would present a timetable for implementing the remedy. If the government failed to implement its commitments, the Court would be able to withdraw from the legal peace and issue judgments in the clone cases as in the pilot case”.

I should also stress that I welcomed the Court’s flexible and friendly approach towards the government’s suggestions regarding this procedure. It is important to note that the Court kindly accepted the need to acquire the consent of the concerned government to initiate the pilot judgment procedure. I myself advocated such a solution at the Seminar in Oslo in 2004.

The high assessment of the concept of pilot judgments does not mean that I do not discern certain shortcomings which could be eliminated through development of this procedure. In my opinion, one of the main weaknesses of the present concept is its expanded structure. As a consequence, the Court needs a considerable amount of time to reach a judgment within that framework. If we consider the pilot cases already examined by the Court, the period between the communication of the case to the government and the delivery of the judgment amounted up to four years. If we take into account the period prior to the communication, as well the amount of time necessary to examine the clone cases, the whole procedure may take up to 10 years.

Having analysed very thoroughly the issue of the length of procedure in pilot cases, I presume that it might be possible to shorten it considerably, at least in certain categories of cases. This could be achieved when some steps in the course of the procedure are simplified. At present the pilot judgment procedure consist in three main steps:

– the delivery of a pilot judgment,
– the friendly settlement, and
– the delivery of a judgment approving the friendly settlement.

I would suggest that in certain circumstances the procedure could involve the delivery of a pilot judgment approving a friendly settlement or the government’s unilateral declaration. In other words, the conclusion of a friendly settlement or submitting a unilateral declaration could precede the delivery of a pilot judgment. The simplified pilot procedure would not replace the present one, but would have an optional character.
Along these lines, I would suggest the following *modus procedendi* in applying the simplified pilot procedure:

**Step 1.** When a systemic problem underlying the violation of the Convention is identified in legislation or domestic practice, a government can request the Court to initiate the simplified pilot procedure.

**Step 2.** Among the clone cases communicated by the Court to the government, the latter choose one or several cases and propose the applicant(s) a conclusion of a friendly settlement involving both the individual as well as general measures. The Registry of the Court would take part in the negotiations as a mediator. Alternatively, or even as a rule, the mediation between the parties could be undertaken by the Council of Europe Commissioner for Human Rights. It is my profound belief that the expertise and experience of the Commissioner might be of great value when it comes to conclusion of a friendly settlement in cases revealing a structural problem.

**Step 3.** In case of adopting a friendly settlement, the government would not object to the Court’s declaring a systemic violation in a judgment, which would be then considered a pilot judgment. If a friendly settlement is approved in a judgment, the other cases from the group would be suspended.

**Step 4.** In cases the applicant does not agree for a friendly settlement, the government would have the right to submit a unilateral declaration, including both individual as well as general measures, which would be taken into account by the Court. If the Court accepts the unilateral declaration in a judgment, the latter would become a pilot judgment. Then the other cases from the group would be suspended.

**Step 5.** A pilot judgment would conclude the simplified pilot procedure. The judgment find a systemic violation and approve the friendly settlement or proposals indicated in the unilateral declaration as to individual and general measures. The Court could also determine the procedure of monitoring the execution of general measures which may influence the determination of suspended cases.

**Step 6.** When the government fulfil the individual measures, the case would be struck out of the list.

**Step 7.** When the general measures indicated in the pilot judgments are implemented in domestic system, the Registry of the Court would inform the applicants whose cases are still pending that they can pursue their claims before domestic courts or competent organs. The applicants would be informed that in case they do not avail themselves of the indicated domestic measures, their cases would be struck out of the list. Also, if the applicants make avail of the existing domestic measures, the proceedings would be monitored by the Registry of the Court. This guarantee would not entail an automatic redress in domestic law, but would rather concern the fairness of procedure provided for by domestic legal system.

**Step 8.** When the monitoring of domestic procedures with respect to the clone cases is completed, the Court would decide to struck the cases out of the list or would adopt other decisions it deemed appropriate.

I am aware that the simplified pilot procedure may only concern cases where the government do not deny the existence of a systemic violation and its causes. However, the practice of Polish pilot cases reveals that the lengthy pilot procedure has considerable drawbacks both with respect to the position of the government, as well as the applicants’ status. It also affects the efficiency of the Court.

It is my sincere belief that the simplified pilot procedure could contribute to a more effective implementation of the Convention in situations where the government concerned declares its willingness to co-operate with the Court in eliminating the problem underlying the systemic dysfunction. Of course, the concept of the simplified pilot procedure require some further thought, however, the idea remains clear: to strengthen the mechanisms developed in the *Broniowski* and *Hutten-Czapska* cases in order to secure a
more effective way of dealing with systemic violations of the Convention.

In conclusion, I wish to bring your attention to the fact that the concept of pilot judgments is currently in the agenda of the Reflection Group established by the Steering Committee for Human Rights in November 2007. The Reflection Group is tasked to examine in depth a concrete follow-up that could be given to the recommendations contained in the Report of the Group of Wise Persons as well as other sources. The Polish Delegation to the GDR is particularly interested in the concept of pilot judgments and will support the idea of drafting rules governing the use of pilot judgment procedure, with particular reference to:

- the criteria of a “pilot case”,
- the procedure of selecting a “pilot case” and decision-making process,
- the role of the Registry of the Court and the government,
- possible involvement of other actors in the procedure,
- the course of negotiations following a pilot judgment;
- the desired effect of a pilot procedure.

We hope to find allies who share the view that there is an urgent need to clarify and simplify the pilot judgment procedure. Undoubtedly, we should benefit from the experience of the already completed or pending pilot procedures, with particular emphasis on the Broniowski and Hutton-Czapska cases.

Thank you for your attention.
Mr Roderick Liddell

Director of Common Services in the Registry of the European Court of Human Rights

Mr Chairman,

When I joined the Registry nearly twenty years ago, the Registry’s information activities were fairly minimal. These were the days before the Court was overwhelmed with caseload. Again at the time the principle of subsidiarity was a much repeated mantra in the Court’s case-law but it remained a largely theoretical notion, with one or two exceptions. The Court was still proclaiming that the Convention did not require incorporation into the national legal system, which was of course from a legal point of view perfectly correct. Yet I think we can say now that it made no sense in terms of the practical operation of the principle of subsidiarity. National courts had to have a clear legal basis for applying Convention standards if they were to fulfil their natural role within the Convention system. However, that legal basis alone is not sufficient. National courts must also have access to the Court’s case-law. I should like to consider in this brief address how we can work towards that in the light of the Registry’s existing information activities.

The Court’s information activities can be said to pursue at least four aims.

- The first concerns the direct impact of its judgments. Ensuring an appropriate degree of publicity for findings of violation is part of the deterrent effect of judgments which are essentially declaratory.
- The second is related to the more effective implementation of the Convention at national level and therefore the principle of subsidiarity. If we are serious about the need for national courts to apply the Convention in the light of the Court’s case-law, we have to give national courts the means to achieve this. In other words we have to make available to them not just the judgments finding violations arising out of dysfunctions of their own national systems, but more generally the Court’s leading judgments which define the contours of the corpus of European human rights jurisprudence.
- The third concerns the general principle of transparency in the administration of justice. This is reflected in the provisions of the Convention which require the Court to make documents before it accessible to the public.
- The fourth aim relates to the need to dispel misconceptions about the Court’s mission with a view, among other things, to reducing the number of clearly inadmissible cases.

In the context of today’s discussion I wish to concentrate on the second aspect, that is essentially providing the users of the Convention system with the tools that they need in order to give the rights and freedoms guaranteed therein practical effect in national systems – and in the light of the latest developments of the case-law. The dynamic character of that case-law makes it all the more necessary to make it accessible. Let me just stress in this context, as other speakers have done, the essential importance of the notion of subsidiarity. We often speak of the Court or the Convention system being the victim of its success because of the tens of thousands of applicants who bring their grievances to Strasbourg every year. Yet the system will have been truly successful only when European citizens do not have to come to Strasbourg because they can vindicate their rights before the national
Towards stronger implementation of the ECHR at national level

courts. The international machinery will always represent a less effective, a more expensive and an altogether more cumbersome means of redress than local remedies.

In this area access to the Court’s case-law in a language that is understood by those involved in judicial proceedings at national level is key. You only have to look at the judgments of the United Kingdom courts since the entry into force of the Human Rights Act in 2000 to see how a national judiciary is capable of acquiring ownership of the Convention if it is given access to it. If the United Kingdom courts have given us some of the most detailed and sophisticated analysis of the Convention case-law this is surely at least partly because most, if not all, of the main Strasbourg judgments are available in English.

How does the Court disseminate information about its judicial activities today? In the time allotted to me I cannot go into relations with the media and the more general issues of communication policy. Of course the heart of the Court’s information activities is its website. Until 1998 the Court was sending out paper copies of its different information documents. In 1999 the Court brought into operation its HUDOC data base, having decided that the only realistic means of fulfilling its Convention obligation to publish its judgments was to make them available via the web. Today all the Court’s judgments are published on the Internet via HUDOC on the day of delivery. We take this for granted in 2008, but nine years ago it was rather radical and quite an achievement. HUDOC is equipped with a powerful search tool, which in theory enables users to conduct extensive and sophisticated research.

Since last year, other collections have been added to the HUDOC data base of judgments and decisions. These include the case-law information notes, information on communicated cases and press releases. All these collections are searchable. For our purposes perhaps the most relevant is the collection of case-law information notes. These are issued on a monthly basis and seek to identify the most important cases in terms of jurisprudential developments – at different procedural stages.

The Court has recently published on its site a new series of information documents, the “key case-law issues”. These consist of different items dealing with the most relevant and recent case-law on specific themes and Articles. Thus there is a section devoted to Article 8 and the various issues arising under that provision. Another section deals with the questions relating to Article 35 in the context of admissibility. Ultimately this series will cover all the Convention rights and freedoms. In so far as it concerns the substantive provisions, this information is not only aimed at applicants and their representatives; it can also be of use to judges and practitioners at national level. It is proposed to make these “key case-law issues” available in different language versions; indeed they have already been translated into Russian and Turkish.

Another new collection that will shortly be made available will be the summaries produced for cases published in the Official Reports. This collection will also be searchable.

The Court also produces a HUDOC CD-ROM which is regularly updated. When we first looked at this idea, we carried out some market research which suggested that there would be significant interest in it. In reality, its added value in relation to the Internet version of HUDOC does not appear to have been sufficient and sales have been low. But this can perhaps be attributed to the success of HUDOC via the Internet. I am asked to remind you that it is not too late to subscribe to this service.

As I have said HUDOC was ground-breaking when it was introduced nearly ten years ago, but apart from anything else the sheer mass of information which it now contains makes it unwieldy. It currently comprises over 50 000 texts and increasingly performs the function of a repository. We have recently conducted a user survey (completed in April). Whatever the final results of that survey which we are now analysing, it is clear that we need to carry out extensive work on HUDOC and notably with regard to the search functionalities. We are investigating the feasibility of developing a new search engine and there is also work that needs to be done on cleaning up and harmonising the data. Another suggestion that has been made is the creation of a separate...
case-law database, which would contain only the most important cases.

This is work in progress, but the real challenge is, as I and other speakers have suggested, to ensure effective access to the Court’s key judgments for the national authorities and courts. As the Wise Persons pointed out in their report, national judicial and administrative institutions should be able to have access to the case-law of the Court in their respective language. That of course echoed many other voices over the years going in the same direction, including the Committee of Ministers in its Recommendation (2002) 13 and its Resolution (2002) 58. Certainly no one would contest the value and importance of the Wise Persons’ proposition. It is, however, easier said than done.

We should not however overlook that much has already been achieved by different actors: government bodies, NGOs and the Council of Europe, notably through the Directorate General of Human Rights and Legal Affairs (DGHL). The first task facing anyone wishing to place translation of the Court’s judgments into non-official languages on a more formal and co-ordinated basis is to draw up an inventory of what already exists. This the Court is in the process of doing, in collaboration with DGHL. Thus the Council of Europe Field and Information Offices have been asked to inform the Registry of any local translations commissioned by the Council of Europe. Letters will also be sent to government agents and NGOs asking them to provide the Registry with any translations into non-official languages and make accessible electronic versions.

The next step will be to contact private publishers and to see to what extent they are prepared to waive copyright or what other arrangements can be made with them.

Once we have established what exists and, where appropriate, verified its quality, it will be necessary to make it accessible via the website, either by creating a separate collection or by inserting links to sites with the different language versions, including private publishers’ sites. Ideally it should be possible to discover when you open the official language version in HUDOC the other languages in which the judgment exists and access them. As to the future organisation of systematic translation of the Court’s leading judgments, it seems to me that, as the Wise Persons indicated, responsibility for translation, publication and dissemination of the Strasbourg case-law lies with the member states. I know that many of the government agents are already overworked and under-resourced, but the logical point of contact and co-ordination would clearly be the Agent’s office. It is recognised that government agents have an important role to play within the Convention system; this additional mission would be entirely consistent with that role. It will no doubt require extra funding, but Agents should not assume this task in isolation. Government agents who share a language could liaise with each other. Agents could communicate with each other to identify best practices in this field, I believe that some Agents are particularly active already. In addition it will be necessary to harness the valuable work of NGOs and academics who make such an important contribution in this respect, not to mention the continuing efforts of the Council of Europe. One thinks in particular of the different judicial training programmes and the potential for co-operation within that framework. It may be that private funds or voluntary contributions can be mobilised for specific programmes of translation.

As regards selection of judgments meriting translation, I would suggest that in the Court’s Publications Committee we already have a body whose task is to identify cases raising novel issues of case-law. Their choice of cases is already published on the Internet site but if it were helpful government agents could be informed immediately so as to give them as much advance warning as possible about judgments which will need translation. Indeed it might be necessary for the Court to make a more limited selection – to flag the most important cases of principle.

Mr Chairman

In the time available it has only been possible to sketch a brief outline of some of the Registry’s information activities. Let me conclude by making the following interlinking points on the specific question of translation into non-
official languages: Firstly, however important information activities may be, they are obviously only part of the problem and therefore only part of the solution. Secondly, and notwithstanding what I have just said, this is not a peripheral issue, but one which goes to the effectiveness of the Convention system. Thirdly, providing access to the case-law via translation is essential if national courts are going to play their full role. Fourthly, the Registry does not now and will never have the means to organise and effect that translation itself. Fifthly, this can only be achieved by a collective effort – co-ordinated by the government agents. The Convention is a joint venture in this aspect as in others. The mission of implementing it is a shared one as are the values which underpin it. I now look forward to hearing your suggestions and comments for enhancing the Court’s and the Registry’s contribution in this area.

Thank you for your attention. ★
Ladies and gentlemen,

Have you ever felt like a movie star? I mean, not just in your dreams or in the loneliness of your bedroom when you were a teenager, while staring at the posters of your childhood heroes, but in real life? I certainly have – not even very long ago – and it had everything to do with human rights and the European Court. Let me tell you how it happened.

Ten years ago, the city of The Hague celebrated its seven hundred and fiftieth birthday. On the initiative of the then president of the District Court of The Hague, the city, which after all claims the title of legal capital of the world, organised an international moot court, where delegations of lawyers from a number of countries presented fictitious court cases according to their national rules and traditions. This event was subsequently repeated at intervals of about three years. Those moot courts were announced in the press and always generated a lot of attention from the public at large. They usually concluded with an equally fictitious but quite realistic hearing by one of the international judicial bodies based in The Hague, usually the International Criminal Tribunal for the former Yugoslavia. Last November, however, the organisers saw fit to close the “international day in court” with a hearing by the European Court of Human Rights. They asked the Dutch judge in the Court and the government agent to prepare a case for the hearing. Those of you who know Judge Myjer will not be surprised to hear that he happily rose to the challenge and did not mind twisting reality a bit, to the extent that he personally assumed the role of President of the Court. The government agent appeared as himself, while friends and colleagues, all experienced lawyers, played the roles of judges, applicant and applicant’s counsel.

To cut a long story short, after a highly interesting day of oral presentations of court cases from Belgium, Germany, the Netherlands, Romania, Spain, Sweden, Turkey, the United Kingdom and the United States, sometimes with active participation by the audience, the time came late that afternoon for the closing ECHR-hearing. This is where the movie star feeling comes in. A huge crowd of spectators, including judges, lawyers, students and many other interested citizens huddled impatiently outside the court room well before the hearing. When they were finally allowed in and tried to fight their way to the best places as if it were a Rolling Stones concert, it turned out that even the Hague Court of Appeal’s largest courtroom was far too small to accommodate them all. At least half of them had to watch the proceedings on a big screen in the hall outside. The actors may not have been asked for their autographs, but they nevertheless received numerous questions by the public after the hearing.

What conclusion can be drawn from this story? Of course that depends in the end on everyone’s own interpretation. But for me it was another indication that human rights are a very hot topic and that, even in a country like the Netherlands with a long-standing human rights tradition and a mere handful of ECHR judgments per year, it is no means cooling
Towards stronger implementation of the ECHR at national level

down. On the contrary, judging by recent events, we may safely conclude that human rights are more a front page issue now than they have been for decades. Certainly, at the Dutch Foreign Ministry – my employer – human rights have been at the heart of policy-making since at least 1979, when the Ministry issued its first comprehensive human rights policy document. But that document – like its updates and successors, the latest of which saw the light only a couple of months ago – concerned human rights and foreign policy. As if human rights are something alien, only of concern to diplomats stationed in faraway and less developed countries.

Through all those years, awareness in the Netherlands that human rights also require continuous care and maintenance at home was low. It was basically limited to a few lawyers and die-hard Strasbourg watchers, sometimes ominously referred to as "the human rights mafia". The European Court and the former European Commission on Human Rights occasionally found violations of the Convention by the Netherlands, but these rarely attracted attention outside the legal press. I personally still get mostly sceptical reactions and encounter doubts about the size of my workload when I tell people about my work as government agent. It is telling that the most active domestic non-governmental organisation monitoring the human rights situation in the Netherlands is a group of lawyers, the Dutch section of the International Committee of Jurists. I have nothing against lawyers, of course; some of my best friends are lawyers. But human rights are simply too important to entrust completely to one profession.

In this atmosphere, the Court's judgment in the case of Saïd v. the Netherlands in July 2005 and particularly its judgment in the case of Salah Sheekh v. the Netherlands in January last year came as something of a shock. The Court ruled that the government's planned expulsion of Mahmoud Mohammed Saïd to Eritrea and of Abdirizaq Salah Sheekh to Somalia would violate Article 3 of the Convention. More than before, this made the public at large, informed by the general press and of course by Internet, realise that human rights in the Netherlands are – to put it mildly – subject to discussion and not beyond reproach. It goes without saying that this awareness did not come in unison. There were those who claimed that they had seen it coming – particularly the human rights mafia I mentioned earlier, many of whom felt that the government got just what it deserved. But there were also large groups in society who were taken by surprise and considered this another example of totally inappropriate interference by "Europe" in domestic affairs, a sort of conspiracy to swell the already uncontrollable influx of migrants into our country.

And there is more evidence of the revival of the domestic human rights debate. You will all have heard of, and probably seen, the film *Fitna*, recently produced and released by Dutch MP Geert Wilders. Seldom can a publication or release have caused such heated debates throughout society, even before it took place. Interestingly, these debates have frequently been cast in terms of human rights, explicitly or implicitly, sometimes with legal subtlety, sometimes with provocative bluntness. There were those – obviously including the film's producer – who portrayed freedom of expression as the *conditio sine qua non* of our Western democracies, which must prevail over all other rights and freedoms and at all costs. Others – including for example the Secretary General of the Organisation of the Islamic Conference – considered it their divine duty to defend freedom of religion against any unfriendly expression by nonbelievers. Gays and lesbians suddenly saw their right not to be discriminated against and their right to private and family life most passionately defended by an extreme right-wing party. Pious inhabitants of the Bible Belt stood shoulder to shoulder with followers of the Koran in upholding freedom of religion, bien étonnés de se trouver ensemble.

The spirit of reconciliation which one might expect from this picturesque description, was not much in evidence, however. Instead, the debates were dominated by widespread misunderstanding and ignorance about the equality, the indivisibility and the interdependence of human rights and about the interaction between them. Many participants in the debate strongly pleaded the cause of human rights, only to conclude that it was first of all their human rights which were threatened by,
and should take precedence over, those of others. Be that as it may, the conclusion is clear: there is an intensified human rights debate in my country. I suspect that this is true not only for the Netherlands but also for other countries.

This brings me to the issue which is under discussion here this morning: helping member states implement the European Convention on Human Rights. If I may continue for a moment to speak as a national representative, I would remind you that international instruments are increasingly being used to monitor and improve the human rights situation in my country. This is attracting a lot of attention domestically. This attention may take the form of criticism, with an undertone of irritation about what is sometimes considered inappropriate foreign intervention, but it undoubtedly contributes to the intensified human rights debate I just described. Last year, the European Committee for the Prevention of Torture, the European Commission against Racism and Intolerance and the Committee of Experts of the European Charter for Regional and Minority Languages all visited the Netherlands and reported on the situation there. In April this year, the Netherlands was one of the first UN member states to undergo the Universal Periodic Review under the UN Human Rights Council. The State Secretary for Justice, who led a large interministerial delegation to the UPR, thereby announced that the government would not wait until the next review before reporting again on the situation and would report in the interim at its own initiative. In the meantime, we are looking forward to the visit to the Netherlands in September this year of the Council of Europe Commissioner for Human Rights. A first co-ordinating meeting took place recently with an advance party from the Commissioner’s office.

As long as all these bodies and mechanisms – and I haven’t even mentioned the regular reporting under the UN human rights treaties – duly take into account the results of each other’s work, I am convinced that they can avoid the pitfall of duplication of effort and in fact can mutually reinforce one another. In recent months, I have sensed among my colleagues at other ministries – Justice, the Interior, Education, Social Affairs, Health – not reporting fatigue, but rather a widespread preparedness to respond to questions from monitoring bodies, as long as these colleagues were sufficiently assured that their responses were being taken into account at all international levels.

Having made these comments from my national perspective, I think it is high time for me to change hats and talk about the work of the Council of Europe Reflection Group I chair on the follow-up to the Wise Person’s Report and other reports. I suspect that this was the main reason I was invited to address you this morning. The Reflection Group, which has existed for a year now, was mandated to focus in its first year on measures that do not require amending the Convention. So obviously national measures aimed at implementing of the Convention were an integral part of our discussions. I will briefly sum up the elements of our discussions that relate directly to today’s topic, helping member states implement the Convention.

We spoke at length about access to information and advice for potential applicants to the Court, and considered the possibility of drawing up guidelines for member states. This issue may seem straightforward at first glance, but it is not. Crucial questions came up, such as: Would giving applicants better information and advice lead to a decrease or an increase of the influx of applications to the Court? Who would be responsible for the quality of information and advice? Where is the dividing line between purely factual information on the one hand and legal advice to the applicant on the other? The Group decided that it needed first to acquire better knowledge of the actual situation in the member states, with the “Warsaw pilot project” as a potential major source of information. I am sure that Ms Nuala Mole, who will speak later this morning and has a fund of expertise in this area, will be able to help us answer our questions.

We also considered favourably the possibility of seconding national judges to the Registry of the Court. Although most of my colleagues in the Reflection Group think this would primarily benefit the Court, I personally do not agree. The Netherlands has for many years now been seconding trainee judges to the
Towards stronger implementation of the ECHR at national level

Registry, for fixed periods of one year, as part of their training. We know the Court greatly appreciates their help, but we also consider these secondments an effective way of enhancing knowledge of the Convention system among our national judiciary. I am sure that Ms Hanne Juncher, who will also speak this morning, will agree.

The Reflection Group joined the Group of Wise Persons in underlining the crucial role of the Council of Europe Commissioner for Human Rights, and particularly of the network of national human rights structures that the Commissioner co-ordinates. There is no need for me to go into more detail here, since Mr Thomas Hammarberg himself will certainly inform us later about the Commissioner’s work in this area.

The Reflection Group has also stressed the potential of the HUDOC system to help both applicants and national authorities. HUDOC could be expanded to include links to translations of the Court’s case-law into non-official languages, an analysis of patterns in the Court’s awards of just satisfaction, and information on admissibility criteria.

Finally, the Reflection Group revisited the crucial issue of domestic remedies for violations of the Convention. We did not, however, take up the fifth proposal from the Group of Wise Persons, recalled at last year’s conference in San Marino by the Deputy Secretary General, to elaborate a new convention on domestic remedies. We were influenced by the consideration that a new binding instrument would cast doubt on the scope of current Article 13 of the Convention, which guarantees an effective domestic remedy for any kind of violation of the Convention. We were much more open to the possibility of developing an additional soft law instrument, building particularly on the existing Recommendation Rec (2004) 6 and the ensuing work in the DHR-PR.

In the coming year, the Reflection Group will continue its discussions in accordance with its mandate, focusing now on measures that would require amending the Convention. I hope this brief overview has clarified the situation and I look forward to the discussion.

I should not, however, close my presentation this morning before paying tribute to the Norwegian Government for their initiative to create a trust fund to support the implementation of the Convention in the member states. Needless to say that such a fund may play a constructive role in making the Convention more effective at the domestic level. I am therefore happy to confirm that my government has committed itself to donating a sum of 250 000 euros to the fund.

Till sist vill jag ta tillfället i akt att tacka Svenska regeringen, och då speciellt min kollega Inger Kalmerborn, så hjärtligt för gastfriheten och eran fantastiska organisation av den här kongressen. Det är alltid ett nöje att hälsa på i norden, framföralt under perioden då solen aldrig går ner.

Tack så mycket. Thank you.
Mr Thomas Hammarberg

Council of Europe Commissioner for Human Rights

Effective work for human rights must start at home. The diplomatic exchanges between countries as well as the international treaties and their monitoring mechanisms are important and do encourage further efforts at national level. However, genuine progress must be based on domestic decisions. This perspective should not be forgotten and is a key dimension of the mandate of the Commissioner.

This mandate is spelled out in Article 3 of my terms of reference:

The Commissioner shall:

a. promote education in and awareness of human rights in the member states;
b. contribute to the promotion of the effective observance and full enjoyment of human rights in the member states;
c. 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, promote the effective implementation of these standards by member states and assist them, with their agreement, in their efforts to remedy such shortcomings; (emphasis added).

d. provide training and practical assistance to human rights actors in the member states;

e. conduct studies and reports on the states of human rights in the member states and publicise these reports;

This mandate means that the Commissioner, beyond the mere indication of shortcomings, is expected to enter into dialogue with the governments of the member states. This non-judicial institution, is not to deliver legally binding judgments on whether or not human rights obligations have been breached. Rather, I am asked to be a bridge between the Council of Europe and its member states. To assist the various authorities of the member states in construing national solutions for the implementation of the ECHR and also of the other Council of Europe human rights instruments.

Let me in this context mention specifically three important activities under my mandate.

I. Assistance to member states in preventing ECHR violations

Permanent contact with the various human rights actors in the member states allows the Commissioner to screen developments on an ongoing basis. When he detects activities or omissions that might lead to non-abidance by the ECHR, he alerts the authorities of the member state concerned. This may encourage the national authorities to address the issue before it becomes a breach of the Convention and is brought before the Court (or the other monitoring mechanisms).

Aware of the Court’s case-law with respect to the wide range of situations found in our member states, I am in position to recognise shortcomings which may be problematic vis-à-vis the Convention. For example, during my special mission to Armenia following the State of Emergency in March this year, the lack of an effective and independent investigation on the events crystallised as an obvious problem. Based on the Court’s requirements, I highlighted the absolute need for such kind of investigation. This analysis was welcomed by the Armenian Government and we are now discussing possible ways of setting such independent investigation into motion.

Indeed the Commissioner can, respectfully, take the pragmatic approach of indicating, by way of “recommendation” possible measures which he has found to work well in other countries that had to face similar difficulties. Thus, the sort of constitutional princi-
Towards stronger implementation of the ECHR at national level

Towards stronger implementation of the ECHR at national level

ples set out by the Court can be adjusted by the
Commissioner in the form of concrete sugges-
tions. Recently, the Polish Government, fol-
lowing my report of 2007, has put into place a
special Committee on the implementation of
my recommendations and consults me and my
Office regularly to make sure my recommen-
dations are well understood. This is one of the
most promising examples.

II. Assistance to member states in correcting situations of non-compliance with
the ECHR

When the national authorities, the Court,
one of the various specific monitoring bodies
or the Commissioner detect situations that
have already created violations of human
rights in a country, the Commissioner can
assist the authorities in correcting the situa-
tion.

While the Court cannot go beyond the
object of the application before it, the Com-
missoner can look at all aspects of a phenom-
emon. For instance, in its judgment in the case
of Hummatov v. Azerbaijan of 29 November
2007488, the Court found that the medical care
provided to the applicant in the Gobustan
Prison had been inadequate and must have
caused him considerable mental suffering
which had diminished his human dignity and
amounted to degrading treatment. Conse-
quently, the Court held that there had been a
violation of Article 3. During my recent visit to
Azerbaijan, I visited the Gobustan Prison and
I was able to consider a number of issues
related to prisoners sentenced to life sen-
tences, their conditions of detention and their
legal regime. In light of the Court’s principles
and also of the CPT recommendations, I tried
to suggest measures to the authorities that
went beyond the issue which was considered
by the Court.

From his country visits and thematic work,
the Commissioner has knowledge of the ways
in which the various countries address difficul-
ties which, after all, often resemble one
another. This allows him to bring possible
avenues of solution to the attention of the

national authorities who face the need to react.
Good practices of other member states are
shared via the Commissioner.

In reality the difference between preven-
tion and corrective measures is not easy to
make. Corrective measures are part of preven-
tion. Let me give you an example.

The Court has found quite a number of
cases where it concluded to a lack of an inde-
pendent investigation into police misconduct.
Having encountered this issue in many coun-
tries, I decided to organise an expert workshop
on police complaints in the end of May in
Strasbourg to find out together what can be
done. Participants included representatives of
complaints mechanisms, police, prosecutors,
government authorities, intergovernmental
and non-governmental organisations as well as
academic experts.

Currently, there is a variety of different
mechanisms for investigating police com-
plaints in the member states of the Council of
Europe. A few countries have set up bodies
operating separately from the police. Many
countries entrust public prosecutors to lead
and supervise investigations carried out by the
police. Another model is to have teams with
specialised prosecutors and police officers.
Several European states are also in the process
of reforming their current procedures. The
purpose of this workshop was to share experi-
ences from the Council of Europe’s member
states models and procedures, to assess their
independence, effectiveness and transparency
and to discuss good practices and challenges
regarding these different models.

III. Assistance to National Human Rights Structures (NHRs) in implementing
the ECHR

Resolution Res (99) 50 expressly tasks the
Commissioner to co-operate with the NHRs
and help them perform their own duties in the
best possible way.469 NHRs are independent

488. Applications Nos. 9852/03 and 13413/04.
national bodies set up under the laws of their countries to advise their government and other national authorities on how to best abide by human rights standards. They have a long-standing experience of constructive dialogue with the authorities at all levels. In line with proposals made by the Group of Wise Persons, I have engaged in an enhanced co-operation with the NHRSs in order to foster their awareness of the Council of Europe standards, which they may help their authorities to implement. Also, we have set up a network between the NHRSs that allows for mutual inspiration between these national non-judicial human rights protectors in the member states. This is an asset when it comes, for instance, to preparing a national human rights action plan.

Three concrete results should be mentioned in this respect:

**The involvement of NHRSs in the implementation of the 2004 Recommendations**

Our contact persons in the NHRSs were involved in the review of the implementation of the 2004 Committee of Ministers Recommendations undertaken by the Steering Committee for Human Rights (CDDH). Taking into account their workload, the Office of the Commissioner decided to consult the NHRSs only on two of the five Recommendations, namely 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 European Convention on Human Rights and Recommendation (2004)6 on the improvement of domestic remedies. These recommendations appeared to have the closest links with the mandates of most NHRSs.

The reaction of NHRSs was very positive. The Commissioner received 36 replies from the Contact Persons and made a compilation of them which was transmitted to the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR). This experience has proved that the Commissioner’s Office can serve as an effective channel to inform, stimulate and collect contributions from the NHRSs, in particular by using the new tool now put in place in the form of the network of Contact Persons. The second positive outcome of this consultation was that it contributed to the awareness raising of the role of NHRSs for the implementation of the Court’s judgments.

**The execution of the Court’s judgments**

Some NHRSs have expressed the wish to enhance their capacity to act in the execution of ECtHR judgments. They have asked my Office to help them fully understand their role under Rule 9 of 2006 Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements. Working with them on the public documents of the Committee of Ministers’ website and on the First Annual Report on execution, we have provided the NHRSs with information they had sought. As a result, under the aegis of my Office experts from a number of NHRSs have discussed good practices that might allow for the execution of certain sorts of judgments. This, in turn, would ensure the non-repetition of violations at national level.

489. Article 3 c: “[T]he Commissioner shall, wherever possible, make use of and co-operate with human rights structures in the member states. Where such structures do not exist, the Commissioner will encourage their establishment.” Article 3 d: “The Commissioner shall [...] facilitate the activities of national ombudsmen or similar institutions in the field of human rights.”

490. Article 3 c: “[T]he Commissioner shall, wherever possible, make use of and co-operate with human rights structures in the member states. Where such structures do not exist, the Commissioner will encourage their establishment.” Article 3 d: “The Commissioner shall [...] facilitate the activities of national ombudsmen or similar institutions in the field of human rights.”

491. Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers’ Deputies.
Towards stronger implementation of the ECHR at national level

490. **Rule 9 Communications to the Committee of Ministers**

1. The Committee of Ministers shall consider any communication from the injured party with regard to payment of the just satisfaction or the taking of individual measures.
2. The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention.
3. The Secretariat shall bring, in an appropriate way, any communication received in reference to paragraph 1 of this Rule, to the attention of the Committee of Ministers. It shall do so in respect of any communication received in reference to paragraph 2 of this Rule, together with any observations of the delegation(s) concerned provided that the latter are transmitted to the Secretariat within five working days of having been notified of such communication.

**Training of NHRSs**

Co-financed by the Council of Europe and the European Union the Project (referred to as “The Peer-to-Peer Project”) consists of a work programme to be implemented by the Office of the Commissioner for Human Rights in 2008 and 2009. It aims at setting up an active network of independent non-judicial National Human Rights Structures (NHRSs) compliant with the Paris Principles, with special focus on non-EU member states. The Peer-to-Peer Project seeks to enable national structures to improve their performances in terms of:

- raising human rights awareness in their countries;
- detecting potential or existing human rights problems;
- proceeding to efficient investigations were this is in their mandate;
- engaging in constructive dialogue with the authorities to avert or solve problems of human rights protection;
- triggering rapid mobilisation of international partners if necessary.

The main tool of the programme will be the organisation of workshops for small groups of practitioners from the NHRSs to convey select information on the legal norms governing priority areas of NHRSs action and to proceed to a peer review of relevant practices used or envisaged throughout Europe. A manual in several languages will be prepared after each workshop for dissemination amongst NHRSs and other relevant actors. The choice of the themes for the workshops takes due account of priorities indicated by the NHRSs. The feedback from the first two workshops was very positive. I do believe that when NHRSs become increasingly aware of their own means and responsibilities as well as of good practices of colleagues abroad, they will play a more and more proactive role in advising their authorities on how to better protect human rights in our member states.

We are moving towards more emphasis of the principle of subsidiarity with the Commissioner in the role of a facilitator. For this progress to be successful, state authorities must be open minded and receptive to ideas and suggestions. So far, I can report encouraging signals. ★
THE COUNCIL OF EUROPE’S SUPPORT FOR NATIONAL CAPACITY-BUILDING ON THE ECHR

Ms Hanne Juncher

Head of Division, Legal and Human Rights Capacity Building Division, Directorate General of Human Rights and Legal Affairs

Excellencies, ladies and gentlemen,

The Council of Europe carries out projects and activities on human rights capacity-building in the widest sense. If I list them briefly, it should give you a sense of the scope of beneficiaries involved and therefore the diversity of approaches needed:

- Training on the Convention for legal professionals constitutes the core of our work. The beneficiaries are judges, prosecutors, lawyers and law enforcement officials. National ombudspersons and their staff are also beneficiaries of these programmes. Separate programmes target prison staff.

- Draft legislation is reviewed for its compatibility with the requirements of the Convention, at the request of member states;

- The implications of the execution of the Court’s judgments in cases requiring general measures are addressed in roundtables and meetings between the Execution Department and the relevant national authorities;

- Government agents benefit from study visits to the Council of Europe and to other Agents’ offices, and from seminars with the national authorities on the role of the Agent.

- Case-law, training manuals, handbooks and moot court scenarios are translated into the national languages and distributed, in paper and electronic form;

The projects take as their starting point the ECHR, and all of them aim to improve the ability of key target groups to use the Convention nationally. There are two main objectives: Firstly, to transfer specific knowledge and skills to the direct beneficiaries, and secondly to strengthen the ability of the national structures to carry out training and capacity-building themselves.

The intention is to make the human rights standards real, to do it in a spirit of collaboration rather than monitoring, and of course to improve the level of knowledge. All the training is preventive in nature; it aims at contributing to good human rights protection already at the national level. By increasing the number of cases handled effectively by the national judiciaries, it is hoped that training will also contribute to reducing the number of cases reaching the Court.

We currently have projects underway at a combined value of around €16 million. Bilateral projects cover 14 countries, including Kosovo. Three fourths of the funding is raised from external donors, the most important of which by far is the European Commission. We implement around 250 activities every year, and of those about 150 are training activities. The projects are managed from Strasbourg but they are implemented locally. We employ project staff in 9 different countries in Eastern and South Eastern Europe and in the South Caucasus.

The bilateral projects are complemented by one multilateral programme called “The
Towards stronger implementation of the ECHR at national level

The Council of Europe has trained 7 000 prosecutors and 5 000 judges in Ukraine, using a Training-of-Trainers approach and reaching all the regions of the country. In Turkey, a Training-of-Trainers project is under way and 10 500 lawyers will be trained on the Convention. During a project which ended in November last year, all Ministry of Justice Inspectors in Turkey, as well as 2 500 governors, deputy governors, gendarmerie and police officials were trained on issues such as freedom of assembly, the prohibition of ill-treatment and the positive obligations of an effective investigation, legal grounds of detention, and fighting terrorism while respecting human rights. Two thirds of the prosecutors in Azerbaijan are being trained as part of a project funded by the Government of Sweden. In Serbia, some 1 300 legal professionals have been trained on the Convention during a project funded by the Government of Ireland. Under a three-year programme in Russia, the Council of Europe is continuing the work to train Russian judges, a massive task given the size of the country’s judiciary. These are just examples.

Bearing in mind the objective I mentioned at the outset of improving national implementation of the Convention, we have made a number of observations based on the projects carried out as regards in particular effectiveness – in other words the pre-conditions for improving implementation of the Convention at the national level through capacity-building. I would like to summarise a few of them here:

– The principle of subsidiarity is always highlighted as the context for the projects. The same applies to the desirability seen from the perspective of a member state of avoiding cases reaching Strasbourg, and therefore of investing in improving the capacity at home.

– Incorporation of the ECHR as part of domestic law is already an important step to facilitate implementation of the Convention. Still, a clear message from the highest political level in a country to the judges’ associations or the prosecution service that there is support for training on the Convention standards is very helpful in motivating participants and it helps add legitimacy.

– Training-of-Trainers can be effective but only if there is a long-term commitment to using this methodology, and only if the national partner agrees to a rigorous selection procedure for those expected to take on the role of national trainers. The Council of Europe monitors the quality of the training carried out in the subsequent cascade training sessions but eventually the trainers will be on their own and here the national training structures have an important role to play in ensuring that the level continues to be satisfactory.
The training activities being carried out as part of Council of Europe projects should be accompanied by the integration of training on the Convention into the curriculum of all judges, prosecutors and law enforcement officials, for initial and in-service training. Likewise, it should be part of the reading provided within law faculties. This has all been stressed in the aforementioned Committee of Ministers Recommendation. As far as judges and prosecutors are concerned, this is where the HELP Programme comes in.

The HELP Programme was one of the priorities of the Action Plan adopted at the Summit of Heads of States and Governments of the Council of Europe in Warsaw in 2005. It began in 2006 and is aimed at helping member states integrate the Convention into the curriculum for judges and prosecutors. Whereas the bilateral projects I spoke about earlier comprise actual training, the HELP Programme is about how to train on the Convention. The result has been the development of a multitude of concrete tools and materials for the training of judges and prosecutors.

This includes full curricula on each of the ECHR Articles and transversal themes, such as administrative, civil, criminal law, etc.; course outlines containing all relevant concepts and landmark judgments of the Court; PowerPoint presentations on substantive Articles of the ECHR and transversal subjects; 70 case studies and moot court exercises; a manual on the training of trainers, and interactive e-learning courses based on Grand Chamber judgments. These materials are available free of charge in English, French, German, Russian and Serbian on the HELP website (www.coe.int/help).

The HELP Programme has benefited from very strong interest from the member states. 45 countries are currently participating in the working groups, submitting examples of their own curricula, testing courses, and so forth. However, there is no funding envisaged for the HELP Programme beyond December of this year. I would like to take this opportunity to encourage member states to consider making available voluntary contributions to ensure its continuation. This would enable the Council of Europe to meet the many requests from member states for assistance and advice on ECHR training, and to update the tools and materials which would otherwise quickly become out of date. We call this service the HELP-desk. The amount needed is around €200 000.

As mentioned earlier, the Council of Europe regularly benefits from the sponsorship of certain projects by individual member or observer states – Sweden, Norway, Ireland, Denmark, the United Kingdom, Canada to mention a few.

An interesting new development in the same direction was the launch in March this year of the Human Rights Trust Fund. Member states may pay contributions to this new Fund whose aim is to support national efforts to implement the Convention and other Council of Europe human rights treaties.

The Directorate General of Human Rights and Legal Affairs will be responsible forconceptualising projects in fields where the Council of Europe monitoring mechanisms have identified shortcomings, and for their implementation once approved by the Fund.

It should also make it possible for the Council of Europe to provide assistance in fields other than training and human capacity-building and to take on for example institution-building or assistance towards structural changes. We are currently reflecting on the first project proposals to submit for approval by the Fund.

The Council of Europe is by no means the only actor when it comes to capacity-building on the ECHR. The OSCE runs a number of programmes and many NGOs, national and international, organise training events and awareness-raising activities. This is a good thing. As long as there is a reasonable exchange of information at least between the intergovernmental initiatives, we should not complain about a surplus of good-quality human rights training. Here too though, the Council of Europe has a particular role to play given our ownership of the Convention, our long experience, and the excellent network of short-term experts we have built up over many years and whose contributions are a guarantee of good
Towards stronger implementation of the ECHR at national level

quality. The tools produced under the HELP Programme are of course also available to these “outside” training initiatives.

To this should be added the close cooperation and support we enjoy from the Registry of the Court, for which we are very grateful. We are able to draw on the national lawyers and judges within the Registry for the in-country events. Participants very much appreciate these opportunities for direct contact. Likewise, the Execution Department often puts at our disposal their unique knowledge as regards the precise implications of the Court’s judgments.

I would like to mention one more issue concerning human rights capacity-building which remains eternally problematic, and that is evaluation and impact. First of all, the two are not the same. We are able to evaluate training events without any problems and we know what to do to improve them. Impact is a different matter. It is difficult to measure or quantify the results in any meaningful way. Just counting the number of persons trained is no guarantee of a long-term result. Yet, donors expect us to be able to point to tangible outcomes and it is also important for us to be able to adjust the methodology.

There are some ways of assessing the impact. One is to look at the quality of the applications reaching the Court. There we see a clear improvement in a number of the countries where the Council of Europe has longstanding programmes. We also noted for example that the lawyers who brought the first successful cases against Russia concerning Chechnya had participated in the Council of Europe training programmes. I should add here that we make a point of training “both sides” as it were, the judiciary as well as the practising lawyers. Still, the connection may be tenuous, we cannot be sure that the improved quality is a direct result of our training.

Another possibility would be to count the number of references to the Convention and the case-law within national judicial decisions. But making this count is difficult in practice and raises the added problem of the quality of the reference. In addition, we have learnt that judges often hesitate to refer explicitly to the Convention but this does not necessarily mean that the Convention principles and case-law have not featured in their deliberations – in which case the training has had an impact.

An examination of the position taken by the domestic authorities in the decisions subsequently brought before the ECtHR may provide important pointers as to the level of knowledge of the ECHR and the Court’s case-law. Given that lawyers have to raise their ECHR arguments before the domestic authorities in order to exhaust domestic remedies, they have a clear opportunity to demonstrate their knowledge then. However, whatever method is used, it requires resources which are not presently available.

Ladies and gentlemen,

In my intervention I have focused mainly on training but it is important to stress that this is only one of the avenues to be pursued in order to improve implementation of the Convention. It is equally important to ensure regular and systematic dissemination of the Court’s case-law, in the national language, as well as information about the decisions of the Committee of Ministers concerning execution. I would also mention the service offered by the Council of Europe in the form of legislative expertise. Member states can submit draft legislation to the Secretariat for an expert review of its compatibility with the requirements of the Convention.

If I were to attempt to draw any overall conclusions from the work of the Council of Europe in the field of capacity-building on the Convention, it would be that the interest on the part of member states is very high. Furthermore, the level of knowledge of the participants in the training events is increasing all the time. In some cases, especially among the practising lawyers, it is often very good indeed.

Nevertheless, despite several years’ of work on Training-of-trainers, member states still rely heavily on external training providers. The Council of Europe is only meeting part of the needs in this field, and yet in many cases the expectation on the part of the member states who are beneficiaries of the Council of Europe
programmes continues to be that the training is prepared for them. This phenomenon confirms the particular value of the HELP Programme.

Training-of-trainers, when it is successful, is the exception to that but even then we see that the outputs are not always used systematically afterwards once a particular project has ended. I would therefore finish here by encouraging member states to attach a very high priority to professional training on the Convention. It goes without saying that they can count on the Council of Europe’s continued support for this important work.

Thank you.
Towards stronger implementation of the ECHR at national level

PROFESSIONAL TRAINING ON THE STANDARDS OF THE ECHR

Ms Nuala Mole

Director of the AIRE Centre (Advice on Individual Rights in Europe)

Introduction

Thank you to the Council of Europe and to our Swedish hosts for the magical evening last night.

This colloquy is about making rights “practical and effective not theoretical and illusory.” It is about ensuring that the people of Europe are able to enjoy in practice the rights that are guaranteed to them in theory.

That’s what the AIRE Centre and other NGOs – and many others from all branches of government, the Court, the Secretariat of the Council of Europe and the NGO community in this room – have been striving to achieve for 15 years. Some member states have unfortunately not been trying so hard – almost all governments have been found in violation of their obligations; some in violation repeatedly and some in violation of a very serious kind.

Before coming here, I looked back over speeches I gave at the first truly pan European Council of Europe Colloquy in Posnan 20 years ago, at the various events hosted by previous presidencies – Rome in 2000, the Netherlands in 2004, San Marino 2007. I first went to Chisinau in the early 1990s, and now have personal experiences of training on the ECHR in 39 of the 47 member states of the Council of Europe.

The Convention was at the end of the 1940s (some would say cynically to give the Council of Europe something to do). Although based on a British draft, it brought together different legal systems and different legal traditions. There were some misconceptions, such as the illusory “homogeneity” of the founding members; and there were some self deceptions, with the UK and Sweden in particular believing that the ECHR would make no difference at all.

Yet all the parties agreed to their obligation under Article 1 of the Convention to guarantee its rights and freedoms to all those within their jurisdiction. And they further agreed under Article 13 that they would afford a domestic remedy for anyone whose Convention rights were violated.

Since the Convention was drafted, we have witnessed the varied evolution of the role of the rule of law in the 47 member states. These different legal systems are all accommodated within the Convention, and many states have alternatives to the judicial resolution of disputes – from ADR and mediation within the rule of law, to blood feuds and bribery, or simply “my cousin’s brother-in-law in the Ministry will fix it” syndrome outside the rule of law.

There are also vast differences in legal education – from the founding of the Ecole de la Magistrature in France as long ago as 1958, to other states where there was no formal legal education. In the 1960s in the UK, judges, and the barristers over whose advocacy they presided, didn’t even have to have been to university, but only took a Bar exam.

The history and evolution of the ECHR has witnessed not only the persistent re-offending of the some of the oldest member states, but also the huge difficulties faced by the “new"
member states especially. This is partially because of the plethora of new legislation in the “new” member states as they complete the transition to market economies and “western democracy”. But it is also because of the need to change a whole different legal and rights culture – and, as they say, Rome was not built in a day.

In 2004, the Committee of Ministers adopted Recommendation Rec (2004) 4 on the ECHR in university education and professional training. In particular, it noted the preventive role played by education in human rights principles, and recommended that member states ensure that adequate university education and professional training about the Convention and the case-law of the Court exist at the national level.

This presentation will look at four questions in relation to training: Who? What? When? Where? It will also pose an important question that remains to be answered fully – How are they going to get it?

WHO needs training?

Recommendation Rec (2004) 4 talks not only about judges, prosecutors and lawyers, but as well about others involved in law enforcement such as members of the police and security forces, prison and hospital personnel, immigration officials.

Underlying the recommendation is the unwritten yet fundamental importance of getting the key players involved in the day to day protection of human rights convinced of the need for human rights education and training, and of the need for greater awareness of human rights in all sectors of society.

Clearly the list could not be exhaustive, but the 2004 Recommendation has some conspicuous omissions in the candidates for training. We need to talk about them here today. In particular, the public officials and general civil servants, whose decisions are challenged in the courts, are nowhere mentioned. Such training is crucial for getting the right decision initially from a public official. And however hard it is to get that right decision, it is always easier to get it right the first time than trying to get a wrong one reversed. If this happens, there will be less need to involve the judiciary in remedies. As Roeland Böcker said, human rights are far too important to be left to lawyers.

The Recommendation makes no mention of social services or welfare officers who play a crucial role in determining what happens to vulnerable children; in some Council of Europe countries, decisions to remove children from their parents are still not taken or reviewed judicially as the Convention requires. Nor are educational decision-makers mentioned, who decide whether children belonging to minorities should be schooled apart from their peers, thus deciding the fate of Roma children among others. These are important issues for this colloquy in particular, with children being one of the priorities for the Swedish Government’s Presidency.

Recommendation Rec (2004) 4 does not mention the military, but the ECHR does not stop at the barrack gates. There are very important issues surrounding military justice, ranging from courts martial to the application of the Convention to military operations outside the metropolitan territory (which is not yet a closed issue despite the decision in Behrami). There are further questions of vulnerable young conscripts not receiving the care they need, and of conscientious objection and its consequences. My personal experience of training the military, in its senior echelons, is that they really want to know what the ECHR standards are and they want to be applying them. This reflects Hanne Juncher’s comment about the request for training that came from the general staff in Turkey.

The 2004 Recommendation does not mention training for civil servants in central governments in general. Nor does it mention parliamentarians; we have heard from other speakers of the important role that parliamentarians can play and their frequent imperfect knowledge or misunderstanding of the ECHR, and it is clear that they need training as well.

Nor does it mention NGOs, who are often committed and enthusiastic but sometimes lacking in knowledge and expertise. Such training is crucial if they are to fulfil their role as watchdogs of their national authorities and...
unofficial guardians of human rights. The Convention binds states, but it is often the NGOs who make sure that this happens.

Even the press should be candidates for human rights training – and not just on Article 10 and Article 8 issues – but to ensure that they understand the Convention with a view to reporting it more fairly. This is particularly true of the national press when violations by their own state are found by the European Court, and is very important in helping states to create a climate in which they can comply with unpopular judgments.

Perhaps even the members of the Committee of Ministers are candidates for the training that they themselves recommended member states provide. As we heard from Ingrid Siess-Schertz and we who represent applicants know, the Committee may at times be too willing to accept measures from states, especially General Measures, which will only result in repeat violations occurring. 492 Hopefully the new transparency of the system for the execution of judgments will enable the Committee of Ministers to hear voices other than those of governments in the course of these processes.

The real need if for the mainstreaming of ECHR standards into professional training given to anyone with a role to play in human rights related decision making. It is important that we bring together all the players in a field so that they learn about the ECHR together.

The other Who is who is going to do this? We will come to that at the end when we talk about How.

492. See e.g. Verein Gegen Tierfabriken Schweiz v. Switzerland (Grand Chamber judgment to be handed down on 9 July 2008) and Mehemi (2) v. France and Dowsett (2) v. the United Kingdom (pending).

WHAT do they need to know?

Training needs to familiarise the participants with the basic provisions of the ECHR and the case-law, but it needs to teach more than that. It should include key concepts, the “sandwich provisions” (Articles 1 and 13), the “invisible” provisions, and positive and negative obligations.

Human rights decision-makers need to become familiar with the case-law relevant to their professional particularity from all the jurisdictions – not just from their own. But it must be done properly – they need someone to help make the (alien) ECHR case-law from other jurisdictions relevant to their day-to-day work. The case-law (not even the case-law from their own jurisdictions) cannot simply be translated and disseminated, though it would be a start if all judgments (or at least all important judgments and not just Grand Chamber judgments) were available at least in both official languages of the Council of Europe. But read in isolation, many of the judgments are sibylline and require the application of modern training methodologies if they are to be understood and applied by those who need to implement the standards they set or confirm. Only when they understand these judgments can officials cultivate the practical tools, such as the keeping of custodial records and the use of particular investigation techniques, necessary to give practical effect to the standards.

But they also need to know how the ECHR fits in with other binding international standards. For example, people should be made aware of Article 53 and especially the decisions of the UN treaty bodies; the HRC is fortunate now to have a former distinguished judge of the ECHR in the person of Elizabeth Palm; soft law such as the European Code of Police Ethics or the European Prison Rules.

They need to know about the work of the Committee of Ministers (and here may I thank them for their excellent first report, which is a marvellous document – many congratulations!) Those being trained need to know that other states have had to react to judgments, change their law and practice and how they have done this. The AIRE Centre’s experience with Serbia, where we held a seminar to share the experiences of other governments, could usefully be duplicated elsewhere.
WHEN do they need training?

They need it ALL the time. Continuous professional development for all those we have identified in the who section above (and all those we didn’t but should have!) is incredibly important. They must be kept properly up to date on ECHR case-law.

Furthermore, they need to know about the applicable standards before violations have occurred. There was no training on ECHR and trafficking before *Siliadin* was decided, and even now most of the anti-trafficking initiatives of which I am aware do not focus on the relevance of Article 4.

Training is also important after judgments have found a state to be in violation. Those responsible for the violation will often need to explore *for themselves* precisely what they did wrong so that they can make sure it doesn’t happen again. Such training should always include a follow-up element and incorporate the drafting and adopting of best ECHR practice guidelines or check lists. But this must come “from the heart,” as the Earl of Onslow said yesterday.

And finally – it is important that states devote as much time and energy to encouraging, nurturing and fostering best ECHR compliant practice *within the existing legal framework*. There is often a tendency just to throw yet more new legislation at the problem and hope it will go away. Too often have I been in states where the existing legislation was fine but was not effectively utilised. The solution adopted was to change the legislation, not the bad practices and attitude.

WHERE should they learn it?

Human rights training should occur in the workplace. People must be trained together with their related professional colleagues in other disciplines. It should take place locally and regionally, with direction and encouragement from the central government and the Supreme Courts. But it is essential to win hearts and minds. Contrary to what we have been hearing in this room, a lot of people in a lot of member states, old and new, are not in favour of Europe as an idea. Nor are they in favour of human rights, especially for terrorists and paedophiles. Politicians don’t like this, but a lot of those who hold these views are the very people we have identified in the who section. You can take a horse to water, but you cannot make it drink. (In French, the saying is “On ne saurait faire boire un âne qui n’a pas soif” – but I wouldn’t like to suggest that Europe’s public officials and judiciary are to be compared to donkeys!)

Training can also occur abroad. Resistance to applying international law is best addressed by exposure to “abroad.” Foreign countries and foreign (i.e. international) legal systems seem less foreign once visited. Such “study visits” must be proper study visits. For example, when we took Serbian and Montenegrin judges to visit Strasbourg, we ensured that we had a prior seminar at which we discussed the case we would be seeing, provided the admissibility decision in local languages, and, after the hearing, held a discussion about the procedures and issues raised.

HOW should it happen?

Training should be systematic and mainstreamed; this means properly funded ECHR training.

If local high level dignitaries (such as Supreme Court judges) have the relevant expertise, they are the best to provide the training needed. From a *status* point of view, the national judge in Strasbourg is the very best, and the Council of Europe and the Court needs to ensure (not just permit) that national judges return sufficiently often to their own states for their presence to be felt.

Registry lawyers doing national cases are the next best to provide human rights and ECHR training. The Registry, for obvious reasons, may be reluctant to release them but this reluctance is misguided, as effective training can reduce the Court’s caseload.

At this stage, many countries still lack enough of their own real experts and thus need
Towards stronger implementation of the ECHR at national level

international experts. While this remains necessary, we should work to do away with the “parachuting” of experts who are familiar with the ECHR but unfamiliar with local data. All the internationals sent to a country must be properly briefed on the relevant aspects of local law and practice and on the problem areas.

In addition, it is important to provide all training materials in local languages. Sadly, recycled English power point presentations add little and distract an audience with a poor or no knowledge of the language.

If foreign speakers must be used, quality interpretation is essential. Where the speakers do not prepare a written text (a time-consuming exercise for busy people who are often asked to attend at short notice and on an expenses only or token honorarium basis) it is important that they talk through problematic language with the interpreters – common Convention phraseology can be a nightmare for an inexperienced interpreter.

Efficient and effective have different meanings in English – but are forever being used interchangeably and with the wrong meaning. “Motivated” does not mean “reasoned”. In addition, some common words have very complex technical meanings “criminal,” “charge,” “arrest,” and even “application” and “complaint.” And if you think that those are challenging, try translating Convention terms such as “precise and ascertainable” or “dynamic and evaluative” or explaining what “moral and physical integrity” is!

Training will still need to be done by internationals. Being an expert on the ECHR is necessary but not sufficient. It does not necessarily mean that the person is a good trainer. Training is a skill which often has to be acquired or learnt. As such, the use of expert training methodologies is important. For example, at the AIRE Centre, we produced a methodology for training the trainers for our seminars; we have since adapted and refined this methodology for the Council of Europe, and it is now on the HELP website.

It is always important to deliver ECHR standards in thematic contexts – not article by article. Practical situations never arise in neatly boxed ECHR articles. Training which, for example, addresses all the ECHR issues relevant to the pre-trial stage of criminal proceedings will be far more effective that one which treats Article 5 or 6 of the Convention in isolation.

Conclusion

Finally, there is a pressing need for coordination – at least at national level. All too often the Council of Europe arranges, or is forced by circumstance to arrange, a seminar which is held ten days or two weeks before a similar event organised by someone else or worse still on the same days as another event.

This year in the first five months alone, I have conducted trainings on the ECHR in Greece, Netherlands, Hungary, Serbia, Montenegro, Turkey, the UK and Ireland. Only one of those was a Council of Europe activity, and that was in Turkey where I was working with the Council of Europe’s Counter Terrorism group. If our target groups are not to suffer ECHR fatigue, greater co-operation and collaboration between human rights bodies at a local level is needed.

In the end, the practical and effective implementation of Convention rights will depend on effective systematic training supported by the necessary political will and the necessary financial support. The Council of Europe HELP programme in particular needs that support.

The need for training runs and runs. Rome was not built in a day. Drip-feed technique is slow, but it is the best. And while the Council of Europe must continue to play a key role, they should continue to support the initiatives of other organisations and institutions.
Chairperson, Excellencies, Ladies and gentlemen,

Now we are approaching the end of our work. Allow me first of all to congratulate the Swedish Presidency for having chosen the theme of this Colloquy and, more generally, for having given first place amongst the priorities of its presidency to the realisation of the fundamental objective of the Council of Europe: making human rights an effective reality. Strengthening implementation of the European Convention on Human Rights at national level contributes fully to the realisation of this objective.

This priority of the Swedish Presidency fits perfectly into the decisions of the Ministers of Foreign Affairs adopted in Rome in 2000, on the occasion of the 50th Anniversary of the Convention, then in the package of measures adopted by the same ministers in 2004 and confirmed by them in 2006. Furthermore, one can only welcome the continuity of this action, after than undertaken by the San Marinese and Slovak presidencies, and express the wish that the following presidencies of the Committee of Ministers pursue the same course.

After two days of presentations and intense discussions, it would be somewhat ambitious, even pretentious of me to want to give a brusque summary of the particularly rich exchanges of views we have had. It will therefore be not so much conclusions, strictly speaking, but rather non-exhaustive observations raising the salient points that can nurture reflections during our future work.

If I had to sum up the substance of our work in a single word, I would hold on to “subsidiarity.” All our reflections have centred on this fundamental notion – a fundamental notion that underpins the whole control system of the Convention and that finds its formal expression, above all, in Articles 1, 13 and 35 of the Convention.

The collective responsibility of states party to the Convention, as set out in the Preamble thereto, was recalled, in particular in connection with supervision of the execution of judgments. Collective responsibility and solidarity were also quite rightly evoked, however, in connection with the implementation at national level of the package of measures adopted in 2004. It seems to me equally that the last state yet to ratify Protocol No. 14 should find itself called upon to show collective responsibility and solidarity. Indeed, all the states party must show their solidarity and accept their responsibilities in the face of a risk of implosion of the control system of the Convention.

It was recalled most judiciously that collective responsibility is a notion that finds itself applied equally on the domestic level: all state authorities – executive, legislative and judicial, including local and regional bodies – are collectively responsible and must show solidarity in the face of the obligations accepted by the state in the name of the Convention. Confronted with a given problem, every authority should ask itself, “What would Strasbourg say?”

In this context, one can note with satisfaction that, for several years, the Convention has been a part of domestic law in all the states party to the Convention. This amounts to a very important factor in permitting full and complete implementation of the principle of subsidiarity.

Similarly, direct application of the Convention seems now to be generally accepted in all member states, which allows the Convention
to be invoked directly before national authorities, in particular before the courts.

It was pointed out that national judges must find themselves recognised as having the capacity to guarantee the primacy of the Convention. Integration of the Convention into domestic law, direct application of the Convention and primacy of the Convention over conflicting national law are decisive elements for ensuring full implementation of the Convention at the national level. But are these principles a reality in all our member states? Can national judges really apply the Convention and the case-law of the Court directly, where necessary, at the expense of conflicting national law? We have heard that even in the oldest states party, misunderstandings or, at least, uncertainties sometimes occur over the status of the Convention and, perhaps more often, the case-law of the Court. It should be possible to overcome these misunderstandings and uncertainties, notably through dialogue between national courts – especially constitutional and supreme courts – and the Strasbourg Court.

From there, I come to the question of execution of judgments. Full and prompt execution of the Court’s judgments is of the utmost importance for the effective judicial protection of the victims of violations, for the prevention of future violations and for guaranteeing the authority of the Court. In this context, the *erga omnes* effect of judgments was raised repeatedly. One must recognise that the full effectiveness of the principle of subsidiarity is to a large extent dependent on the *erga omnes* effect of the Court’s judgments, in other words going beyond the *res judicata* to a full recognition of the *res interpretata*. In fact, so far as possible, it is necessary to anticipate possible future violations of the Convention by attacking the very sources that may be found in national legislation and practice. As was underlined during the government Agents’ seminar in Bratislava last April, states’ best defence is above all the prevention of violations at national level.

It was suggested that the *erga omnes* effect – *de facto* or *de jure* – could be enhanced through more systematic use of third-party intervention by states. It is indeed likely that states would thus feel more concerned by judgments and that this would promote the effect.

It was in this context that discussion took place on the introduction into the Convention system of advisory opinions – which could also be requested by states and no longer be limited to the Committee of Ministers alone – and preliminary rulings. In once again turning to these issues, we must ask ourselves, what would be the consequences on individual applications once the Court’s opinion was known? In addition, would these new approaches produce a real gain in effectiveness or, on the contrary, would they further increase the burden on the Court?

Beyond these reflections, the question of introducing preliminary rulings was also linked to the far more fundamental question of the very nature of the Court: should it eventually become a European Constitutional Court of Human Rights, limiting itself to addressing issues of principle? Should it be endowed with a discretionary power to choose from amongst the applications, following the model of the *certiorari* procedure as understood by the United States’ Supreme Court? We are all aware of the potential consequences of the response to these questions for the very nature of the right of individual petition. These issues were the subject of intense discussions during negotiation of Protocol No.14. The solution that emerged was clearly rejected, being found not to be politically acceptable. Without doubt, however, it will be necessary to take up these questions anew.

What about the role of national parliaments? This role has also been advanced as a key element of subsidiarity. Indeed, parliaments should apply themselves yet more to a close examination of the compatibility of laws and practices with the Convention, an exercise that, undertaken with a view to the *erga omnes* effect, could by all accounts have a particularly beneficial preventive effect. It was also underlined that the contribution of parliaments can prove decisive during the implementation of judgments, in so far as it is sometimes necessary to adopt legislative measures rapidly in order to achieve conformity. Several examples of good practice were put forward to promote this active parliamentary role, which presup-
poses also an active role for the executive (often the government Agent). This in fact involves not only informing parliament of the judgments handed down against the state concerned, but also of informing it of judgments that could be of interest to the state. It is clearly strongly desirable that this practice be extended to all states.

Whatever its status in domestic law, the Convention itself obliges states to put in place effective remedies that are capable not only of finding a violation but, where necessary, of correcting it, notably by offering adequate just satisfaction to the victim of the violation. Putting in place effective remedies is a complex, ongoing process involving at once the executive, legislative and judicial authorities. It has quite rightly been pointed out that the introduction of new domestic remedies requires negotiation and co-operation between the different actors, and that all possible means should be explored for resolving complaints at the national level, notably by non-binding measures such as mediation.

We have heard with interest that, in certain countries, Supreme Courts have adopted a creative approach to interpret domestic law in such a way as to avoid violations, going so far as to establish new remedies, founded directly on the Convention. Could this approach, much more rapid than legislative reform, be generalised in the legal orders of all the member states? More specifically, is this approach being used in those states where it is possible? Should the Council of Europe do more to examine and encourage this possibility? These questions need to be examined.

A possible new binding legal instrument on domestic remedies has also been suggested on several occasions. The Reflection Group of the Steering Committee for Human Rights (CDDH) has set aside the idea of a new convention: on the other hand, it has expressed its interest in a possible “soft law” instrument. We await the discussions to come within the CDDH and its subordinate bodies on this issue with great interest, all the more so given that the Court has established criteria for determining the effectiveness of such remedies, at least in the context of excessive length of proceedings in the sense of Article 6 § 1 of the Convention. For myself, I would say that the legal instruments are already in place. Article 13 of the Convention is of direct application. What therefore would be the real value added of a new binding legal instrument? What is perhaps missing is a real political will to give full implementation to this Article 13. A new political declaration of the Committee of Ministers to this end could be welcome.

It has been underlined that the so-called pilot judgment procedure has allowed the Court, basing itself on a resolution of the Committee of Ministers, to prove its creativity in identifying structural or systemic problems and guiding the respondent states in the execution of the judgment. This procedure has been welcomed by the majority of judges of the Court and also strongly encouraged by the Group of Wise Persons, as well as by Lord Woolf. But as with any novel procedure, it is open to further development and remains subject to discussion.

For example:
- Is it necessary to introduce this procedure formally into the Convention?
- Is it necessary to introduce it into the Rules of Court?
- Is it necessary to regulate better the respective competencies of the Committee of Ministers and the Court concerning the execution of these judgments?
- Is there a need to instigate a simplified procedure, before the Court has even pronounced judgment?

All these questions will be the subject of in-depth discussions within the Reflection Group. In any case, to my mind, the nowadays entirely judicial character of the control system should in no way be put into question, it being one of the essential achievements of Protocol No. 11, the 10th anniversary of whose entry into force we are celebrating this year.

Beyond the question of procedure before the Court, is it true that the stage of supervision of execution of judgments by the Committee of Ministers has become increasingly judicial? And if this is indeed the case, have we reached the point where we must ask whether the Committee of Ministers is fully equipped to address the range of issues that arise at the stage of execution of judgments? Must we
Towards stronger implementation of the ECHR at national level

confer this task on a body with more judicial character, separate from the Committee of Ministers or under its delegated authority? Would such a reform make the supervision of the execution of judgments more effective, or would it reduce its effectiveness? So many questions which, for the time being, remain without clear answers.

It has been unanimously pointed out that rapid and easy access to the Court’s case-law in the national language is essential for obtaining an *erga omnes* effect *de facto*. And indeed, anything that enhances the authority of the case-law contributes significantly to guaranteeing the effectiveness of the Convention. It has been rightly emphasised that translation is above all part of the obligations of national authorities, where appropriate – as was suggested notably by the government Agents in Bratislava – in partnership with others and in particular with states that share the same language. That said, the Registry’s initiative to compile existing translations and make them available via the HUDOC database would certainly be very useful and much appreciated. It has also been underlined that it would be highly desirable to translate certain judgments that do not involve the respondent states but which would be likely to have a direct or indirect effect on legislation and national practices.

Alongside co-operation between states sharing the same language, numerous examples of good practice have been mentioned during both the present colloquy and the seminar in Bratislava. In this connection, I would mention the publication of collections, of manuals or of vade mecums concerning the Court’s case-law; accompanying judgments, often complex, with explanatory notes; co-operation with the private sector or with NGOs; and finally, making the best use of the Internet and of information technology in general. Furthermore, as was emphasised in Bratislava, how can we develop the potential role of government Agents in selecting judgments that merit being translated and/or disseminated and in encouraging the translation and dissemination of Committee of Ministers’ resolutions concerning execution?

Whilst welcoming the efforts already made to train judges, prosecutors and prison staff in human rights standards, it has quite rightly been pointed out that the need for training extends also to other categories, such as the armed forces, civil servants and parliamentarians. Training must extend to all those involved in the defence of human rights, which implies a willingness to receive training. In this area, the member states have a primary responsibility. In order for this training to be effective, the language used must be perfectly exact, which implies high-quality translation and interpretation during the organisation of training courses in the member states. Finally, the need to follow-up and evaluate training, as well as the usefulness of identifying good practices in this field, were underlined.

Of course, the member states are not alone in this task. The Council of Europe’s *HELP* programme of human rights training for legal professionals has shown itself to be innovative and extremely useful. I recall that financing for this programme will allow it to continue only until the end of this year. It would therefore be most appreciated if our member states undertook to continue it by allowing its financing through voluntary contributions. And since I am making this call for financial contributions, I would also like to mention the “Human Rights Trust Fund,” a Norwegian initiative that displays considerable potential for supporting specific efforts undertaken in countries, in co-operation with the Council of Europe, to reinforce the implementation of the Convention at national level. I welcome, with great satisfaction, the fact that a second state has made a contribution to this Fund and invite all the member states to do likewise.

We have heard how both the Court and the Commissioner have established extremely useful and fruitful relations with civil society, human rights defenders, national human rights institutions and Ombudsmen. I would especially point out the usefulness, even necessity of putting in place genuine national human rights action plans, creating a strategy and timetable for ensuring, in a coherent and effective way, the implementation of human rights at national level.

But is the public really aware of its rights and how to protect them? What more can national authorities do in order to increase
public awareness, to improve public knowledge of these issues and to encourage public debate? If it is true that human rights are too important to be left to one profession, how do we bring them out of this “ghetto?” What can bodies such as professional associations, NGOs and the media do to stimulate and feed public debate? What potential might the Internet represent in this connection? There we have so many questions to which we will need to give further attention.

From there, I come to the last point, of utmost importance: the implementation of the recommendations. The follow-up exercise on implementation of the 2004 recommendations was, without doubt, unprecedented within the Council of Europe and reflected the particular status that the Committee of Ministers had wished to afford to these crucial instruments. Whilst clearly affirming that overall, the member states had “played the game” and responded in good faith to the recommendations, it was also underlined that this response had not always reached the level of proactivity required. We are all aware of the fact that the member states cannot provide replies to questionnaires indefinitely. We know that the Committee of Ministers wished to take a break from collecting information on an intergovernmental basis. Nevertheless, it is indispensable to maintain political will in this area. The sixty years of the Council of Europe in 2009 and of the Convention in 2010 were evoked as important occasions for a political reaffirmation of this will.

In the meantime, it is important that the Council of Europe ask itself a number of questions:

- Do we need to review and further develop the competence and the role of the Committee of Ministers in supervising and promoting the implementation of these instruments?

- Do we need a specific body to discharge this task, or can one assume that the Committee of Ministers, together with, for example, the Commissioner for Human Rights, the Venice Commission, the European Commission for the Efficiency of Justice (CEPEJ), the execution department and the capacity building division are already doing what is necessary? Would enhanced co-operation be enough?

We cannot avoid giving answers to these questions.

The Secretary General opened this colloquy by setting out a series of questions. I hope that I have not disappointed his expectations, or yours. In fact, not only have I not replied to each of the questions asked, on the contrary, I have added to them. That said, the goal of this Colloquy was not simply to respond to the questions that were already known to us, but to identify those to which it will fall to us to respond in the future. To this end, I believe I can say that our Colloquy has fulfilled expectations.

Those who will continue our reflections and attempt to put them into effect must not lose spirit. They must know that they can count on the full support of the Directorate General for Human Rights and Legal Affairs to complete their task successfully.

I could not allow myself to finish without thanking you all for your active participation in the debates and expressing once again, on everyone’s behalf, our gratitude to our Swedish hosts, who have marvellously honoured their country’s tradition for hospitality and generosity.
Towards stronger implementation of the ECHR at national level

CLOSING ADDRESS

Mr Per Sjögren

Ambassador Extraordinary and Plenipotentiary, Chairman of the Ministers’ Deputies of the Council of Europe, Permanent Representative of Sweden to the Council of Europe

Mr President of the European Court of Human Rights, distinguished Representative of the Parliamentary Assembly, Mr Commissioner for Human Rights, Colleagues, Ladies and Gentlemen.

First, allow me to express, on behalf of Mr Carl Bildt, Minister for Foreign Affairs and Chairman of the Committee of Ministers, our thanks to you all for your participation here during the past two days. Our discussions have been frank, pragmatic and above all result-oriented. For the Swedish Chairmanship, for whom this is a key priority, there can only be satisfaction in this.

Speakers have identified three facets of human rights protection:

- at national level, member states must ensure that rights and freedoms are properly guaranteed and protected through effective remedies and appropriate laws and practices;
- at international level, the European Court must be in a position to deliver swift and effective justice whenever the national system fails;
- thirdly, returning to the national level, the Court’s judgments must be executed in compliance with the Convention, providing redress to the applicant and ensuring that general measures are taken to prevent similar violations in the future. Effective procedures for supervising execution are very important here.

These facets are interlinked and interdependent: for example, more effective execution enhances human rights protection and thus contributes to easing the burden on the Court. This means that we have many fronts on which to advance: for example, in the presence of the growing number of violations arising from complex, systemic problems, we are seeing greater implication of national authorities in the general process of supervision of execution, which is positive.

We can also call on a variety of actors within the Council of Europe in this respect: not just the Court and the Committee of Ministers, but certainly the Parliamentary Assembly, certainly the Commissioner, and probably the CEPEJ and the Venice Commission and even others.

In fact, you may agree that all the bodies, whether intergovernmental or interparliamentary, which have been involved over the years in improving the European domestic legal order, have been contributing to the end we are met here to pursue.

I think we have all taken note in particular of what the Commissioner said this morning, and what was said yesterday about the particular potential contributions of the Court, the Assembly and the CDDH. There is no lack of pointers to the way forward.

As I said, this is a matter of utmost priority for the Swedish Chairmanship and we are determined to take the matter forward energetically and with the greatest possible coherence. Everyone who has spoken has agreed that reinforcing implementation of the Convention at national level is of prime importance. A wealth of good practice and thought has been laid before us and proposals have been placed on the table.

What has been said for the past two days, and in particular the admirable conclusions just presented by Director General Boillat, will
provide us with ample material to work on. Next week he and I will be reporting to the Ministers’ Deputies on this colloquy, and the Swedish Presidency will lay before them a plan leading to a concrete and consistent approach to the question.

Before closing, I should like to say a few “thank-you’s” on behalf of us all. Thanks to the organising team and to the interpreters. Special thanks to the Directorate General of Human Rights and Legal Affairs of the Council of Europe for their essential contribution. Thanks to all the speakers, both invited and spontaneous who made our debates so rich in reflection. And finally, thanks to you, Mr Chairman, for conducting our proceedings so effectively and purposefully.

To those who are returning home, I wish a good journey and to those who are staying to enjoy Stockholm a little longer, I wish you a pleasant stay. ★
APPENDIX I: REPORTS
REPORT OF THE EVALUATION GROUP TO THE COMMITTEE OF MINISTERS ON THE ECHR

EG Court (2001) 1

27 September 2001
A Court of Human Rights for all Europeans

The European Court of Human Rights is a unique body invested with a pioneering role. The scope of its competence and the breadth of its geographical reach are unprecedented in the history of international law. Almost 800 million women and men in 41 states have direct access to a judicial body to complain of alleged violations of their fundamental rights.

The European Court of Human Rights is the nerve centre of a system of human rights protection which radiates out through the domestic legal orders of virtually all European states. It sets common legal standards which permeate the legal orders of the contracting states, standards which influence and shape domestic law and practice in areas such as criminal law, the administration of justice in criminal, civil and administrative matters, family law, aliens’ law, media law, property law. Over the years and through its case-law, the European Convention on Human Rights has become deeply entrenched in the legal and moral fabric of the societies of the older Council of Europe states and this same process is well under way in newer States Parties. Its crucial role in securing the peaceful development of greater Europe is a model for a system of strong and effective international justice.

The system operates under the principle of subsidiarity; primary responsibility for securing the rights and freedoms set out in the Convention lies with the domestic authorities and particularly the judiciary. Courts throughout the contracting states can and should apply the Convention and afford redress for breaches of it.

Where this national protection fails, individuals may bring their complaints to Strasbourg. These complaints trigger international scrutiny of the effectiveness of national human rights protection. Complaints declared admissible result in legally binding judgments, which are then enforced collectively through the Committee of Ministers of the Council of Europe. In this way the Convention states are locked into a system of collective responsibility for protection of human rights which is unparalleled in the world.

Citizens’ confidence in the democratic method of government is strengthened by the knowledge that their rights will be protected in an effective way, if necessary ultimately through recourse, outside the domestic legal order, to the European Court. States too benefit directly from this external control which makes it possible to identify weaknesses in their legal system. The Court’s judgments have frequently led to the amendment of legislation and/or practice.

Democracy lies at the heart of the guarantees protected by the Court. The Court upholds pluralist democracy by securing core democratic principles in areas such as free elections, freedom of expression, religion, association and assembly and non-discrimination.

The Court promotes the rule of law, which provides the essential framework for effective political democracy. Thus, it defines legal standards for the administration of justice and for the personal liberty and security of individuals and other safeguards protecting the individual against arbitrariness, unfairness and the abuse of power.

The Court strengthens respect for human dignity by securing vital guarantees such as the right to life, the prohibition of ill-treatment and the protection of private and family life.

In the first decades of its existence the Court firmly established its position in the European constitutional landscape. It produced an extensive body of case-law giving concrete content to the Convention rights and freedoms, specifying the nature of states’ obligations, and above all adapting the Convention standards in line with evolving European societies. It applied a living instrument in a process of continuing and dynamic interaction between the international mechanism and the
national legal systems. This led to a generally higher level, and increased understanding, of human rights protection within the older Convention states which proved a unifying and stabilising factor throughout Western Europe, as well as acting as a catalyst for the breakdown of the barriers between East and West.

Since 1989-1990 the enlargement of the Council of Europe has created a new dimension for the operation of the Convention system. While the underlying purpose of the system remained the same, the Court now had a further role to play in the consolidation of democracy and the rule of law in the wider Europe. This is a process which continues today. In this sense its significance has arguably never been greater. The Court, through its case-law and in partnership with national Supreme and Constitutional Courts, serves to infuse national legal systems with the democratic values and the legal principles of the Convention and helps to ensure that Convention standards are implemented in everyday practice.

The major challenge for the Court today is not only to maintain and develop the Convention standards but also to ensure that the Europe of human rights remains a single entity with common values.

However, the Court is confronted with a steadily rising volume of applications, which grew by over 500% between 1993 and 2000. This is not solely the consequence of the accession of new states; in older member states individuals also increasingly turn to Strasbourg. The system is seriously overloaded and, with the relatively limited resources available to it, the Court’s ability to respond is in danger. Urgent action is now required for Europe’s unique achievement in human rights protection to be safeguarded for the 21st Century.

This report sets out the basis for such action. ⭐
EXECUTIVE SUMMARY

The purpose of this report is to examine and propose measures for ensuring the continuing effectiveness of the European Court of Human Rights in the light of its ever-increasing workload. In order to do this, the report sets out the Court’s situation today and presents the predicted evolution of case-load on the basis of the assessment of the Council of Europe’s Internal Auditor (Chapters I-III).

Implications of the problem (Chapter IV)

On the basis of the projections made by the Council of Europe’s Internal Auditor, the report concludes that immediate action is indispensable if the Court is to remain effective and retain its credibility and authority (paragraphs 37-39). An estimate is also made as to developments in the matter of the supervision of the execution of judgments (paragraph 40).

The Evaluation Group’s approach to the problem (Chapter V)

The Evaluation Group adopts the following basic premises (paragraph 41):

– the substantive rights guaranteed by the Convention should not be reduced;
– the right of individual application must be preserved in its essence;
– the Court must be able both to dispose of applications within a reasonable time and to maintain the quality of its judgments.

Having analysed the problem and its implications and indicated the general approach adopted, the Evaluation Group identifies five areas in which parallel action should be contemplated. These are:

– national measures
– execution of judgments
– measures involving no amendment of the Convention
– resources
– measures involving amendment of the Convention

National measures (Chapter VI)

The primary duty to protect the Convention rights lies with the national courts and authorities, the role of the Strasbourg Court being subsidiary. The Evaluation Group therefore first considers measures to be taken at national level to improve domestic implementation of the Convention (paragraph 44).

The Group endorses measures discussed at the November 2000 Ministerial Conference in Rome, namely:

– the provision of effective domestic remedies;
– the systematic screening of draft legislation and administrative practices;
– reinforcement of training in human rights;
– wider dissemination of information concerning the Court to national authorities, including the provision of translations of extracts from key judgments;
– ensuring that national courts have the requisite status, authority and independence;
– the introduction of procedures for the re-opening of domestic proceedings after a finding by the Court of a Convention violation (paragraph 45).

In addition, the report draws attention to the need to furnish individuals with adequate information concerning the Court and its procedures (paragraph 46).

It further recalls the obligation of the Committee of Ministers to keep the question of national measures under close and constant scrutiny and the need for collective and complementary efforts
by all concerned; a feasibility study should also be carried out into means of reinforcing interaction between the Strasbourg Court and national courts (paragraph 47).

**Execution of judgments (Chapter VII)**

A court is not “effective” if its judgments are not implemented. The Group thus examines the issue of the supervision by the Committee of Ministers of execution of the Strasbourg Court’s judgments. The Group notes the large number of “repetitive” applications, very many of which would not have been made if appropriate general measures had been taken or taken more promptly by the state concerned following a finding of violation (paragraphs 43 and 48).

In this connection the report:

– welcomes the trend in the Parliamentary Assembly to follow the question of execution more closely (paragraph 52);
– recommends the introduction of a special Committee of Ministers procedure in the presence of “repetitive” applications (paragraph 51);
– emphasises the need for that Committee to use every possible means to ensure the expeditious execution of judgments and recalls its mandate to seek further means to this end (paragraph 53).

**Measures to be taken in Strasbourg involving no amendment of the Convention (Chapter VIII)**

Improvements have already been made by the Court to its internal working methods (paragraph 56). Proposals currently under discussion within the Court involve notably:

– a modification of the procedure relating to the registration of applications;
– the conferring of a new, non-dispositive role on designated Registry officials, under the Court’s supervision, in respect of streaming of applications; and
– recourse to a summary procedure for certain categories of application (paragraphs 57-59).

The Evaluation Group endorses these proposals as indicating the way forward in the immediate future and encourages their adoption (paragraph 60).

The Group endorses the suggestion that the Court should continue to play a pro-active role in respect of friendly settlements, with attempts to reach a settlement being pursued at an earlier stage in the proceedings. The Committee of Ministers might adopt a Resolution or Recommendation encouraging Governments to conclude settlements; also incentives for applicants to settle might be introduced in appropriate cases (paragraph 62).

Other matters discussed under this head include:

– problems attendant on fact-finding missions by the Court and the relationship of this issue to necessary national measures (paragraph 63);
– the important role of information technology in securing the Court’s continued effectiveness and the consequent need to make resources available for long-term information technology development (paragraph 64);
– the utility of an annual report by the Court on its organisation and activities, highlighting case-law trends and problem areas (paragraph 65);
– certain outstanding issues on the institutional status of the Court within the Council of Europe which should be urgently determined (paragraph 67).

**Resources (Chapter IX)**

The report finds that no guarantee of stability can be given as regards the Court’s future needs for resources, but that resources cannot be increased indefinitely (paragraph 68). The following conclusions are drawn:

– the Registry has additional staffing needs, identified by the Internal Auditor, which should be met, including:
  – further legal and secretarial staff for case-processing;
Appendix I: Reports

– reinforcement of supervisory structures generally, particularly human resources management, training and research (paragraphs 69-71);

– adequate resources should be provided to permit full implementation of the Court’s information technology programme (paragraph 72).

The following related matters are noted:

– the department for execution of the Court’s judgments, within the Directorate General of Human Rights, also has not met staffing needs (paragraph 73);

– in view of the accommodation problems in the Human Rights Building, it is imperative that a decision on a new building for the Council of Europe be taken before the end of 2001 (paragraph 74);

– since the Court’s activities cannot be contracted at will, it is concluded that at least increases in its budget should be treated separately and without regard to the bases applied in fixing the Council of Europe’s ordinary budget; the same should apply to increases in resources related to the supervision of the execution of judgments (paragraph 77);

– a system of two- or three-year budget programmes should be devised (paragraph 78).

Measures involving amendment of the Convention (Chapter X)

Certain detailed matters now dealt with in the Convention could be transferred to a separate instrument, capable of amendment by a simpler procedure than Protocols (paragraph 88). In the interests of ensuring continuity and further guaranteeing the independence of the Court, the current provisions on the judges’ term of office should be modified so as to lay down that they are elected for a single, fixed term of not less than nine years (paragraph 89).

The report makes a number of specific recommendations as regards the intake and processing of cases. Soon after 2005 the increase predicted will once again exceed the Court’s case-processing capacity (as augmented by the additional staff and the other measures mentioned in preceding Chapters of the report) (paragraph 80). Accordingly, in the Group’s view, further measures will be needed to cope with the workload (paragraph 81):

– a provision should be inserted in the Convention that would, in essence, empower the Court to decline to examine in detail applications that raise no substantial issue under the Convention (paragraphs 92-93);

– the necessary studies on this new provision should also consider the devising of a mechanism whereby certain applications could be remitted back to domestic authorities (paragraph 96);

– a study should be carried out by the appropriate Council of Europe bodies, in consultation with the Court, into the creation within the Court of a new and separate division for the preliminary examination of applications (paragraph 98).

Conclusions and recommendations (Chapter XI)

This Chapter summarises the report’s conclusions and recommendations (paragraphs 99-100).
I. FOREWORD

A. The Ministerial Conference (Rome, 2000)


2. One of the themes on the agenda was “Institutional and functional arrangements for the protection of Human Rights at national and European level”, which included an item “Ensuring the effectiveness of the European Court of Human Rights”. By incorporating this item, the Conference took up concerns that had already been expressed and discussed both within the Court and in other quarters. Thus, on the proposal of the Irish Presidency, the Committee of Ministers of the Council of Europe had already established a Liaison Committee with the Court “to deal with all matters relating to the Court and to consider wider issues of human rights protection in Europe”.

In Resolution I adopted at the close of the Rome proceedings, the Conference voiced concern at the difficulties encountered by the Court in dealing with the ever-increasing volume of applications and expressed the view that it was the effectiveness of the Convention system that was now at issue. It called upon the Committee of Ministers to “identify without delay the most urgent measures to be taken to assist the Court in fulfilling its functions” and to “initiate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation through the Liaison Committee with the ... Court ... and the Steering Committee for Human Rights”.

B. The Evaluation Group

3. An immediate response to the above-mentioned Resolution was the setting up by the Committee of Ministers of an ad hoc Working Party to conduct an examination of the additional budgetary requests of the Court for 2001. The recommendations of this Working Party led to the allocation to the Court of additional staffing resources (see paragraph 18 below). The Chairman of the Working Party (who is also Chairman of the present Evaluation Group) drew attention to the need for an analysis of the Court’s medium-term needs and indicated that he would be proposing the establishment of an evaluation group for this purpose.

4. By decision of 7 February 2001, the Committee of Ministers, sitting at Deputy level, set up an Evaluation Group to examine possible means of guaranteeing the effectiveness of the European Court of Human Rights, with the following terms of reference:

   “i. The Evaluation Group is a body set up by decision of the Committee of Ministers in consultation with the President of the European Court of Human Rights.
   
   ii. Having due regard to the judicial status of the Court under the European Convention on Human Rights and the resulting constraints, the Evaluation Group will:
   
   a. examine matters concerning the observed and expected growth in the number of applications to the European Court of Human Rights and the Court’s capacity to deal with this growth; and
   
   b. consider all potential means of guaranteeing the continued effectiveness of the Court with a view, if appropriate, to making proposals concerning the need for reform and report thereon to the Committee of Ministers.”

The Group was instructed to submit its conclusions and recommendations to the Committee of Ministers by 30 September 2001.
5. The members of the Evaluation Group are: Mr Justin Harman, Permanent Representative of Ireland to the Council of Europe, Chairman of the Ministers’ Deputies’ Liaison Committee with the European Court of Human Rights (in the Chair), Mr Luzius Wildhaber, President of the European Court of Human Rights, and Mr Hans Christian Krüger, Deputy Secretary General of the Council of Europe, acting on behalf of the Secretary General.1

C. Procedure followed by the Group

6. The Committee of Ministers directed that representatives of certain specified bodies should be associated with the work of the Evaluation Group as and when its members should so decide. Representatives of the European Court of Human Rights and its Registry have been associated with the work of the Group at all times. The Group has also consulted representatives of the other specified bodies, namely the Parliamentary Assembly of the Council of Europe, the Steering Committee for Human Rights, the European Committee on Legal Co-operation, the European Committee on Crime Problems and the Council of Europe’s Directories General of Human Rights and of Administration and Logistics. As empowered by the decision of 7 February 2001 of the Committee of Ministers, the Group also consulted in writing a number of external experts.2

Furthermore, Mr Paul Ernst, the Council of Europe’s Internal Auditor, has been closely associated with the work of the Group. He made available to it his report to the Secretary General, which contains valuable material notably on the future development of the Court’s case-load, its staffing requirements and, for comparative purposes, the workload and budget of certain European international and domestic superior courts.

The Group also consulted in writing Amnesty International, the European Co-ordinating Group for National Institutions for the Promotion and Protection of Human Rights, the Fédération Internationale des Ligues des Droits de l’Homme and the International Commission of Jurists (organisations having observer status with the Council of Europe’s Steering Committee for Human Rights); the Council of the Bars and Law Societies of the European Community; and Mr Vladimir Toumanov, former member of the Strasbourg Court in respect of Russia.

7. Between 7 February and 24 September 2001, the Group held a total of 18 full meetings as well as a number of working sessions. It also had discussions with representatives of the Court’s Reform Committee and its Chairman met with a number of persons who were considered to be in a position to assist the Group. In addition, very valuable co-operation was established with the Reflection Group on the reinforcement of the Human Rights protection mechanism (set up by the Steering Committee for Human Rights); the two Groups met together and the Secretary of each attended meetings of the other.

The Evaluation Group would like here to place on record its appreciation of the invaluable assistance it has received from all those whom it has consulted or who have been associated with its work. The need to keep this report within manageable proportions has meant that, whilst all suggestions – totalling some 70 – were carefully considered by the Group, they are not specifically identified in the body of the report. Certain contributions, however, appear in the Appendices hereto. ★

1. Mr Jonathan L. Sharpe, Deputy Secretary General of the International Commission on Civil Status, acted as Executive Secretary of the Group.
2. Namely, Mr Frank Franceus, of the Belgian Ministère Fédéral de la Fonction Publique et de la Modernisation de l’Administration; Mr Michel Gentot, President of the French Commission Nationale de l’Informatique et des Libertés; Mrs Lynn Knapman, Head of the United Kingdom Administrative Court Office. Spontaneous observations were also received from Professor Gérard Cohen-Jonathan.
II. GENERAL BACKGROUND

A. The European Convention on Human Rights

8. The Convention was drafted in the immediate aftermath of the Second World War. Its authors had in the forefront of their minds the aim of preventing a recurrence of the atrocities that had occurred during that conflict and the desirability of establishing a system for the collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights of 10 December 1948.

To this end, the Convention not only defined a number of rights and freedoms which the contracting states undertake to secure to everyone in their jurisdiction, but also set up an enforcement machinery. This latter feature constituted an innovation in international law. It is important to observe that the duty of securing rights was cast primarily on the states, the enforcement machinery being intended to play a vital but subsidiary role.

9. The task assigned to the enforcement machinery was the examination of complaints that a contracting state had violated rights guaranteed by the Convention, such complaints being introduced either by another contracting state or by a person, non-governmental organisation or group of individuals (hereinafter “individuals”). On account of political compromises reached at the time the machinery was complex and not devoid of anomalies. It was composed of two distinct institutions set up by the Convention (the European Commission of Human Rights and the European Court of Human Rights) and also of the Committee of Ministers of the Council of Europe (the Organisation’s executive body, composed of the Ministers of Foreign Affairs of the member states, whose Convention functions are in practice carried out by the Ministers’ Deputies). Commission and Court were both part-time institutions, composed of one member in respect of each contracting state or each member state of the Council of Europe, respectively.

10. Allegations of violation of the Convention could be laid before the Commission either by a contracting state or, provided that the Commission’s competence in the matter had been recognised by the respondent state, by an individual. The Commission’s task was to examine whether the application met the admissibility criteria laid down by the Convention, to ascertain the facts, to attempt to achieve a friendly settlement of the case and, in the absence of a settlement, to write a report expressing a non-binding opinion as to whether the Convention had been violated.

Provided that the Court’s jurisdiction had been recognised or accepted by the state or states concerned, the case could subsequently be referred to the Court for adjudication, either by the Commission or by the applicant state, the respondent state or the state of which the individual applicant was a national. If the Court did not have jurisdiction or in the absence of such reference, the case was left for decision by the Committee of Ministers. It is to be noted that the individuals who had complained to the Commission in the first place could not themselves refer the case to the Court (although such a power was, to a limited extent, granted to them by Protocol No. 9 to the Convention, which entered into force on 1 October 1994). Supervision of the execution of the judgments of the Court, which are binding on the state concerned, was entrusted by the Convention to the Committee of Ministers.

It should be added that, although recognition of the Commission’s competence and of the Court’s jurisdiction were optional, the position was reached, over the years, in which in practice all the contracting states had accepted both.

The division of labour between Commission and Court was such that, it may be said in a general way, the Court was able to concentrate its attention on the substantive legal issues in a reduced
number of leading cases referred to it. Whilst it had powers to investigate facts and on occasion dealt with issues of admissibility, these matters – like settlement negotiations – were pre-eminently the province of the Commission.

Complaints by one contracting state against another have at all times remained rare; they are not dealt with further in this report.

11. The members of the Commission and the judges of the Court were not only not resident in Strasbourg but also, for the most part, had other professional activities (as judges, academic lawyers or practising lawyers, for example). They convened, generally in Strasbourg, as often as was necessary for the transaction of Convention business, but growth in the workload meant eventually that, without counting work done at home, they were devoting a substantial amount of time to their Convention duties (8 sessions of 2 weeks each per year for the Commission and 10 sessions of 10 days each per year for the Court).

B. Protocol No. 11

12. Over the years, several amendments, both substantive and procedural, were made to the Convention by Protocols. A major step was taken by Protocol No. 11, which restructured the original control machinery and entered into force on 1 November 1998.

Reasons that prompted the elaboration of this instrument included: the increasing workload of the existing institutions (for example, the number of individual applications registered with the Commission grew from 1 013 in 1988 to 4 721 in 1997, and the number of judgments – including decisions rejecting applications submitted under Protocol No. 9 – delivered by the Court from 19 in 1988 to 150 in 1997); the increasing length of time taken to dispose of cases and an aim of shortening the length of the Strasbourg proceedings; the difficulty with which part-time institutions were able to meet their obligations; and a desire to eliminate a certain overlap between Commission and Court proceedings, in that both institutions undertook an examination of the merits of admitted cases.

13. Under Protocol No. 11, the existing Commission and Court were replaced by a single, full-time institution (which retained the title of “European Court of Human Rights”), composed of one judge in respect of each Contracting Party to the Convention. The Convention now stipulates that judges shall not engage in any activity incompatible with the demands of a full-time office, and Resolution (97)9 of the Committee of Ministers on the status of the judges provides that they shall reside at or near the seat of the Court (Strasbourg). The Protocol also reduced the term of office of judges from nine to six years.

In addition to this basic structural change, Protocol No. 11 also formally abolished any requirement as to acceptance by states of the competence of the Strasbourg machinery to receive applications from individuals or as to recognition or acceptance by states of the Court’s jurisdiction. It also repealed Protocol No. 9. Furthermore, the role of the Committee of Ministers was reduced to that of supervising the execution of the Court’s judgments (as to which, see paragraphs 33-34 below); it is no longer called on to examine the merits of cases. In sum, since November 1998 all applications alleging violation of the Convention, emanating either from states or individuals, can be lodged directly with and will be examined by the Court.

14. It follows from the foregoing that the new Court’s role goes far beyond ruling on the substantive issues raised by a case; it has inherited from the Commission all of the latter’s tasks in the matter of filtering applications (as to which, see paragraphs 22-23 and 25 below), fact-finding, determining admissibility and friendly settlement negotiations.
C. Enlargement of the Council of Europe

15. The events of 1989 and 1990 brought in their train a vast change in the Council of Europe, in that there was a rapid increase in the number of its member states, from 23 at the end of 1989 to 43 in 2001. In its approach to enlargement, the Council of Europe decided that ratification of the Convention shortly after joining the Organisation should be a condition for accession thereto; the Evaluation Group considers that this fact must be taken into account when solutions are being devised for the challenges currently facing the Court. Consequently, the Convention, to which 22 states had previously been party, was ratified in or after 1990 by 19 new member states, most of them being countries of Central and Eastern Europe. For the enforcement machinery this meant that the number of potential applicants, if calculated by reference to the population of the contracting states, grew from 451 to 772 million. As regards states in the transitional period of evolving from their previous to democratic regimes, care had to be taken that established standards were maintained. Such states were likely to generate cases raising issues different from and more complex than the issues in cases originating in the older member states, especially where structural problems were involved. Ratification of the Convention by a new member state entailed the election of a new member of the Commission (until 1998) and of a new judge, who had to familiarise themselves fully with the practices, traditions, perspectives and case-law of the Strasbourg institutions. It may also be observed that, when the reform leading to Protocol No. 11 was first conceived, this substantial and rapid enlargement of the Council of Europe and the impact it would have on the control machinery was not anticipated.

D. Budget

16. Article 50 of the Convention provides that the expenditure on the Court shall be borne “by the Council of Europe” (and not by the Contracting Parties to the Convention). Until now, the budget of the Court (and of the Commission and former Court before it) has always been included as a particular Vote in the ordinary budget of the Council as a whole. The scale of states’ contributions to the Court’s budget has thus been the same as that of their contributions to that ordinary budget. One result of this is that the contribution of some states does not suffice to cover certain expenses (e.g. judge’s and Registry staff emoluments) deriving from the sole fact of being party to the Convention.

17. In recent years, the budget of the Commission and Court has developed considerably, as is shown by the following (rounded) figures: 1989: €7 m. (FRF 44 m.); 1997: €22 m. (FRF 145 m.); 1998: €23 m. (FRF 152 m.); 1999: €25 m. (FRF 164 m.); 2000: €26 m. (FRF 171 m.); 2001: €29 m. (FRF 190 m.); draft budget for 2002: €29.2 m. (FRF 192 m.). This increase in financial resources has been by way of derogation from the practice of setting a ceiling on the Council of Europe’s ordinary budget. The impact of that practice is nevertheless reflected in the fact that the growth in the “Convention budget” has been far less in the period after the entry into force of Protocol No. 11 (1998) than in the period from 1989 (beginning of the enlargement of the Council of Europe) to 1998.

3. At the end of 1989, the member states were: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, United Kingdom. They were joined: in 1990, by Hungary; in 1991, by Poland; in 1992, by Bulgaria; in 1993, by Estonia, Lithuania, Slovenia, the Czech Republic, Slovakia, Romania; in 1994, by Andorra; in 1995, by Latvia, Albania, Moldova, Ukraine, “the former Yugoslav Republic of Macedonia”; in 1996, by the Russian Federation, Croatia; in 1999, by Georgia; and in 2001, by Armenia, Azerbaijan.
Appendix I: Reports

The budget of the Commission and Court has represented a continuously increasing proportion of the total ordinary budget of the Council of Europe (10% in 1989, rising to 15.8% in 2001 and 16.15% in the draft budget for 2002). In the period from 1989 to 2001 the financial resources of the institutions have grown more than twice as much as the resources made available, in the ordinary budget, for the other activities of the Council of Europe.

It may be noted that the budget of the Council is annualised, with the result that the needs and requirements of the Court are the subject of debate within the Committee of Ministers every year.

E. Staffing of the Court

18. The Court is assisted by a Registry, which at 1 February 2001 was composed of 295 officials (185 permanent, 95 temporary and 15 trainees). Of these 196 (including 62 permanent and 31 temporary lawyers) were case-processing staff, responsible for dealing with correspondence, examining applications and preparing files and documents thereon for the attention of the judges; the remainder are engaged in managerial, administrative, translation and support duties.

The number of officials in the Registry (or in the Registry of the former Court and the Secretariat of the Commission) has also grown with time, as is shown by the following figures for permanent staff: 1989: 74; 1997: 161; 2001: 185. In December 2000, the Committee of Ministers approved a special appropriation to cover the recruitment of 45 additional temporary lawyers and an additional 15 secretaries and the maintenance of a scheme for trainee lawyers.

Here again, the proportion of resources available to the Convention institutions as compared with those available to the Council of Europe as a whole has increased over the years. Of the total permanent staff of the Council, 8.6% were working for the Commission and Court in 1989 and 17% for the Court in 2001.

F. Accommodation

19. The Court is housed in the Human Rights Building in Strasbourg, which premises are also occupied (and used for meetings) by the Council of Europe’s Directorate General of Human Rights and its staff and the Human Rights library. The Council of Europe’s Committee of Experts on Buildings noted in February 2001 that the situation in the Human Rights Building had worsened since late 1999 and that even a moderate extension of the Court and its staff would result in serious accommodation problems until the Directorate General moved to other premises. In a report of June 2001 the Committee again emphasised the need to find additional space for offices and other facilities for the Court. This question is currently under discussion in the Committee of Ministers.

G. Technological resources

20. From 1996 the Court developed a decentralised information technology system which had three main features:

(a) A client-server network for 350 users.

(b) A sophisticated case-management system (CMIS), which is central to the Court’s capacity to respond effectively to increased case-load by, among other things, reducing the time needed to enter data, by automatically triggering document production in response to procedural events and by increasing accessibility, and rapidity of retrieval, of up-to-date case-management information and statistics.
A case-law data base (HUDOC) accessible through the Court’s Internet site. All the Court’s judgments (and many of its decisions) can be consulted via HUDOC, using a powerful search engine.

The Court now intends to integrate HUDOC into CMIS to create a single system managing the internal and external access to judgments and case-files. Phase II of CMIS will also see a development allowing external users to access the public documents in the case-files (to ensure compliance with Article 40, paragraph 2 of the Convention). Scanning technology will be used to transform hard-copy files into electronic versions that can be entered into the CMIS system.

In addition, in agreement with the Directorate General of Human Rights, the Court is planning to open restricted access to the CMIS database in order to facilitate the work of the Directorate General and the Committee of Ministers in connection with the supervision of execution of judgments. At the same time Court users will be enabled to track data concerning execution of judgments.

Further particulars concerning the Court’s information technology programme appear in Appendix II hereto.

H. Languages

21. A particular feature of the Court relates to languages. Whilst its official languages are English and French, the need to ensure that the right of individual application is real and not illusory means that the Court must be able to handle communications from applicants in their own language. The Court today deals with applications in 37 national official languages and its Registry must therefore comprise an adequate number of staff with the appropriate linguistic knowledge. The organisation of the Court’s work is such that judges, with Registry assistance, often have to deal with the first examination of applications drafted in a language with which they are not familiar. 🌟
III. IDENTIFICATION OF THE PROBLEM

A. Tasks of the Court

22. An important point to be made at the outset is that the Strasbourg Court is not a court of appeal from national courts. It is not its role to re-hear cases which have been the subject of domestic proceedings. However, there are circumstances in which the Court may be called upon to make its own assessment of the facts, notably where no effective domestic proceedings have been conducted. In a number of cases with which it has to deal, the legal issues have not been “pre-digested” and the facts have not been elucidated by a lower jurisdiction. Again, applications of all kinds, however fanciful or unmeritorious, may be submitted to Strasbourg and, with the entry into force of Protocol No. 11, the task of sifting them, formerly carried out by the Commission, has devolved upon the Court (which receives approximately 800 letters every day).

B. Provisional applications and applications registered

23. In its sifting task, the Court has until now followed the previous practice of the Commission, in that applications received are not immediately registered. There will first of all be correspondence between the Registry and the individual concerned, whose attention will be drawn to matters that may render the application inadmissible (for example, failure to exhaust domestic remedies or comply with the time-limit for applying; complaint or allegation having no connection with a right guaranteed by the Convention or ill-founded in the light of existing case-law). Nevertheless, if applicants insist, their applications must – save in the event of failure to supply certain documents or information – be registered, no power of decision being vested in the Registry. The fact that this practice leads very many applicants to desist explains the vast difference between the number of applications received (“provisional applications”) and of applications registered, cited in paragraph 25 below.

C. General points on statistics

24. Four general points about the statistics that follow should be mentioned:

- Firstly, on account of their rarity, applications by states have been left out of account.
- Secondly, the number of provisional applications and applications registered and the growth in the number thereof vary greatly from respondent state to respondent state.
- Thirdly, for the years prior to 1999 (the first full year of the new Court’s existence) the figures cover applications lodged with the Commission.
- Fourthly, the new Court did not commence its activities in November 1998 with a clean slate; it inherited 92 pending cases from the former Court and 6 684 registered applications from the Commission.

D. Individual applications

25. The annual number of provisional applications grew from 4 044 in 1988 to 20 538 in 1999, and then to 26 398 in 2000 (that is, by some 553% over the full period and by some 28% in the last year). In the first seven months of 2001, 20 739 provisional applications were received; if the same rate were maintained, provisional applications in 2001 would total 35 553, an increase of nearly 35% over 2000.

The annual number of applications registered grew from 1 013 in 1988 to 8 402 in 1999, and then to 10 486 in 2000 (that is, by some 935% over the full period and by some 25% in the last

---

4. As well as the details given in the body of the report, statistical information appears in Appendix I.
No year between 1988 and 2000 saw a significant decrease in the number of applications, whether provisional or registered.

Over the period considered, the number of applications registered in a year is a relatively small percentage of the number of applications received in the same year (25% in 1988, 41% in 1999, 40% in 2000 and 38% in the first seven months of 2001). There are thus roughly two unregistered applications for every registered application, which illustrates vividly the impact of the pre-judicial part of the sifting process.

26. The following table indicates the number of applications registered for each contracting state in 1999 and 2000 and the number of applications registered per million inhabitants for each contracting state for each of those two years.

<table>
<thead>
<tr>
<th>State</th>
<th>Applications registered</th>
<th>Applications registered/population (1 000 000)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1999</td>
<td>2000</td>
</tr>
<tr>
<td>Albania</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Andorra</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Austria</td>
<td>227</td>
<td>241</td>
</tr>
<tr>
<td>Belgium</td>
<td>136</td>
<td>73</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>196</td>
<td>304</td>
</tr>
<tr>
<td>Croatia</td>
<td>104</td>
<td>86</td>
</tr>
<tr>
<td>Cyprus</td>
<td>17</td>
<td>17</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>151</td>
<td>198</td>
</tr>
<tr>
<td>Denmark</td>
<td>56</td>
<td>56</td>
</tr>
<tr>
<td>Estonia</td>
<td>29</td>
<td>46</td>
</tr>
<tr>
<td>Finland</td>
<td>144</td>
<td>109</td>
</tr>
<tr>
<td>France</td>
<td>870</td>
<td>1032</td>
</tr>
<tr>
<td>FYRO Macedonia</td>
<td>16</td>
<td>18</td>
</tr>
<tr>
<td>Georgia</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>Germany</td>
<td>535</td>
<td>592</td>
</tr>
<tr>
<td>Greece</td>
<td>144</td>
<td>124</td>
</tr>
<tr>
<td>Hungary</td>
<td>94</td>
<td>161</td>
</tr>
<tr>
<td>Iceland</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Ireland</td>
<td>20</td>
<td>18</td>
</tr>
<tr>
<td>Italy</td>
<td>883</td>
<td>866</td>
</tr>
<tr>
<td>Latvia</td>
<td>29</td>
<td>80</td>
</tr>
<tr>
<td>Liechtenstein</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Lithuania</td>
<td>76</td>
<td>182</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>12</td>
<td>15</td>
</tr>
<tr>
<td>Malta</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>Moldova</td>
<td>32</td>
<td>62</td>
</tr>
<tr>
<td>Netherlands</td>
<td>206</td>
<td>173</td>
</tr>
</tbody>
</table>

5. It should be noted that applications are not necessarily registered in the same year as they are received.
Appendix I: Reports

576 Reforming the European Convention on Human Rights

* For states with a population of less than 1 million inhabitants, the calculation of averages would be misleading.

E. Special situation arising from applications concerning the length of court proceedings in Italy

27. Many applications received in Strasbourg allege that the length of domestic criminal, civil or administrative court proceedings has exceeded the “reasonable time” stipulated in Article 6, paragraph 1 of the Convention (more than 3 129 of a total of 5 307 applications declared admissible between 1955 and 1999). A particularly high number of such applications have concerned Italy. Thus, of the total of 21 128 applications registered in the period from 1 November 1998 to 31 January 2001, 2 211 were directed against Italy; of these, 1 516 related to the length of proceedings. Again, of the 1 085 applications declared admissible in 2000, 486 concerned Italy and, in 428 cases, related to this same issue. In addition, as at July 2001, there were altogether about 10 000 further provisional applications against Italy falling into this category, of which 3 177 files were ready for registration but could not be processed for lack of human resources in the Registry.

Legislation on this matter has very recently been adopted, in the shape of Law No. 89 of 24 March 2001, which provides that anyone who has suffered pecuniary or non-pecuniary damage by reason of violation of the “reasonable time” requirement is entitled to lodge a request for just satisfaction with the Court of Appeal. In the framework of the execution of judgments, the Committee of Ministers is awaiting to assess the impact of a broader range of measures taken by Italy with a view to speeding up court proceedings. The effect of the new Law and those other measures on the case-load of the Strasbourg Court remains to be seen.

F. Disposal of applications

28. The statistics also reveal that, of the applications received that survive the initial sifting process and are registered, few proceed to judgment on the merits. Of the 7 711 registered applications disposed of by the Court in 2000 (with the 1999 figures in brackets):

- 6 774 (3 519) were declared inadmissible or struck out of the list (i.e. about 88% (94%) of the total disposed of); of these applications some 92% (79%) were the subject of a unanimous decision of a Committee of three judges (see paragraph 30(b) below);
– 227 (39) were concluded by a friendly settlement;
– 695 (177) were the subject of a judgment on the merits (i.e. about 9% (5%) of the total disposed of);
– 15 (2) were otherwise disposed of (struck out after the admissibility decision).

G. Pending applications and “productivity”

29. As at 31 July 2001, there were 18 292 registered applications pending before the Court (i.e. uncompleted cases, whether those awaiting a first examination of admissibility or those at a later phase of the adjudication process). This figure represents an increase of nearly 45% in the number of such applications at the end of 1999 (12 635).

As with the number of applications registered, the number of registered applications pending varies considerably from state to state. At 1 July 2001, the situation was as follows (the figures in brackets being the number of registered applications pending at 1 July 2000):

- Albania: 5 (2) Luxembourg: 12 (18)
- Andorra: 5 (1) Malta: 1 (3)
- Austria: 431 (411) Moldova: 52 (45)
- Belgium: 199 (191) Netherlands: 195 (205)
- Bulgaria: 600 (368) Norway: 27 (48)
- Croatia: 118 (73) Poland: 1 513 (1 216)
- Cyprus: 28 (29) Portugal: 203 (166)
- Czech Republic: 357 (283) Romania: 932 (678)
- Denmark: 68 (54) Russia: 1 685 (909)
- Estonia: 76 (39) San Marino: 6 (11)
- Finland: 254 (250) Slovakia: 496 (300)
- France: 1 594 (1 250) Slovenia: 146 (106)
- Georgia: 14 (5) Spain: 830 (204)
- Germany: 578 (517) Sweden: 406 (265)
- Greece: 161 (136) Switzerland: 189 (185)
- Hungary: 287 (177) “The former Yugoslav Republic of Macedonia” 31 (8)
- Iceland: 9 (10) Turkey: 2 667 (2 568)
- Ireland: 29 (36) Ukraine: 795 (396)
- Italy: 2 110 (1 885) United Kingdom: 996 (840)
- Latvia: 117 (60)
- Liechtenstein: 2 (2)
- Lithuania: 153 (91)

Since the new Court commenced its activities, its “productivity” has significantly increased. In 2000 the number of applications disposed of drew closer to, or in two months (March and September) equalled, the number of applications registered, the monthly averages being 643 disposed of and 874 registered and the annual totals being 7 711 disposed of and 10 486 registered. However, it must be remembered that the Court did not have a clean slate in November 1998, having inherited a legacy from the former Court and Commission (see paragraph 24 above). Moreover, it is not to be expected that the number of applications registered will remain constant, which might enable the Court to achieve “level-pegging”.

6. It may be added that, in judgments finding a violation of the Convention, the Court endeavours to deal at the same time with the question of the application of Article 41 of the Convention (award of “just satisfaction” to the applicant). However, this is not always possible and there were 8 separate judgments on this point between 1 November 1998 and 31 July 2001.
Appendix I: Reports

In the first seven months of 2001, the Court disposed of 5,330 applications (403 judgments covering 523 applications and 4,807 applications declared inadmissible or struck out); if this rhythm were maintained, the Court would dispose of 9,137 applications in 2001.

H. The itinerary followed by, and time taken to dispose of, applications

30. The itinerary normally followed by applications can be divided into four or possibly five phases.

(a) Pre-judicial phase

As explained in paragraph 23 above, an application will, on receipt, be treated as “provisional” and will not be immediately registered. There will in the first instance be correspondence between the Registry of the Court and the applicant, which may conclude with the registration of the application, this step constituting the official opening of the judicial procedure.

(b) Phase I (first examination)

As soon as the application is registered, the President of one of the four Sections of the Court to which the case is assigned will nominate a member of the Section to act as judge-rapporteur. The latter will thereafter work in close collaboration with the case-processing lawyer in the Registry to whom the case has been allocated. The tasks of the judge-rapporteur cover examination and preparation of the case, channelling it towards a Committee of three judges or a Chamber of seven judges and making proposals as to its disposal. In so doing, he/she may ask the parties to supply documents, information on the facts of the case or any other materials (other than legal arguments) considered necessary.

The judge-rapporteur will seize one of the Committees (at present twelve have been constituted) of the case if it is not complex and appears to be inadmissible de plano. A Committee may by unanimous decision, which is final, declare an application inadmissible. It must be of the view that such a decision can be taken without further examination; in practice a very large number of applications are disposed of in this way (see paragraph 28 above). If the Committee is not unanimous, the case will be referred to a Chamber.

Applications considered by the judge-rapporteur to need closer examination will be directed to a Chamber. It is for the judge-rapporteur to prepare a report summarising the facts of the case, indicating the issues which it raises and making a proposal as to the procedure to be followed (inadmissibility, communication to the respondent Government, questions to the parties, etc.).

(c) Phase II (second examination)

At any stage of the proceedings, a Chamber may – provided that the parties do not object – relinquish jurisdiction in favour of the Grand Chamber of the Court (composed of seventeen judges), if the case raises a serious question affecting the interpretation of the Convention, or where there is a possibility that the Chamber might arrive at a result inconsistent with a previous judgment of the Court.

Unless the Chamber concludes at the outset that the application is inadmissible, it will be communicated to the respondent state for observations within a set time-limit and the applicant will be afforded an opportunity of replying to those observations. After receipt of the observations and reply, the Chamber may decide to hold a hearing, which will usually deal with issues of admissibility and merits. It will then deliver a decision as to the admissibility of the application.

7. Where applications have been joined, a decision or judgment may cover more than one application.
tion. A decision that it is inadmissible is final and concludes the case. It falls to the judge-rapporter to prepare draft decisions on admissibility for consideration by the Chamber.

(d) Phase III (post-admissibility)

Once the application has been declared admissible, the Registrar, acting on the instructions of the Chamber or its President, will contact the parties with a view to arriving at a friendly settlement, which must be based on respect for human rights as guaranteed by the Convention. Settlement negotiations are confidential and without prejudice.

If no settlement is arrived at, the Chamber will examine the merits of the case, by means of written observations from the parties and, in certain cases, an oral hearing. The judge-rapporteur, assisted by the judge elected in respect of the respondent state (or, in certain cases, a drafting committee), will then submit a draft judgment for adoption and vote by the Chamber.

(e) Phase IV (possible re-hearing by the Grand Chamber)

Judgments by a Chamber may in exceptional cases be the subject of a request by any party to the case that it be referred to the Grand Chamber. Chamber judgments thus become final:

– three months after the date of the judgment, if such reference has not been requested;
– when the parties declare that they will not request reference of the case to the Grand Chamber;
– if such reference has been requested, but a panel of five judges of the Grand Chamber rejects the request.

If the panel accepts the request for a reference (which it must if the case raises a serious question affecting the interpretation or application of the Convention, or a serious issue of general importance), the case will be re-examined by, and determined by a judgment of, the Grand Chamber. To date, eight such requests have been accepted by the panel.

31. The Court considers that, ideally, a case should be finally disposed of within two years. Since this is very difficult to achieve in the current situation, it has set itself a “target for the handling of applications” of three years, comprised of 12 months for each of the phases I, II and III described above. The target is not met if these time-limits have been exceeded, either overall or in any of those three phases.

Roughly 50% of applications are disposed of by the Court within one year of registration, but a considerable number is not terminated within the 3-year target. The latter was true, for example, of about 2 250 of the 19 200 applications pending in September 2001. Some cases are not disposed of until after a period of 4-6 years (for example, about 514 of the 4 719 applications registered in 1997).

Here again, there are differences between the contracting states. At the end of July 2001, the number of applications per state in which the maximum duration for one of the phases after registration had been exceeded ranged from 1 to 1 459, with 18 states having 100 or more such applications.

I. Classification of judgments and decisions

32. Judgments of the Court on the merits (excluding those delivered by the Grand Chamber) may be classified in four categories on the basis of their legal importance:

(1) leading judgments selected for publication in the Reports of Judgments and Decisions;
(2) judgments dealing with new questions but not considered of sufficient importance to justify publication;
(3) judgments essentially applying standard case-law;
(4) straightforward cases concerning the alleged excessive length of domestic proceedings.

This classification refers exclusively to legal interest and does not necessarily imply complexity or length.

Judgments delivered in 1999 and 2000 can be classified on this basis as follows:

<table>
<thead>
<tr>
<th>Judgments</th>
<th>Category 1</th>
<th>Category 2</th>
<th>Category 3</th>
<th>Category 4</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>58</td>
<td>4</td>
<td>28</td>
<td>87</td>
<td>177</td>
</tr>
<tr>
<td>2000</td>
<td>94</td>
<td>35</td>
<td>81</td>
<td>485</td>
<td>695</td>
</tr>
</tbody>
</table>

Decisions by the Court (excluding partial decisions) – i.e. decisions relating to admissibility or striking an application out of the list – can be classified in three categories:

1. decisions included in the monthly case-law reports;
2. other decisions by a Chamber of the Court;
3. decisions by a three-judge Committee of the Court.

On this basis, the 1999 and 2000 decisions may be classified as follows:

<table>
<thead>
<tr>
<th>Decisions</th>
<th>Category 1</th>
<th>Category 2</th>
<th>Category 3</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>120</td>
<td>1,135</td>
<td>2,995</td>
<td>4,250</td>
</tr>
<tr>
<td>2000</td>
<td>142</td>
<td>1,225</td>
<td>6,155</td>
<td>7,522</td>
</tr>
</tbody>
</table>

J. Supervision of the execution of judgments

33. Article 46 of the Convention provides:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

Although this text gives no special guidance on the content of the states’ undertaking and the role of the Committee of Ministers, these points have been clarified over the years as practice and procedures have developed. Thus, according to the Court’s jurisprudence and the Committee’s established practice, the obligation to abide by a judgment may require – apart from payment of “just satisfaction” – the adoption by the respondent state of individual measures to erase the consequences for the applicant of the violation(s) found, and of general measures to prevent further similar violations. The Committee of Ministers’ supervision of the execution of judgments covers all of these elements (Committee’s Rules for the application of Article 46 paragraph 2 – Rule 3b).

While taking into account the discretion of the respondent states to choose the means whereby they implement individual or general measures, the Committee supervises that the chosen means effectively achieve the result required by the judgment. The collective nature of the Convention system, underlined in the Preamble of the Convention, means that all the states, not just the respondent state, are responsible for ensuring that cases reach a satisfactory outcome. After having invited the respondent state to inform it of the measures taken in consequence of the judgment, the Committee will first check that any sum awarded to the applicant by the Court by way of “just satisfaction” has been paid and that any other necessary individual measure has been taken. It will then satisfy itself that the requisite general measures have been taken. Finally, it will certify, by adopting a public resolution, that it has exercised its functions under Article 46 paragraph 2 of the Convention.
The Directorate General of Human Rights assists the Committee of Ministers in carrying out this exercise. In close co-operation with the authorities of the state concerned, the Directorate considers what measures need to be taken in order to comply with the Court’s judgment. It also supplies the Committee with opinions and advice on points of law and regarding the experience and practice of the Convention organs.

In the great majority of cases, the Committee is able to fulfil its function under Article 46 without difficulty. In some cases, however, problems do arise. Political motives or strongly held cultural ideas may render difficult or delay the passing of legislation, as may pressures on parliamentary time. Given the increased number and complexity of the execution problems posed, the Committee is more and more facing difficulties in ensuring states’ rapid compliance with judgments. Moreover, in recent years some states have challenged, on the occasion of several individual cases, the authority of the Court’s judgments with regard either to “just satisfaction” or to specific measures required by the judgments. The Committee’s position has, however, always remained that states have, under Article 46 of the Convention, unconditionally undertaken to comply with the judgments of the Court.

If, in case of problems, the confidential scrutiny by the other governments at the Committee’s meetings should fail to achieve the necessary result, the Chairman-in-Office of the Committee can be invited to make direct, usually confidential, contacts (letters, meetings, etc.) with the Minister of Foreign Affairs of the respondent state. Furthermore, public interim resolutions may be adopted, notably to convey the Committee’s concerns to interested states, organisations and parties and to make relevant suggestions to the authorities of the respondent state. If there are serious obstacles to execution, the Committee will adopt a more strongly worded interim resolution urging the authorities of the respondent state to take the necessary steps in order to ensure that the judgment is complied with. The Rome Ministerial Conference called upon the Committee of Ministers to seek further measures that might be taken in this connection.

According to the Rules for the application of Article 46, the Committee’s agenda is public (Rule 1a). Information provided by the state to the Committee of Ministers and the documents relating thereto are also accessible to the public (Rule 5). This Rule has the advantage of ensuring that applicants and their lawyers are kept duly informed about the state of proceedings before the Committee. The Deputies recently decided that, in application of these Rules, the annotated Agenda and Order of Business of each meeting, which contains information on the progress of execution of judgments, would be rendered public a few days after the meeting. According to Article 21 of the Statute of the Council of Europe, the Committee’s deliberations remain confidential. On each of the last three points, the Committee may decide otherwise. In addition, the extension of the Court’s HUDOC/CMIS system will make it possible for specialists and the public to access information on the execution procedure via the Internet.

Just as the number of applications filed with the Strasbourg institutions has continued to increase very substantially, so too has the number of cases considered by the Committee of Ministers (24 cases at the February 1992 meeting; 273 at that of September 1995; an average of 800 cases at each of the six 2-day meetings in 2000, with a peak of 1 885 at the meeting of September 2000; an average of 1 000 cases at each of the six 2-day meetings in 2001, with a peak of approximately 2 300 cases to be examined at the meeting to be held in October 2001).

The working methods of the Committee have been under more or less constant review in recent years. The latest reform undertaken in 2000 implied the adoption of new Rules for the application of Article 46, paragraph 2 and a radically revised documentation system. Emphasis has also been given to the use of written procedures and of Internet technology.

In order to save valuable Committee of Ministers’ time, cases raising similar problem(s) vis-à-vis a certain state are examined together en bloc and payment control and other routine control
Appendix I: Reports

(such as publication and dissemination of judgments) are usually dealt with through written procedure, i.e. without any debate. Despite these efforts, it is the general experience that, because of the sheer volume of material to be dealt with, not all cases raising problems, and thus requiring debate, receive as much attention as they might need.

In addition to meeting time, staff resources are another key factor. Although the above reforms and the rationalisation of the Secretariat working methods have enabled time to be saved, the Secretariat’s workload continues to increase.
IV. THE IMPLICATIONS OF THE PROBLEM

35. Any assessment of the implications of the problem must depend in the first place on a forecast of the number of applications that will be received by the Court in the future. However, it is extremely difficult to make such a forecast with accuracy. It is conceivable that measures taken at national level might have an effect on the Court’s workload. On the other hand, recent years have seen no slacking-off in the number of applications and there are few grounds for supposing that this will occur in the next ten years or so. Experience has shown that publicity given to important cases, coupled with increasing knowledge of the Convention machinery on the part of the legal profession and the population in general, has a “snowball” effect. This point is of particular relevance for those states which have ratified the Convention more recently; the flow of applications from them is not yet very great (4,959 out of the 10,486 applications registered in 2000 concerned countries of Central and Eastern Europe) and in some cases has hardly begun (see table in paragraph 26 above). Nor is there any evidence of a significant falling-off of interest from the older contracting states.

36. The Evaluation Group is unable to forecast the date of entry into force of Protocol No. 12 to the Convention or its implications for the Court’s case-load. However, it is widely accepted that the Protocol, concerning as it does non-discrimination, is bound to generate a substantial volume of business when the time comes. Furthermore, it may well render more complex applications that would have been lodged even without the Protocol’s existence.

37. The Council of Europe’s Internal Auditor, by taking the number of applications registered for each year and each country over the last ten years and applying statistical methods, estimated, in his report to the Secretary General, that the number of applications registered would be 14,655 in 2002 and 20,720 in 2005. In the five-year period from 2000 (when 10,486 applications were registered) to 2005, there would thus be an overall increase of nearly 100%. The Auditor recognised that his projections were conservative; indeed, it can be seen that they fall below the recorded increase for 2000 and the calculated increase for 2001 (see paragraph 25 above). On the basis of the foregoing and particularly the country-by-country analysis, the Evaluation Group considers that there is no ground for disputing that an increase in the number of registered applications of at least the order indicated by the Auditor will occur.

38. Precise calculations are not easy since applications are not necessarily disposed of in the same year as they are registered. With this reservation, it may be noted that, notwithstanding the increase in the Court’s “productivity”, in 2000 there remained a “gap” of 2,775, in that 10,486 applications were registered and 7,711 disposed of (see paragraphs 25 and 28 above).

In making its estimates for its staffing needs for 2001, the Court considered that an additional “productivity” gain, of 10%, was possible. In the view of the Internal Auditor, a yet further “productivity” gain, of some 10%, could be achieved by internal means, such as streamlining procedures and working methods, more efficient allocation of tasks and better support to case-processing staff. With an estimated 20% growth in the number of applications and a one-off overall “productivity” gain of 20%, the figures for 2001 would, if the number of case-processing staff were not increased, be 12,583 applications registered and 9,253 disposed of (a “gap” of 3,330).

8. Internationally accepted statistical methodology provides for forecasting the future value of a parameter (in this case registered applications) by considering the range of its known values. This analysis produces a trend (a curve) for the known values which fits them in the best manner. As a second step, this trend is projected in the future over some period of time (in this case 5 years) to produce the future values of a parameter with the highest degree of reliability.
39. It is abundantly clear from the foregoing that immediate and urgent action is indispensable if the Court is to remain effective. If no steps are taken, the situation will simply deteriorate, with the Court having no prospect of “catching-up” with its ever-increasing arrears of work. It will no longer be able to determine all cases within a reasonable time, its public image will suffer and it will gradually lose credibility. Moreover, constant seeking for greater “productivity” obviously entails the risk that applications will not receive sufficient, or sufficient collective, consideration, to the detriment of the quality of judgments; on this account as well, the credibility and authority of the Court would suffer. Finally, it should be remembered that the problem cannot be seen solely in terms of statistics; the figures quoted say nothing as to the ratio of “more difficult” to “less difficult” cases, even though it may be that this will remain constant.

40. The foreseeable development of cases from the perspective of execution of judgments is also dramatic. There is every reason to suppose that the predicted increase in the Court’s case-load will lead to a significant increase in the number of judgments sent to the Committee of Ministers for supervision of their execution. While in the year 2000, 495 new judgments were sent to the Committee of Ministers, the figure for 2001 had already risen to 650 by the beginning of September 2001. This suggests that the total number for this year will be around 825 judgments. Past, ongoing and future increases in the number of cases registered and processed by the Court will undoubtedly mean that the annual number of new judgments requiring supervision will continue to increase, most probably to around 1 100 in 2002 and possibly reaching some 1 400 in 2003. In terms of the overall number of pending cases, the figures are equally telling: 2 161 in 2000 and already 2 650 at September 2001, suggesting an end-of-year figure of around 2 800 cases. Finally, the workload concerning specifically the supervision of the adoption of general measures is also rising: whereas in 2000 the adoption of 181 general measures had to be supervised, the figure for 2001 is currently around 200. This part of the work is particularly time-consuming. ★
V. THE EVALUATION GROUP’S APPROACH TO THE PROBLEM

41. In carrying out its mandate, the Evaluation Group has adopted the following basic premises.

(a) There should be no reduction in the substantive rights guaranteed by the Convention and its Protocols.

(b) The right of individual application, which lies at the heart of the Strasbourg machinery, must be preserved in its essence.

(c) The Court must be in a position to dispose of applications within a reasonable time but, at the same time, to maintain the quality and authority of its judgments. The latter point goes not only to the credibility and public image of the Court; judgments also often serve as guidelines in the framing of measures to be taken in the respondent state and in other states too.

42. The Evaluation Group identified five distinct avenues which it should explore. Each of them receives more detailed treatment in Chapters VI to X below; they deal, where appropriate, not only with major measures recommended or endorsed but also with measures which, though not of themselves capable of resolving the problem, are considered useful or desirable and with proposals which the Group felt unable to retain.

43. Those five avenues are the following.

(a) National measures (Chapter VI)

The prime responsibility for securing the rights and freedoms guaranteed by the Convention is cast by Article 1 not on the Court but on the High Contracting Parties themselves. The Court’s role is subsidiary. It is therefore logical to deal first with measures to be taken at national level.

(b) The execution of judgments (Chapter VII)

The Evaluation Group moved next to the execution of judgments, for two reasons. Firstly, this avenue is related to the first, involving as it often does a need for general measures to be taken at national level. Secondly, whilst in the majority of cases the supervisory system works well (see paragraph 33 above), this is an area in which a serious defect can be discerned. The Court has had to deal with very many “repetitive” applications, raising an issue identical or very similar to one already determined in a judgment finding a violation of the Convention: the special situation concerning Italy (see paragraph 27 above) is the most striking but not the only illustration. Very many of these “repetitive” applications would never have seen the light of day if general measures to prevent further violations (see paragraph 33 above) had been taken, or been taken more promptly, by the state concerned. Put bluntly, the Strasbourg machinery has failed to function properly in these cases.

(c) Measures to be taken in Strasbourg involving no amendment of the Convention (Chapter VIII)

The Evaluation Group has already emphasised the need for immediate and urgent action (see paragraph 39 above). Its next avenue was accordingly measures that could be taken without the complex and time-consuming process of drafting and ratifying Protocols amending the Convention.

(d) Resources (Chapter IX)
Appendix I: Reports

The Evaluation Group then turned to its fourth avenue, on which it had located the question of resources (staffing, accommodation and budget).

(e) Measures involving amendment of the Convention (Chapter X)

Finally, the Evaluation Group has come to the conclusion that further measures, involving amendments to the Convention, are inevitable. The reasons for this conclusion and an indication of the areas to be explored in this connection appear in Chapter X.
VI. NATIONAL MEASURES

44. What measures might be taken at national level to improve the domestic implementation of the Convention was discussed at the Rome Ministerial Conference (see paragraphs 1-2 above) and is the subject of on-going review by the Council of Europe’s Steering Committee for Human Rights. The Evaluation Group cannot stress sufficiently the importance of this avenue: the primary duty to protect fundamental rights and freedoms lies with the national courts and authorities and it is at that level that protection can be secured most effectively.

45. Amongst the measures discussed in Rome in this connection, and which the Evaluation Group cannot but endorse, are:

- ensuring the availability of effective domestic remedies to prevent and redress violations of the Convention (including procedures for the proper investigation and establishment of facts);
- the systematic screening of draft legislation and administrative practices, to ensure that they meet Convention standards;
- the introduction or reinforcement of training in human rights for sectors responsible for law enforcement;
- wider dissemination of information concerning the Court and its case-law to national authorities, notably the courts, and in particular the provision of translations of extracts from key Strasbourg judgments;
- ensuring that national courts have the status, authority and independence needed to inspire public confidence;
- the introduction, in accordance with Committee of Ministers’ Recommendation (2000) 2, of procedures for the re-opening of domestic proceedings after a finding of violation by the Court (an area in which, the Group is pleased to note, legislation has now been adopted or is contemplated in a number of member states).

The last point has affinities with one that the Group identifies later in this report (see paragraph 96 below) as meriting further study, namely the possibility of sending certain applications back to domestic authorities.

Furthermore, the Group would encourage the inclusion of the Convention and its case-law as an item in curricula of university law faculties and professional institutions where this is not already done.

46. To this list the Evaluation Group would add the furnishing to individuals of adequate information and advice concerning the Convention and its procedures. A good number of applications would never reach Strasbourg if applicants were more accurately informed as to the matters falling within the Court’s jurisdiction and the conditions on which it can examine complaints. One way of doing this would be to develop, and provide the requisite facilities to, the Council of Europe information and documentation centres that exist in certain contracting states. The provision of advice through national human rights institutions or legal aid bureaux would be another. What is important is that such information and advice be readily available in all the member states across the board.

National human rights institutions can also play a useful role in advising Governments on issues relating to the compatibility of domestic law and practice with Convention standards.

47. In any event it is clear that the question of national measures must be kept under close and constant scrutiny by the Committee of Ministers and its subordinate bodies. The Court’s role must remain subsidiary and it cannot conceivably take over duties and responsibilities incumbent on the contracting states themselves or act as a first-instance court in respect of a large number of
violations of Convention rights alleged to have occurred in a community of almost 800 million individuals. As the Reflection Group set up by the Steering Committee for Human Rights has recognised, there would be merit in also examining, in the context of any reform of the Convention enforcement machinery, ways and means of reinforcing the interaction between the Strasbourg Court and national courts, with a view to improving the operation of the principle of subsidiarity. Moreover, the protection of human rights is not the province of any single body; it requires collective and complementary efforts on the part of all concerned. The Committee of Ministers should strive to promote synergies between the various mechanisms existing within the Council of Europe (the Committee itself, specialised Ministers, the Parliamentary Assembly, the Commissioner for Human Rights, the various political monitoring procedures, the Steering Committees, intergovernmental and co-operation programmes, etc.). ★
VII. THE EXECUTION OF JUDGMENTS

48. The Evaluation Group has already drawn attention to a defect in the area of execution of the Court’s judgments (see paragraph 43 (b) above). It notes that this is an area under ongoing examination by the Steering Committee for Human Rights and encourages that Committee to continue to treat this as a priority item, since a court whose judgments remain unexecuted cannot be regarded as “effective”.

49. The Steering Committee has already made preliminary observations on certain proposals emanating from the Parliamentary Assembly. Like that Committee, the Evaluation Group has hesitations about some of those proposals.

Thus, the idea that the Committee of Ministers might be empowered to ask the Court for interpretation of a judgment in cases where problems arise as to its execution could result in a blurring of the respective responsibilities of the Court and the Committee of Ministers as assigned by the Convention and draw the Court into an arena outside its purview.

Again, the idea of imposing financial penalties for non-execution of a judgment on a recalcitrant state raises questions as to how such penalties could be calculated. It has to be borne in mind that the implementation of general measures often requires a lengthy legislative process (sometimes bearing on amendments to a whole area of law) that may be interrupted by extraneous events such as elections, changes of government and lack of parliamentary time.

Finally, the idea that the Court should give in its judgments a more precise indication of the measures to be taken by the respondent state runs counter to the notion, often expressed in the Court’s case-law, that the state is better placed to assess, and should therefore enjoy freedom in choosing, those measures, provided that they are fully in line with the Court’s conclusions and always under supervision of the Committee of Ministers. On this point the Evaluation Group does, however, note a more recent practice of the Court, consisting of indicating (in the context of Article 41 of the Convention, relating to the award of “just satisfaction” to applicants) measures that would constitute *restitutio in integrum*. Whilst this is a matter entirely for the Court, the Evaluation Group considers that further development of this practice in appropriate cases would be beneficial in the context of the execution of judgments.

50. The Evaluation Group has noted, and welcomes, the fact that steps are now being taken to improve communications (notably by the use of modern technology) between those involved at this stage of the proceedings – the Court, the Committee of Ministers and the Council of Europe’s Directorate General of Human Rights. There is clearly merit in, for example, a free flow of information on the progress and nature of cases and in the Court’s being kept advised of difficulties encountered in the execution of judgments.

51. In this connection, a particular point arises concerning “repetitive” applications. When transmitting to the Committee of Ministers a judgment finding a violation of the Convention, the Court may be only too well aware that this is the “tip of the iceberg”, in that there are pending before it a number of applications raising an identical or very similar issue. The Evaluation Group considers that it would be advisable for special arrangements to be devised for such cases: on being informed by the Registry of the Court of the existence of the pending applications, the Committee of Ministers would deal with the execution of the original judgment by a special procedure allowing for expedited treatment; the pending applications would be “frozen” by the Court for a given period, but subject to regular review, to allow time for the necessary measures to be taken by the respondent state. This procedure would enable the Committee of Ministers to exert special pressure on the state concerned and could reduce the need for the Court to deliver a series of purely repetitive judgments on the merits.
Appendix I: Reports

52. Under the Convention, supervision of the execution of judgments is a matter for the Committee of Ministers. It is, however, widely recognised that the Parliamentary Assembly can play a valuable role in this context. The Evaluation Group welcomes the trend in the Assembly to follow this question more closely and its proposal to hold regular debates on the subject. The supervision process may be facilitated and accelerated as a result of contacts made or questions raised in national Parliaments by members of the Assembly and the resultant publicity.

53. More generally, the Evaluation Group can only emphasise the need for the Committee of Ministers to utilise every means at its disposal to ensure the expeditious execution of judgments, in particular to remedy the defect identified by the Group. Additional publicity for difficult cases might be one means; complementary examination of structural problems by the Council of Europe’s political and parliamentary monitoring procedures might be another. The Committee could also ensure a greater degree of involvement and international responsibility for difficult cases by designating one of its members as rapporteur to take the lead in pursuing a dialogue with the respondent state. The supervision procedure must have full collective attention from the Committee of Ministers.

The Group would also recall that the Rome Ministerial Conference called upon the Committee of Ministers to “pursue examination of … possible responses in the event of slowness or negligence in giving effect to a judgment or even non-execution thereof”. Discussions on this subject should be rapidly initiated and vigorously pursued by the Committee. ★
VIII. MEASURES TO BE TAKEN IN STRASBOURG INVOLVING NO AMENDMENT OF THE CONVENTION

54. The Evaluation Group's terms of reference (see paragraph 4 above) enjoin it to have due regard to the constraints resulting from the judicial status of the Court under the Convention. For this reason, the Group has – rather than making specific recommendations – rehearsed and commented on certain proposals, in order to avoid trespassing into matters outside its remit (see especially paragraphs 57-60 and 62 below).

55. There are, to begin with, two suggestions that the Evaluation Group has not felt able to retain. The first is that legal representation of applicants (which today is not obligatory until an application has been declared admissible unless it is decided to hold a hearing on admissibility) should be compulsory at all stages of the Strasbourg proceedings. The thinking is that this might result in better-prepared applications which would be simpler and quicker to process. However, such a rule could – unless adequate legal aid were available at national level – exclude for financial reasons a number of meritorious applications and constitute an unwarranted impediment to access to the Court.

For broadly similar reasons, the Evaluation Group would exclude any alteration in the current practice according to which before an application is declared admissible an applicant may use any one of the 37 national official languages in the Strasbourg proceedings. After admissibility or in communications and pleadings in respect of a hearing, applicants are required to use one of the Court's two official languages. The utilisation of (at present) 37 languages does create serious difficulties, but reducing that number or obliging applicants to obtain translations could again involve an unwarranted impediment to access to the Court.

56. The Court's internal working methods are kept under constant review and have, since 1999, been the subject of significant improvements.

Thus, in a report which was adopted by the Plenary Court on 6 December 1999, the Court’s Working Party on working methods made a large number of recommendations with the objective of facilitating the highest output whilst ensuring that decisions and judgments are of the highest quality. Matters covered included: the assignment of applications to Registry lawyers; setting targets for the handling of applications (as to which, see paragraph 31 above); the format of reports, decisions and judgments; guidelines for the handling of provisional applications; and the procedure in Committee, Chamber and Grand Chamber cases. Of the steps taken in pursuance of these recommendations, the following may be highlighted.

(a) Monitoring of targets, coupled with “country meetings” (analysis of the situation regarding applications concerning a specific respondent state), have enabled adjustments to be made to the allocation of cases within the Court and the Registry.

(b) The pre-judicial phase of proceedings (see paragraphs 23 and 30 (a) above) has been streamlined by the setting of clear guidelines as to the action to be taken by Registry lawyers at that stage and, notably, significantly reducing the amount of correspondence between them and applicants. Registry lawyers thus have more time available to them for the vital task of processing cases for the judicial stage.

(c) Unless special reasons militate otherwise, proposals that applications be declared inadmissible are increasingly referred to Committees (rather than Chambers) in the first instance, thus giving judges more time for the examination of weightier cases.
(d) In cases before Chambers, time is saved by examining the admissibility and the merits of simpler applications at the same time, rather than in two separate phases.

57. The Court’s Working Party on working methods and its Reform Committee are currently elaborating detailed proposals concerning, respectively, the procedure applied in the matter of registration of applications on their arrival and the creation of new procedures for the streaming of applications. Discussions on both of these aspects are at an advanced stage. What follows is a summary of the ideas that are on the table and does not necessarily represent the Court’s final opinion. It can, however, be stated at the outset that the key to the proposals is the notion that, whilst there should be no restriction on the continuing flow of applications to Strasbourg, the treatment afforded to them by the Court should be more detailed or less detailed, depending on their nature and content.

58. Under the Reform Committee’s proposals, the current system whereby, following correspondence with the Registry, applications are registered and then examined by the Court (see paragraphs 23 and 30 (a) above) would be modified. Certain categories of application – the exact list has yet to be determined but would include at least those that are obviously far-fetched and those that do not satisfy the formal conditions set out in the Rules of Court – would no longer be registered. The individual concerned would be notified, with a very brief indication of the reason, that his or her application had not been accepted for registration. These proposals would have to be combined with the Working Party’s recommendations on registration policy. The proposed new streaming would be carried out by a number of designated senior officials of the Registry under the supervision of the Court, which would in all cases retain the power of decision. The officials would be able, in the first place, either to identify an application as falling within a category whose registration can be refused or to certify it as inadmissible on one of the grounds set out in the Convention. Their conclusions would be submitted, in groups of cases, to a Committee of three judges for approval by silent procedure. The officials would also be able to recommend that an application be struck out of the list if its continued examination was no longer justified.

As regards the remaining applications, the officials would, on the basis of standard case-law, certify them either as being admissible and manifestly well-founded or as being prima facie admissible or, alternatively, would recommend that they be communicated to the respondent state concerned. In the latter event the existing procedure before a Chamber of the Court would be followed.

Subject to approval by a judge of the Registry’s recommendation, applications certified as admissible and manifestly well-founded would be determined by a Chamber under a summary procedure, unless the Government objected to this procedure within a prescribed period. Applications certified as prima facie admissible would be referred to a Chamber which could declare them admissible under a summary procedure, by means of a decision incorporated in the judgment on the merits; in this case the respondent state would be able to include observations on admissibility in its submissions on the merits. Both forms of summary procedure would afford an opportunity of concluding a friendly settlement.

59. It is considered that these proposals would have the twofold advantage of simplifying the work of the Registry in the initial processing of cases (notably by eliminating a large amount of the correspondence, paper-work and administrative steps involved in current procedures) and of alleviating the burden on judges in the preparatory stages (notably in that a judge-rapporteur would in future be appointed only for communicated applications – cf. paragraph 30 (b) above), thereby leaving them more time to devote to the more important and weighty cases. Moreover, the proposals would not create an extra layer of decision-making or entail any duplication of work. The idea is to attach greater procedural effect to work already carried out by Registry staff.
so as to make their contribution more time- and cost-effective. The designated senior officials should therefore not have to be replaced. The necessary staffing changes can be effected under the proposals set out in paragraph 70 below.

60. The Evaluation Group, for its part, notes the following particular merits of these proposals:

(a) involving as they do no change to the Convention, they could be put into effect within a relatively short time;

(b) by reducing the number of steps and avoiding duplication of work in the decision-making process, they would save time and effort in the processing of applications, a condition that must be satisfied if measures relating to the streaming of applications are to lead to gains in "productivity" and augment the capacity of the Registry to absorb case-load increases;

(c) they would help to alleviate two major problems facing the Court, namely:
   – the need to deal with an ever-increasing mass of applications of which the vast majority raise no or no difficult Convention issue; and
   – the need to deal with a large quantity of "repetitive" applications (i.e. cases raising an issue identical or very similar to one already decided and which would in future be handled under a summary procedure);

(d) whilst recognising that some applications warrant a less detailed treatment, they would not impinge on the essence of the right of individual application.

Whilst it is not its task to make recommendations to the Court regarding its internal procedures (see paragraph 54 above), the Evaluation Group sees these proposals as indicating the way forward in the immediate future; it accordingly endorses them and encourages their adoption.

61. The proposals under discussion within the Court incorporate a number of suggestions made in various quarters, for example: that similar applications should be dealt with in groups; that issues concerning admissibility and merits should, whenever possible, be determined together in a single decision; that a special summary procedure be instituted for manifestly well-founded applications; and that an improved procedure be devised for "repetitive" applications. There remain some further points on which the Evaluation Group would comment.

62. Article 38 of the Convention requires the Court, if it declares an application admissible, to "place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter..." This process is conducted in the name of the Court by the Section Registrars. Recent developments suggest that there is now an increasing possibility of disposing of applications by the conclusion of a settlement; indeed, this is adverted to in the proposals now under discussion within the Court (see paragraph 58 in fine above).

The Evaluation Group notes that, in addition to providing Governments with a means of avoiding excessive publicity and applicants with a means of obtaining an immediate and certain result, the conclusion of a friendly settlement can involve substantial budgetary savings for the Court, especially where a fact-finding mission would otherwise have been necessary. The Group thus endorses the suggestion that, rather than being a mere conduit for the exchange of settlement proposals, the Court should, in appropriate cases, play an even more pro-active role in this respect, with attempts to reach a settlement being pursued at an earlier stage in the proceedings than is sometimes now the case (see paragraph 30 (d) above). Consideration might be given to setting up a special unit within the Registry to assist in the settlement process.

The Committee of Ministers – which would, of course, have to retain its power to supervise the implementation of settlements – might consider the adoption of a Resolution or Recommen-
Incentives for applicants to settle might be reinforced if there were a practice on the part of the Court of depriving them – in its awards of “just satisfaction” – of part of their costs in cases where they had declined a settlement offer deemed by the Court to be reasonable. Alternatively, the Court could dispense with the applicant’s consent in striking an application out of the list if, for example, his/her refusal to accept a settlement offer was unreasonable.

As recorded in paragraph 22 above, the Court on occasion finds itself obliged to undertake fact-finding missions in the respondent state concerned. This is particularly so when no proper investigation has been conducted or no effective remedy is available at domestic level. This task, which is time-consuming, expensive and – in view of the time-lag involved – does not always succeed in establishing the facts to the required standard of proof.

To some extent, the Court has itself avoided the need to embark on fact-finding missions with their attendant problems by holding in its case-law that procedural deficiencies, such as lack of investigation or of a remedy, may of themselves constitute a violation of the Convention. On this issue, the Evaluation Group would refer back to what it has said in paragraph 45 above on national measures. It notes that in any event the Court restricts its fact-finding to exceptional cases.

A key element in the Court’s ability to cope with increases in case-load and to process cases efficiently and expeditiously will be the effective use it makes of the latest developments in information technology. The Court’s current information technology system and programme are described in paragraph 20 above and in Appendix II. The Internal Auditor noted in his report that the existing facilities enabled the Court to respond in a satisfactory way to its current needs with regard to the treatment of cases and the provision of information to the public. This is however an area in which rapid technological evolution may provide new solutions which open up new perspectives of productivity and efficiency. The Court must therefore be in a position to follow and where appropriate implement such innovations. It will need to maintain a forward-looking information technology policy, whose long-term funding must be guaranteed.

The Evaluation Group favours the proposal that the Court should continue to prepare (possibly in a revised format) an annual report on its organisation and activities. This would, in particular, highlight case-law trends and areas where problems have arisen. The report would be available to the public at large and would be of particular utility for the Committee of Ministers, the Parliamentary Assembly, domestic courts and authorities and practising lawyers. It could assist all states, including those not directly concerned by a judgment, in bringing legislation and practices into line with the Court’s case-law. The impact of the report would be enhanced if translations could be made available.

Some additional suggestions that would not involve a modification of the Convention (relating to “standby” judges and the constitution of a Fifth Section of the Court) are dealt with in paragraph 87 below.

On a more general point, the Evaluation Group is aware that certain issues relating to the institutional status of the Court within the Council of Europe remain outstanding. The Group recommends that these issues be discussed and determined urgently.
IX. RESOURCES

68. Any consideration of the Court’s resource needs must, in the view of the Evaluation Group, be prefaced by two general remarks.

In the first place, the uncertainties surrounding a forecast of the Court’s future workload (see paragraphs 35-37 above) rule out any absolute prediction as to its future resource needs. Short of providing that no more than a given number of applications will be processed each year (an idea too arbitrary and inequitable to warrant mention), no guarantee of stability can be given; the best that can be offered is an indication of probabilities.

Secondly, the Group recognises that resources cannot be increased *ad infinitum*: quite apart from national budgetary constraints, the outcome would be an unwieldy and unmanageable institution, lacking in particular the necessary efficiency and internal cohesion.

Staffing

69. The current position is that delays in processing applications derive not so much from a shortage of time on the part of the judges as from difficulties encountered by the Registry in preparing files for judicial consideration; the mass of material is simply so great that its processing cannot proceed rapidly enough. The same point was taken by the Council of Europe’s Internal Auditor in his report to the Secretary General, with reference to material on the “productivity” of certain other courts.

The issue of staffing was reviewed by the Internal Auditor in that report. He estimated, in the light of his predictions as to the future case-load (see paragraph 37 above) and taking into account the likely gain in “productivity” (see paragraph 38 above), that by 2005 the Court would need at least 189 lawyers and 95 secretaries as case-processing staff. According to information provided by the Court, provision is made in the proposed draft budget for 2002, prepared by the Council of Europe Administration, for 138 lawyers and 49 secretaries to work in case-processing units. Of these 138 lawyers and 49 secretaries, 45 lawyers and 15 secretaries were initially financed under the scheme proposed by the ad hoc Working Party (see paragraph 3 above). Under the Committee of Ministers’ decision of December 2000, 25 of these 45 lawyers and 10 of the 15 secretaries were to work on “backlog” cases. Consequently, the 35 persons concerned cannot be included in the calculation of the number of case-processing staff needed to deal with new cases, since they will, at least in the foreseeable future, have to continue to deal with the accumulating backlog of cases.

It follows that in order to achieve the target of 189 lawyers and 95 secretaries, additional financing is required for 76 lawyers and 56 secretaries.

<table>
<thead>
<tr>
<th>Case-processing staff</th>
<th>Lawyers</th>
<th>Secretaries</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Target 2005</td>
<td>189</td>
<td>95</td>
<td>284</td>
</tr>
<tr>
<td>Total in draft budget 2002</td>
<td>138</td>
<td>49</td>
<td>187</td>
</tr>
<tr>
<td>Backlog 2002</td>
<td>25</td>
<td>10</td>
<td>35</td>
</tr>
<tr>
<td>Total in draft budget 2002 (minus backlog)</td>
<td>113</td>
<td>39</td>
<td>152</td>
</tr>
<tr>
<td>Additional needs</td>
<td>76</td>
<td>56</td>
<td>132</td>
</tr>
</tbody>
</table>

Appendix I: Reports

While the scale of the problem for the Court demands immediate measures, the Evaluation Group recognises the formidable management and administrative challenges which the recruitment over one year of such a sizeable increase in case-processing staff would present. The number of lawyer posts recommended above by the Group is equivalent to around 50% of the number of posts provided for in the 2002 draft budget. The absorption over a short period of such a significant number of new staff would inevitably impact negatively on the capacity of the Registry, not least by requiring current staff to devote time to training and supervision, thereby adding to short-term case-processing delays. The current absence of a dedicated human resources function within the Court is a further factor.

For these reasons, the Evaluation Group recommends that the implementation of this recruitment be staggered over the period 2003-2005. It points out that this graduated approach would allow the Court annually to review its operations and to take account of relevant changes in conditions such as:

- changes in the levels of incoming cases;
- the volume of the continuing backlog;
- the impact on productivity of the internal measures being taken by the Court (see paragraphs 57-58 above) to improve its effectiveness.

Such reviews could also benefit from contacts between the Court and those domestic courts in which significant administrative and case-processing reforms have recently been successfully completed.

It goes without saying that a graduated approach to recruitment should not be interpreted as putting into question the recommended commitment of the Committee of Ministers to provide the required resources up to the limits set out above.

70. The Evaluation Group also recognises, as did the Internal Auditor, that the Court has not met staffing requirements in areas other than case-processing.

In the first place, bearing in mind the increase in the size of the Registry, both past and contemplated, there is a need to reinforce its management structures, especially at a time when changes are being made to internal procedures. If the Registry establishment is to grow to some 400 persons, it clearly requires the concomitant support and general services and should not have, as at present, to “borrow” valuable case-processing staff to carry out administrative duties.

In the second place, the current under-staffing of the Court’s Research Unit is a serious impediment to the individual and collective work of the judges. The Evaluation Group shares the opinion of the Internal Auditor that resources should be devoted to reinforcing this Unit and to endowing the Court with improved library facilities.

The Internal Auditor recommended the creation of 8 additional posts for the above-mentioned purposes. The Group agrees that this recommendation meets the Court’s immediate needs for support staff. In order that the increase in case-processing staff may proceed from 2003, it is vital that three of these management posts should be made available in 2002 so as to provide proper supervision for new staff, in particular as regards human resources management and training. Similarly, two senior posts (Deputy Section Registrar) are required from 2002 to implement the scheme for internal streaming (see paragraph 58 above). The remaining three posts should be created as from 2003.

71. The Council of Europe’s Finance Division has calculated that, assuming the staffing proposals set out in paragraphs 69 and 70 above are fully implemented, their overall annual budgetary cost by 2005/2006 would be approximately €7.6 m. This figure, which excludes non-recurrent
recruitment expenditure or any adjustment for inflation but includes provision for a proportion of permanent posts, would represent 4.5% of the draft ordinary budget for the Council of Europe for 2002.

72. To the foregoing there should be added the cost of the Court’s investment in information technology. The Evaluation Group considers it imperative that adequate financial resources be provided to permit full implementation of the programme referred to in paragraph 64 above.

73. A further point concerning staffing resources remains. Within the Directorate General of Human Rights, the Department for the execution of judgments currently comprises 5 case-processing lawyers (the post of one of which is temporary), plus two seconded lawyers and two administrative assistants. The Head of Department and the principal administrator are not directly involved in case-processing; their duties concern management, quality control, contacts with delegations concerned, presentation of cases to the Ministers’ Deputies, etc. The Evaluation Group has already drawn attention to the considerable ongoing and foreseeable increases of the execution case-load, in terms of cases examined by the Committee of Ministers at each meeting (see paragraph 34 above), the annual number of new cases requiring supervision of execution and the number of pending cases and of general measures under supervision (see paragraph 40 above). It should also be taken into account that the spread of the legal systems involved is now much wider than in the past.

The Evaluation Group therefore considers that there is a case for urgent reinforcement of this Department. Given that the case-load and staffing situation in 2000 (495 new supervision cases; 4 case-processing lawyers) was such that the backlog remained modest for most of that year, the Group takes as a basis that a case-processing lawyer in the Department should on average be able to handle 125 new cases per year. The Group accordingly recommends a staffing increase of three lawyers and one administrative support staff member in the short term.

Further staffing increases in relation to the execution of judgments are likely to be necessary both in the Directorate General of Human Rights and the Secretariat of the Committee of Ministers. In order to assess these needs, the Group considers that a detailed analysis of current procedures and working methods and of the impact of measures taken by the Court should be carried out. This could be achieved by an audit.

**Accommodation**

74. The current situation regarding the utilisation of the Human Rights Building and the need to find additional space for the Court is referred to in paragraph 19 above.

Bearing in mind that, in the estimate of the Council of Europe’s Committee of Experts on Buildings, six years would be required to plan and complete a new building (capable of housing, *inter alia*, the Directorate General of Human Rights), the Evaluation Group finds it absolutely imperative that a decision on the subject of such a building be taken by the Committee of Ministers before the end of 2001.

The departure of the Directorate General to the new premises would make available space for the additional staff for the Court mentioned in paragraphs 69 and 70 above to be housed in the Human Rights Building. Having regard to its discussions with representatives of the Court and the Council of Europe’s Directorate General of Administration and Logistics, the Evaluation Group notes that – on the assumption that the decision to construct the new building is taken – an interim solution, involving a strictly provisional departure from the usual accommodation

---

10. It should be noted that each lawyer also handles a large number of pending cases.
Appendix I: Reports

598 Reforming the European Convention on Human Rights

norms until that building is completed, could be found and accepted, so that the recruitment of the additional staff, which will be staggered, could proceed.

**Budget and financing**

75. Over and above the question of the Court's staffing and accommodation needs, there remain a number of wider issues relating to its budget.

76. The Evaluation Group does not favour certain proposals the thrust of which would be to finance the Court in part by some form of charge or fee to be levied on "best-customer" states or individual applicants. This could entail additional costs falling on those least able to meet them and would sit ill with the collective nature of the enforcement machinery and the fact that a commitment to ratification of the Convention is a condition for accession to the Council of Europe (see paragraph 15 above). The Group notes in this connection that the Committee of Ministers has set up a Working Group to examine the revision of the method of calculating the scales of member states' contributions to the Council of Europe's ordinary budget.

77. At present, the Court's budget (saving special derogation) is comprised within the ceiling set for the Council of Europe's ordinary budget (see paragraph 17 above). Such an arrangement is totally inappropriate for activities such as those of the Court which cannot be expanded or contracted at will, but depend on the uncontrollable factor of the inflow of applications. Furthermore, the effect of the current system is that an increase in the Court's resources reduces *pro tanto* the resources available for other activities of the Council of Europe. Consequently, as the Internal Auditor pointed out, the Court's budgetary needs will slowly but steadily absorb the Council's ordinary budget. The short-sightedness of such an arrangement becomes only too apparent when it is borne in mind that the Council's other activities include assistance to member states in achieving the overall aims of the Convention and that, if those aims are achieved, the workload of the Court will diminish.

By definition the increased resources required to ensure the future effectiveness of the Court (see paragraphs 69-71 above) cannot be provided from within a Council of Europe budget which is determined on the basis of the current arrangement. Consequently, the Evaluation Group concludes that at least increases in the budget of the Court should be treated separately and without regard to the bases applied in fixing the Council of Europe's ordinary budget. In the Group's view, the same should apply to increases in resources related to the supervision of the execution of judgments.

78. It has been suggested that steps should be taken to ensure that each member state pays at least a minimum budgetary contribution, sufficient to meet the expenses that derive from the sole fact of being party to the Convention (cf. paragraph 16 above). The Evaluation Group considers that this point should be discussed in the Working Group set up to examine the scales of contributions (see paragraph 76 above).

Finally, an unsatisfactory feature of current arrangements is that the Court's budget is annualised (see paragraph 17 above). The Group considers that, in order to avoid recurrent annual crises, a system should be devised whereby two- or three-year programmes are drawn up on the basis of an analysis of trends at a given point of time. This should also apply to appropriations related to the supervision of the execution of judgments.

79. At the risk of stating the obvious, the Evaluation Group would emphasise that the question of resources is an urgent one, requiring immediate action. A policy of awaiting developments in the Court's case-load or the results of reforms envisaged would be misguided. ★
X. MEASURES INVOLVING AMENDMENT OF THE CONVENTION

80. The Evaluation Group has noted in paragraph 38 above that, on the basis of predictions concerning the Court’s case-load and gains in its “productivity”, in 2001 12 583 applications would be registered and 9 253 disposed of. This calculation did not take into account any increase in the number of case-processing staff or the “productivity” gain that would result from implementation of the internal measures described in paragraphs 57-58 above.

In fact, the Group has concluded in paragraph 69 above that a staffing increase is required that would bring the number of case-processing lawyers in the Registry to 189.

The Internal Auditor set an average figure of 110 applications per year to be disposed of by each lawyer, including trainees (the actual average figure for 2000 being 90 applications per lawyer, excluding trainees). The effect of the internal measures, which would take time to implement, cannot be predicted with any certainty. However, even if it is assumed that they would result in a further “productivity” gain of 25%, the Court would still reach saturation point within less than ten years, as the following calculation reveals.

With that assumed 25% gain, the average case-handling capacity per lawyer would increase to 137.5. On this basis, the Court, with its staffing increase, would have the capacity to dispose of 25 987 (189 x 137.5) applications per year. The Internal Auditor estimated that in 2005 20 720 applications would be registered, so that in that year disposals could exceed registrations by 5 267 (25 987-20 720). However, applying on a linear basis the nearly 100% increase in registered applications he estimated for the period from 2000 to 2005 (see paragraph 37 above), by 2007 the number of registrations (29 008) would already once again exceed the disposal capacity, by 3 021. And the situation would continue to deteriorate in the subsequent years (for example, 41 440 registrations in 2010 as against the disposal capacity of 25 987).

81. The picture given by these figures may be too pessimistic, in that they assume a constant rate of growth in registered applications. If, however, the figures resulting from the purely mathematical (and necessarily somewhat speculative) calculations set out in the preceding paragraph were borne out, further increases in “productivity” and in staffing would be required if the Court were not to suffocate. Yet the Group has already pointed to the risks involved in constant seeking for greater “productivity” and to the impossibility of increasing resources ad infinitum (see paragraphs 39 and 68 in fine above).

In any event, even if resources could be increased indefinitely, saturation point would be reached in the near future, particularly in the sense that there must be some limit on the number of cases which 41 (or even 43) judges can examine in depth each year if quality is not to suffer. There is thus a need, in addition to the procedural streamlining and resource increases discussed in preceding Chapters of this report, for yet further measures to reduce the workload, to expedite the handling of applications that do not warrant detailed treatment and to leave the judges with sufficient time to devote to those that do. The immediate measures under discussion within the Court take to the limit what can be done without touching the Convention. The Evaluation Group has thus examined finally measures involving amendment of that instrument.

11. Mr Wildhaber wishes to stress that this Chapter of the report reflects his personal views and not those of the Court, which has not yet discussed amendments to the Convention in plenary session.
82. From the many proposals contained in the materials available to it, the Group will, before turning to the more radical ones, deal first with a number that it considers should not be retained, and then with some – on more general issues – that it favours.

Regional tribunals

83. It has been suggested that with a view to alleviating the case-load problems, regional human rights tribunals might be created throughout Europe, with the Strasbourg court becoming a tribunal of last instance. Quite apart from the expense which this would involve, the Evaluation Group is not attracted by this solution: it carries a risk of diverging standards and case-law, whereas the essence of the Convention system is that uniform and coherent standards, collectively set and enforced, should obtain throughout the contracting states (see the Preface to this report). A much better approach is to improve the role played by domestic courts as “Convention courts” of first instance (see Chapter VI above).

Preliminary rulings and advisory opinions

84. Neither does the Evaluation Group favour suggestions that the Court should be empowered to give preliminary rulings on Convention issues at the request of national courts (in a procedure akin to that utilised by the Court of Justice of the European Communities) or that its competence to give advisory opinions (Articles 47-49 of the Convention) should be expanded. These measures might reduce to some extent the flow of individual applications to Strasbourg, but they would require far more detailed study before they could be implemented, notably as regards their relationship to the Court’s existing jurisdiction. Above all, priority must, in the Group’s view, be given to resolving the current workload problems: the Court simply does not have the capacity at the present time to take on the extra duties which these suggestions would involve.

Conferment of powers of decision on Registry officials

85. The Evaluation Group sees no objection to conferring powers of decision in certain procedural matters to senior officials of the Registry as such, in order to lighten the judges’ workload. However, there is general agreement that such powers should not extend to substantive issues. This would be contrary to the principle, enshrined in the Convention, of a judicial decision and it would scarcely be likely to meet with public approval. The position would, however, be otherwise if certain powers of decision were conferred on persons who, though previously members of the Registry establishment, had been duly invested with judicial status.

Reduction of the size of Committees and/or Chambers

86. In the opinion of the Evaluation Group, proposals to reduce the size of Committees to below three judges or of Chambers to below seven judges would not, taken in isolation, be of great assistance at the present stage. As evidenced by the number of applications disposed of by this means (see paragraph 28 above), the Committee system works well: as already recorded, it is Registry, more than judicial, time that is currently lacking. Decreasing the size of Chambers would make it difficult to achieve the requisite balance between members (geographical origin, gender and legal system of origin). However, some changes in this area might be contemplated in the context of a more radical change to the structure of the Strasbourg machinery (see paragraph 98 below); they could very well introduce a valuable element of flexibility in the light of the nature and complexity of the case under examination.
Additional judges

87. Neither does the Evaluation Group consider that a solution lies in an increase in the number of full-time elected judges on the Court. Once again, the greatest problem is not a lack of judicial time, and the more the number of judges, the more the risk of a lack of cohesion in case-law. Moreover, such an increase would in all probability mean a doubling of the number of elected judges, with the consequent financial implications.

More interesting is the suggestion, which the Court currently has under consideration and which the Evaluation Group considers should be pursued, of having recourse to “standby” judges; subject to satisfactory procedures concerning their nomination, their services could be prayed in aid when, for example, the case-load from a given state placed an excessive burden on the judge elected in respect of that state. A further measure that could, in the Group’s view, be usefully explored is the constitution within the Court, once the number of contracting states so permits, of an additional, fifth Section (Sections currently being composed of 10 or 11 judges).

Both of the latter measures could be implemented without modifying the Convention but, it is important to note, neither of them would resolve the case-processing problems faced by the Registry.

88. In discussions on reform, hesitations are sometimes expressed about certain proposals because they would necessitate resort to the time-consuming process of drafting and ratifying Protocols to the Convention.

Although this would not resolve the case-load problems, the Evaluation Group sees considerable merit in the suggestion that certain matters now dealt with in the Convention itself be transferred to a separate instrument (possibly a Statute of the Court) which could be amended by a simpler procedure (for example, a Resolution of the Committee of Ministers adopted with the Court’s agreement). This instrument would not affect basic Convention principles but would be confined to questions of lesser importance, such as the number of members of a Chamber of the Court. The Court’s regulatory competence concerning matters dealt with in the Rules of Court would, moreover, not be reduced.

89. A more important question, relating to the effectiveness of the Court as a judicial institution rather than its case-load problems, concerns the term of office of elected judges.

In its own case-law, the Court requires of national courts a high standard of objective independence and impartiality, extending also to appearances. The Group recalls in this context that the principles contained in Committee of Ministers Recommendation No. R(94)12 on the independence, efficiency and role of judges hold good for members of the Strasbourg Court as well. The Evaluation Group considers that the Convention should be amended so as to lay down that judges of the Court are elected for a single, fixed term, without possibility of re-election. This term should not be less than nine years. The effect of these changes would be to ensure continuity within the Court and, moreover, to offer a further guarantee of the Court’s independence.

90. Turning to more radical measures and bearing in mind that the Court’s “productivity” cannot be increased ad infinitum if the quality of its judgments is to be maintained, the Evaluation Group has looked first at possible modifications to the Convention that would reduce the work-load by modulating the treatment afforded to applications and reserving full judicial treatment for applications that warrant it.

91. The most far-reaching modification of this kind would be to provide (without more) that the Court should enjoy an unfettered discretion as to which applications it will accept for exami-
Appendix I: Reports

nation. Whilst such an arrangement exists in certain countries, the Evaluation Group does not consider it appropriate for Strasbourg. In the countries concerned, the court enjoying such a discretion is the tip of a pyramid of courts of varying levels. Moreover, practitioners and the public would be left with no guidance as to which applications would or would not be accepted for examination and there would be a risk of the Court’s laying itself open to charges of inconsistency, if not arbitrariness.

92. Another possibility would be to revise the existing admissibility criteria set forth in Article 35 of the Convention. Whilst there might be scope for some such revision (for example, the “manifestly ill-founded” criterion has been applied to applications that are ill-founded but perhaps not “manifestly” so), this would not go far enough. What is required is a means of excluding from detailed treatment by the Court not only applications having no prospects of success but also those which, despite their having such prospects, raise an issue that is, in the view of the Court, of such minor or secondary importance that they do not warrant such treatment.

To the objection that such a solution would deprive some victims of violation of the Convention of protection, the Evaluation Group would reiterate that the primary responsibility for applying Convention standards lies with domestic courts and authorities. More basically, the Group would reply that the point has been reached at which a difficult choice has to be made: either the Court continues to attempt to deal in the same way with all the applications that arrive (in which event it will slowly sink), or it reserves detailed treatment for those cases which, in the light of its overall object and purpose (see the Preface to this report), warrant such attention. Not without some soul-searching but nevertheless unreservedly, the Group opts for the second alternative.

93. The Reflection Group set up by the Steering Committee for Human Rights proposed that the Court might be given wider possibilities to reject applications, by raising the admissibility threshold through the introduction of additional or reformulated admissibility criteria. Concurring with this approach, the Evaluation Group has come to the view that a provision should be inserted in the Convention that would, in essence, empower the Court to decline to examine in detail applications which raise no substantial issue under the Convention. The Group does not see it as its task to formulate such a provision, notably since this would require detailed study by the appropriate Council of Europe bodies in conjunction with the Court, with which outside bodies should be associated. A number of points should, however, be made.

94. Firstly, whatever wording is adopted, it is clear that the interpretation of such a provision will have to be worked out by the Court over a period of time. It would seem appropriate that in determining what is or is not “substantial”, the Court should have regard, inter alia, to the situation obtaining in the respondent state and the extent to which effective domestic remedies are available.

95. Secondly, this proposal should not be seen as a panacea for the workload problems. Whilst the drafting of judgments and the preparatory work involved therein would be eliminated for cases not accepted for detailed treatment, each and every application would still have to be studied to determine whether it raised a substantial Convention issue. The need for adequate case-processing staff within the Registry would thus remain even in those cases, though their tasks would be reduced.

96. Finally, this solution should not be seen as a restriction on the right of individual application: individuals would still be completely free to submit applications to Strasbourg, which would all be examined and receive a considered response. Nevertheless, a blind eye cannot be turned to the question of what happens to the author of an application that is not accepted for detailed treatment. The Evaluation Group considers that this point should be studied concurrently with the drafting of the new provision, with a view to devising a mechanism whereby states would
agree that such an application be remitted back to their authorities for reconsideration: this would be of particular value in those cases where no effective domestic remedy was originally available.

In similar vein, procedures might also be established whereby states would agree that, where an application has been certified as admissible and manifestly well-founded in accordance with the proposals currently under discussion within the Court (see paragraph 58 above), the individual concerned would be entitled to obtain redress from a designated national authority.

97. Estimating the effects in terms of “productivity” of the exclusion of “no-substantial-issue” applications is even more difficult than making the other forecasts looked at by the Evaluation Group. This measure would undoubtedly alleviate the problem, but, though much depends on the manner in which it is applied, it seems unlikely that it could achieve the “productivity” gain that would be needed to cope with the potential case-load situation in the period 2006-2010 (see paragraph 80 above). The Group accordingly considers that yet more radical changes are called for.

98. In the Group’s opinion, a vital consideration must be to ensure that judges are left with sufficient time to devote to what have been called “constitutional judgments”, i.e. fully reasoned and authoritative judgments in cases which raise substantial or new and complex issues of human rights law, are of particular significance for the state concerned or involve allegations of serious human rights violations and which warrant a full process of considered adjudication. A way of achieving this would be to establish a new mechanism in the operation of which the existing judges would not be involved. Such a mechanism should, in the Group’s view, be a part of, and not separate from, the Court, as reversion to the two-institution structure that existed prior to Protocol No. 11 would be a step backwards and would carry a risk of more delays and costs. In short, the Court would consist of two divisions, the first composed of elected judges and the second – with responsibility for preliminary examination of applications – composed of appropriately appointed independent and impartial persons invested with judicial status (who would be designated as “assessors” or some other suitable title).

Whilst the new division would doubtless need to sit full-time, a number of points would require detailed study by the appropriate bodies of the Council of Europe in conjunction with the Court, with which, again, appropriate outside bodies should be associated. They include:

(a) the number and qualifications of assessors and the manner of their appointment;
(b) the definition of the role of the assessors: for example whether they would take all admissibility decisions (or only decisions of non-admissibility) and whether they would have any role in fact-finding;
(c) means of reconciling the need to make the best use of judicial time and the need for the assessors to take over, without duplication of work, sufficient of the tasks now handled by the Registry for the creation of the new division to alleviate significantly the shortage of case-processing capacity within the Registry: on this point the remarks in paragraph 60(b) above apply, mutatis mutandis;
(d) the more political issue of whether, under such an arrangement, the first division of the Court should be composed of a number of judges equal to or less than the number of contracting states and whether that division should sit full-time.

This study should, of course, take account of the experience gained as a result of implementation of the internal measures currently under consideration within the Court (see paragraphs 57-58 above). It should also bear in mind the need not to impinge upon the essence of the right of individual application. ★
XI. CONCLUSIONS AND RECOMMENDATIONS

99. The Evaluation Group has found no single “miracle” solution. The situation currently faced by the Court is so serious that, if it is to remain effective and continue to fulfil its object and purpose (see the Preface to this report) and serve as the final arbiter in the protection, maintenance and development of common human rights standards throughout Europe, action is needed on several fronts.

In the immediate, measures internal to the Court should be taken without delay and, at the same time, more fundamental reforms involving amendment of the Convention must be prepared forthwith. In addition, constant efforts to improve the domestic implementation of the Convention and the system for supervising the execution of the Court’s judgments are called for. Moreover, in view of the member states’ commitment to the cause of promotion of human rights, they must recognise and satisfy promptly the Court’s present and future needs in the matter of resources. However, the Council of Europe should not allow development and expansion of the Convention system of human rights protection to weaken the Organisation as a whole through progressive diversion of financing from other activities to the Court.

100. Having regard to the foregoing and for the reasons developed in this report, the Evaluation Group recommends that the Committee of Ministers:

A. As regards national measures
   1. keep under close and constant scrutiny, in co-operation with all concerned, the question of national measures to improve the domestic implementation of the Convention, such as those discussed at the Rome Ministerial Conference (see paragraphs 45 and 47);
   2. encourage member states to promote the inclusion of the Convention and its case-law as an item in curricula of university law faculties and professional institutions (see paragraph 45);
   3. invite member states to improve the provision to potential applicants of information and advice concerning the Convention and its procedures, and examine enhancing the role of the Council of Europe information and documentation centres in this area (see paragraph 46);
   4. give instructions to carry out a feasibility study on means of reinforcing interaction between the Strasbourg Court and national courts (see paragraph 47);

B. As regards execution of the Court’s judgments
   5. utilise every means at its disposal to ensure the expeditious execution of judgments of the Court (see paragraph 53);
   6. initiate rapidly and pursue vigorously the examination of further responses to non-execution or slow execution of judgments, as recommended by the Rome Ministerial Conference (see paragraph 53);
   7. contribute to the improvement of communications between all those concerned in this area (see paragraph 50);
   8. set up, in conjunction with the Court, a special procedure for the handling of repetitive applications (see paragraph 51);
   9. pursue dialogue with the Parliamentary Assembly in this matter;

C. As regards immediate measures to be taken in Strasbourg
   10. take note of and encourage the proposals currently under discussion within the Court (see paragraphs 57-58 above) as indicating the way forward in the immediate future;
11. consider the adoption of a Resolution or Recommendation encouraging the conclusion of friendly settlements (see paragraph 62);

D. As regards resources

12. provide for the Court the additional staffing resources indicated in paragraphs 69-71;
13. provide adequate financial resources to permit full implementation of the Court’s information technology programme (see paragraphs 64 and 72 and Appendix II to this report);
14. provide for the relevant Department of the Directorate General of Human Rights the additional staffing resources in the short term indicated in paragraph 73;
15. consider the need for further reinforcing the relevant staff of the Directorate General and the Secretariat of the Committee of Ministers on the basis of an audit (see paragraph 73);
16. take before the end of 2001 a decision on the construction of an additional building for the Council of Europe (see paragraph 74);
17. treat separately, and without regard to the bases applied in fixing the Council of Europe's ordinary budget, increases in the budget of the Court, and ensure that the financing of those increases does not reduce the resources available for the other activities of the Council of Europe (see paragraph 77);
18. note that no guarantee can be given that the needs of the Court will stabilise and devise a system whereby budgets for the Court would be programmed on a two- or three-year basis (see paragraphs 68 and 78);
19. adopt, for increases in resources and the programming of appropriations related to supervision of the execution of the Court’s judgments, the same approaches as those recommended, in points 17 and 18 above, for the Court (see paragraphs 77 and 78);

E. As regards amendment of the Convention

20. give instructions to the appropriate bodies with a view to preparing a draft Protocol to the Convention which would:

(a) empower the Court to decline to examine in detail applications raising no substantial issue under the Convention (see paragraphs 92-96); work on this point should also seek to devise a mechanism whereby certain applications might be remitted back to domestic authorities (see paragraph 96);

(b) provide that judges of the Court are elected for a single, fixed term of not less than nine years, without possibility of re-election (see paragraph 89); and

(c) transfer certain matters of lesser importance now dealt with in the Convention to a separate instrument capable of amendment by a simpler procedure (see paragraph 88);

21. give instructions for a feasibility study to be carried out by the appropriate bodies, in consultation with the Court and in parallel with the work referred to at point 20 above, into the creation within the Court of a new and separate division for the preliminary examination of applications (see paragraph 98);

F. In general

22. review regularly the progress achieved in the implementation of the foregoing recommendations and other relevant questions affecting the Court through the mechanism of the Ministers’ Deputies’ Liaison Committee with the Court. ★
REPORT OF THE GROUP OF WISE PERSONS TO THE COMMITTEE OF MINISTERS

November 2006
APPENDIX I: REPORTS

APPOINTMENT, TERMS OF REFERENCE
AND WORK OF THE GROUP

1. The Heads of State and Government of the Council of Europe member states, meeting in Warsaw on 16 and 17 May 2005, decided in their Action Plan to set up a Group of Wise Persons to consider the long-term effectiveness of the ECHR control mechanism, including the initial effects of Protocol No. 14 and the other decisions taken in May 2004. They asked them to submit, as soon as possible, proposals going beyond these measures, while preserving the basic philosophy underlying the Convention.

2. At their 927th meeting, on 25 May 2005, the Ministers’ Deputies entrusted their Chair, in conjunction with the Chairman of the European Court of Human Rights Liaison Committee, with carrying out the necessary consultations in order to present at the earliest opportunity proposals regarding the composition of the Group of Wise Persons set up by the Summit to draw up an overall strategy to ensure the long-term effectiveness of the Convention.

3. At their 937th meeting, on 14 September 2005, the Deputies decided that the Group of Wise Persons would comprise the following persons:
   – Mr Rona Aybay, Turkey,
   – Ms Fernanda Contri, Italy,
   – Mr Marc Fischbach, Luxembourg,
   – Ms Jutta Limbach, Germany,
   – Mr Gil Carlos Rodríguez Iglesias, Spain,
   – Mr Emmanuel Roucounas, Greece,
   – Mr Jacob Söderman, Finland,
   – Ms Hanna Suchocka, Poland,
   – Mr Pierre Truche, France,
   – Lord Woolf of Barnes, United Kingdom,
   – Mr Veniamin Fedorovich Yakovlev, Russia.

4. The Ministers’ Deputies invited the Secretary General of the Council of Europe to provide the Group of Wise Persons with the appropriate assistance and asked the Group to submit an interim report on its work to the 116th session of the Committee of Ministers in May 2006.

5. On 18 October 2005, Mr Rodríguez Iglesias was elected Chair of the Group. On 9 November 2005, the Group appointed Mr Kurt Riechenberg, law clerk at the Court of Justice of the European Communities, as its secretary.

6. After being set up on 18 October 2005, the Group held meetings on 9 November and 7 December 2005 and on 9 January, 6/7 February, 6 March, 30/31 March, 24/25 April, 12 May, 14/15 June, 11/12 September and 4/5 October 2006.

7. The Group drew up an interim report which was presented by its Chair to the Committee of Ministers on 19 May 2006 [document CM (2006) 88]. This report incorporates much of the content of that document.

8. The Group was assisted in its work by Mr Patrick Titiun, Deputy Head of the Legal Advice Department, and Ms Susan Bradbury, Administrative Assistant, who were placed at its disposal by the Secretary General of the Council of Europe. The Group invited the Registrar of the Court, Mr Erik Fribergh, to attend its meetings.

9. In the course of its work, the Group:
   – gave hearings to Mr Luzius Wildhaber, President of the European Court of Human Rights, Ms Maud de Boer Buquicchio, Deputy Secretary General of the Council of Europe, and Mr Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe;
– held a meeting with NGOs, namely Amnesty International and the AIRE Centre (at their request);
– held a meeting with members of the Court, at which they reported on their work to implement the four main innovations introduced by Protocol No. 14, namely the single judge/rapporteur system, the new competence of committees under Article 28 amended, the new admissibility criterion provided for in Article 35 amended, and the new “admissibility/merits” procedure under Article 29 amended;
– held a meeting with the staff of the Registry, the main focus being on how cases are processed and prepared for hearing in the divisions and how the committees’ decisions are prepared;
– gave a hearing to Mr Roeland Böcker, Chair of the Steering Committee for Human Rights.

10. The Group also considered a large amount of written material, in particular:
– resolutions and recommendations of the Parliamentary Assembly and the Committee of Ministers;
– documents produced by the Court, in particular the report by its committee on working methods;
– the report drawn up under the authority of Lord Woolf entitled “Review of the working methods of the European Court of Human Rights”;
– the comments by Mr Hammarberg, Commissioner for Human Rights of the Council of Europe, following the interim report.

11. The Chair of the Group also met representatives of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe on 7 June 2006. The committee members expressed the wish that a link be established in the final report between the work of the Court and the tasks performed by other Council of Europe bodies (in particular the Parliamentary Assembly’s monitoring work). They also raised the issue of the independence of judges.

12. They further expressed the wish that the filtering body mentioned in the interim report should not be a replica of the old European Commission of Human Rights.

13. Lastly, the Group took note of the many comments made following the presentation of the interim report.
I. THE CONTEXT

Human rights protection in the Council of Europe framework

14. It is important to begin by reiterating the fundamental importance attaching to human rights protection in the Council of Europe framework and the diversity of the means employed to achieve this, as it is in this context that the role and long-term effectiveness of the judicial control must be assessed.

15. The enlargement of the Council of Europe and the accession to the European Convention on Human Rights (hereinafter “the Convention”) of the central and east European democracies have contributed to stability in the whole of Europe. The Convention and the Court have become genuine pillars in the protection of human rights and fundamental freedoms. For its part, the Committee of Ministers plays an important role in monitoring the execution of judgments.

16. Since the Convention forms part of the national law of the member states, the remedies available at national level must be effective and well known to their citizens. Indeed, they constitute the first line of defence of the rule of law and human rights. Initially, it is for the national courts to protect human rights within their domestic legal systems and to ensure respect for the rights safeguarded by the Convention. The principle of subsidiarity is one of the cornerstones of the system for protecting human rights in Europe.

17. In addition, the Council of Europe has set up many other institutions and bodies in the human rights field. These have proved their commitment and effectiveness. Not only is there the Commissioner for Human Rights. The European Committee for the Prevention of Torture, the European Commission against Racism and Intolerance, the Advisory Committee on the Framework Convention for the Protection of National Minorities and the European Committee on Social Rights also play important complementary roles.

18. It should also be remembered that the Council of Europe has a number of information offices which were set up pursuant to Committee of Ministers Resolution (99) 9.

19. The Group noted with great interest the lessons drawn from the Warsaw information office project. In view of the success of this innovative initiative, the functions of such offices could be expanded and strengthened. In particular, they could provide potential applicants with information on admissibility issues and familiarise them with the existing domestic remedies and other, non-judicial remedies. These offices could assist in making citizens more aware of how the Convention operates and so save them from initiating proceedings unnecessarily or prematurely, without exhausting domestic remedies.

20. Furthermore, in many member states, non-judicial institutions such as ombudsmen, petition committees and human rights institutions play or could play a significant role in providing information on, and promoting, human rights.

21. Lastly, civil society plays a significant part in human rights protection. Partnership with civil society has always been important in the Council of Europe. It is reflected inter alia in the participation of many non-governmental organisations in the Organisation’s activities. These play a leading role in the field of human rights protection which it is important to maintain and expand.

The judicial control mechanism

22. The setting up of a Court whose jurisdiction is binding on all the States Parties to the Convention represents the basic mechanism for supervising compliance by the Contracting Parties with the rights recognised in the Convention.

23. The right of individual application enshrined in Articles 34 and 35 of the Convention is the most distinctive feature of this control mechanism. The Court is the only international court
to which any individual, non-governmental organisation or group of individuals have access for the purpose of enforcing their rights under the Convention. The right of individual application is today both an essential part of the system and a basic feature of European legal culture in this field.

24. This protection mechanism confers on the Court at one and the same time a role of individual supervision and a “constitutional” mission. The former consists in verifying the conformity with the Convention of any interference by a state with individual rights and freedoms and making findings as to any violation by the respondent state. Its other function leads it to lay down common principles and standards relating to human rights and to determine the minimum level of protection which states must observe.

25. The Group stresses that the credibility of the human rights protection system depends to a great extent on execution of the Court’s judgments. Full execution of judgments helps to enhance the Court’s prestige and the effectiveness of its action and has the effect of limiting the number of applications submitted to it.

The explosion in the number of cases

26. The exponential increase in the number of individual applications is now seriously threatening the survival of the machinery for the judicial protection of human rights and the Court’s ability to cope with its workload. This dramatic development jeopardises the proper functioning of the Convention’s control system. This trend has been clear since the entry into force of Protocol No. 11 and the abolition of the European Commission of Human Rights.

27. It should be stressed that over 90% of cases brought before the Court are declared inadmissible. At the end of September 2006, 89 000 cases were pending before the Court. Of this total, 24 650 individual communications are awaiting “regularisation” as applications. Many of these cases have been pending for a very long time. In addition, out of the total mentioned above, 21 900 are chamber cases.

28. This situation, which, despite the various measures taken by the Court, is likely to get worse, is extremely serious. If nothing is done to resolve the problem, the system is in danger of collapsing. It is the Group’s responsibility, therefore, to recommend effective measures to remedy this situation on a permanent basis, thus making it possible to ensure the long-term effectiveness of the Convention’s control mechanism. Achieving this is the main purpose of this report.

Protocol No. 14

29. Protocol No. 14 is designed to give the Court the necessary procedural means and flexibility to process all applications within a reasonable time, while enabling it to concentrate on the most important cases. It seeks in particular to reduce the time spent by the Court on manifestly inadmissible and repetitive cases.

30. The changes introduced by Protocol No. 14 will no doubt be extremely useful. The Group can only add its voice to those who have already stressed the need for this protocol to enter rapidly into force.

31. The Group is pleased to note that only one more instrument of ratification is now needed for this protocol to enter into force.

32. It will not be possible to make a final assessment of the effects of the entry into force of Protocol No. 14 until it has been in operation for some time. However, it can already be anticipated that the reforms it introduces will not be sufficient to enable the Court to find any lasting solution to the problem of congestion. According to estimates produced within the Court, the increase in productivity resulting from the implementation of this protocol might be between 20 and 25%.
33. The Group expects Protocol No. 14 to be rapidly implemented. It takes this protocol as a starting point. Its proposals go further than the protocol and are designed to ensure that the Court is able to perform its specific functions fully and on a long-term basis.

34. Lastly, although the Group’s proposals are aimed at the long term, attention should be drawn to the need to take exceptional measures as of now to reduce the backlog. The Group calls on the member states to support the measures which the Court will be required to take for this purpose, by making the necessary resources available to it.

A Court able to perform its essential functions

35. In accordance with Article 32, paragraph 1 of the Convention, “the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto”. The Group believes that the Court should be relieved of a large number of cases which should not “distract” it from its essential role. Manifestly inadmissible or repetitive cases, in particular, need to be considered in this connection.

36. It is important, therefore, to set out measures which will enable the Court to concentrate on its function as the custodian of human rights by relieving it of a whole body of litigation which places an unnecessary burden on it. The raison d'être of this high-level European Court is to monitor states’ compliance with human rights. Its authority and effectiveness will be all the greater if it is able to concentrate on interpretation and application of the Convention through decisions on the merits given within a reasonable time.

37. There is a fundamental conflict between the size of the population who have access to the Court with the right to lodge an individual application and the Court’s responsibility as the final arbiter in human rights matters for so many different states. No other international court is confronted with a workload of such magnitude while having at the same time such a demanding responsibility for setting the standards of conduct required to comply with the Convention.
II. THE PROPOSED REFORM MEASURES

Introduction

38. With a view to proposing reforms based on the foregoing considerations, the Group examined a range of measures relating notably to the functioning of the judicial control system established by the Convention and to decentralised actions at the level of member states. The combined effect of the different proposals adopted should ensure the efficient long-term functioning of the control mechanism.

39. The measures which the Group is proposing concern the structure and modification of the judicial machinery, the relations between the Court and the States Parties to the Convention, alternative (non-judicial) or complementary means of resolving disputes and the institutional status of the Court and judges. They are arranged under ten headings:

1. Greater flexibility of the procedure for reforming the judicial machinery
2. Establishment of a new judicial filtering mechanism
3. Enhancing the authority of the Court’s case-law in the States Parties
4. Forms of co-operation between the Court and the national courts – Advisory opinions
5. Improvement of domestic remedies for redressing violations of the Convention
6. The award of just satisfaction
7. The “pilot judgment” procedure
8. Friendly settlements and mediation
9. Extension of the duties of the Commissioner for Human Rights
10. The institutional dimension of the control mechanism.

40. The Group also considered other possible lines of reform which it finally decided not to pursue.

41. Thus, it thought that the setting up of “regional courts of first instance” would entail a risk of diverging case-law and be costly. An innovation of this kind would also be likely to raise a large number of procedural issues.

42. The Group also decided not to pursue the idea of giving the Court a discretionary power to decide whether or not to take up cases for examination (a system analogous to the certiorari procedure of the United States Supreme Court). It felt that a power of this kind would be alien to the philosophy of the European human rights protection system. The right of individual application is a key component of the control mechanism of the Convention and the introduction of a mechanism based on the certiorari procedure would call it into question and thus undermine the philosophy underlying the Convention. Furthermore, a greater margin of appreciation would entail a risk of politicising the system as the Court would have to select cases for examination. The choices made might lead to inconsistencies and might even be considered arbitrary.

43. The Group is fully aware that implementation of the ideas and proposals put forward in this report is not budget-neutral. It feels, however, that it is essential to accept the additional cost involved in view of the importance of the issue at stake, which is nothing less than ensuring the long-term effectiveness of the control mechanism of the Convention. The Group’s discussions have therefore been structured around three main objectives, the first being to harmonise the principles underpinning the Convention system, the second to ensure its long-term effectiveness and the third to guarantee its budgetary viability.
A. CONCERNING THE STRUCTURE AND MODIFICATION OF THE JUDICIAL MACHINERY

1. Greater flexibility of the procedure for reforming the judicial machinery

44. The Group believes that it is essential to make the judicial system of the Convention more flexible. This aim could be achieved through an amendment to the Convention authorising the Committee of Ministers to carry out reforms by way of unanimously adopted resolutions without an amendment to the Convention being necessary each time.

45. This method has been used on numerous occasions in the European Communities. One notable example was the setting up of the Court of First Instance. The Treaty of Nice subsequently introduced the possibility for the Council to create "judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas". It was this means that was employed to set up the new European Union Civil Service Tribunal. In addition, under Article 245, second paragraph, of the treaty, the provisions of the Statute of the Court of Justice of the European Communities, with the exception of Title I, may also be amended by the Council acting unanimously. This reform facilitated the adjustments to the Community judicial system that were deemed necessary having regard to the trends in litigation.

46. Such a method could prove effective in the long term as a tool for making the Convention system more flexible and capable of adapting to new circumstances. The Group notes, however, that this method cannot apply to the substantive rights set forth in the Convention or to the principles governing the judicial system. Furthermore, any amendment would have to be subject to the Court's approval.

47. The idea underlying the proposal is to create a system structured around three levels of rules governing the system, viz.:

– first of all, the Convention itself and its protocols, for which the amendment procedure would remain unchanged;
– secondly, the "statute" of the Court, i.e. a legal level whose content would need to be defined, comprising provisions relating to the operating procedures of the Court (and the "Judicial Committee" – see paragraphs 51 et seq.);
– lastly, texts such as the Rules of Court, which could be amended by decisions taken by the Court itself.

48. The innovation suggested by the Group is the establishment of a "second" level of rules: the statute. The provisions of a statute could be amended by the Committee of Ministers, with the Court's approval.

49. If the European Union model were to be followed, the statute would be appended to the Convention and would form part of it, but, in accordance with a provision of the Convention itself, its provisions, with some exceptions, would be subject to a "simplified" amendment procedure, i.e. by decision of the Committee of Ministers with the Court's agreement. The statute of the Court should include all the provisions of section II of the Convention (and those governing the operation of the Judicial Committee, see paragraphs 51 et seq.) with the exception of the following provisions, which could either be kept in the body of the Convention or included in the statute, but would be explicitly excluded from any possibility of "simplified" amendment:

– Article 19 (Establishment of the Court)
– Article 20 (Number of judges)
– Article 21 (Criteria for office)
– Article 22 (Election of judges)
– Article 23 (Terms of office and dismissal)
– Article 24, paragraph 1 (Registry)
– Article 32 (Jurisdiction of the Court)
– Article 33 (Interstate cases)
– Article 34 (Individual applications)
– Article 35, paragraph 1 (Admissibility criteria)
– Article 46 (Binding force and execution of judgments)
– Article 47 (Advisory opinions)
– Article 51 (Privileges and immunities of judges)

50. The criterion governing this choice is the removal from the “simplified” amendment procedure of provisions defining key institutional, structural and organisational elements of the judicial system of the Convention, namely the establishment of the Court, its jurisdiction and the status of its judges.

2. Establishment of a new judicial filtering mechanism

51. The Group notes that Protocol No. 14 opens up significant possibilities for more efficient processing of cases by assigning new responsibilities to committees of three judges and by introducing the figure of the single judge. The Court is currently studying ways of implementing these possibilities, in particular a system whereby a number of judges might perform these new functions on an annual rotating basis.

52. The Group, whose proposals are aimed at the long term, beyond Protocol No. 14, recommends the setting up of a judicial filtering body which would be attached to, but separate from the Court, in order to guarantee, on the one hand, that individual applications result in a judicial decision and, on the other, that the Court is relieved of a large number of cases, enabling it to focus on its essential role. This body would be called the “Judicial Committee”. It would, in particular, perform functions which, under Protocol No. 14, are assigned to committees of three judges and single judges.

53. The members of the Judicial Committee would be judges enjoying full guarantees of independence. Their number should be less than the number of member states. It would be decided – and could be modified – by the Committee of Ministers on a proposal from the Court. The composition of the Judicial Committee should reflect a geographical balance as well as a harmonious gender balance and should be based on a system of rotation between states. The term of office of its members would be limited in duration in accordance with rules to be laid down by the Committee of Ministers.

54. The members of the Judicial Committee, like those of the Court, should be of high moral character and possess the qualifications required for appointment to judicial office. They would be subject to the same requirements as the members of the Court with regard to impartiality and meeting the demands of a full-time office. Candidates’ professional qualifications and knowledge of languages should be assessed by the Court in an opinion prior to their election by the Parliamentary Assembly.

55. In principle, the Judicial Committee would have jurisdiction to hear:
– all applications raising admissibility issues;
– all cases which could be declared manifestly well-founded or manifestly ill-founded on the basis of well-established case-law of the Court.

56. The power of the Judicial Committee to hear cases on the merits would also entail, where such cases are concerned, the exercise of the same powers as the Court in respect of just satisfaction (in this connection, see paragraphs 94 et seq.).
57. Institutionally and administratively, the Judicial Committee would come under the Court’s authority. The Group considers that, in order to ensure harmonious co-operation between the two bodies, the Chair of the Judicial Committee should be a member of the Court appointed by the Court for a set period.

58. For the same reason, the Judicial Committee should draw on the support of the Registry of the Court. It would be useful if a section of the Registry were assigned to the Committee. This section could be headed by a deputy registrar. There should be no rigid separation, however, so that it is possible to make optimum use of the Registry’s human resources by placing its staff members’ professional and linguistic skills at the service of both bodies.

59. As is already the case at present, each application should first be examined by the Registry, which would then refer it either to the Judicial Committee where it appears in principle to fall within its jurisdiction, or, if not, to the Court.

60. The Group considers that, if effective filtering of the many inadmissible applications is to be achieved, it is important to ensure that applications provide all the information necessary for assessing their admissibility within the time-limit set by the Convention and that the time-limit is strictly applied, save in exceptional circumstances where the Court or the Judicial Committee might give leave for an application to be lodged out of time. The Group is pleased to note that the Court has devised an application form which will soon be available in electronic form. When the Registry receives an application which seems admissible but does not contain all the information needed to assess its admissibility, it should quickly make the form available to the applicant and draw his or her attention to the need to submit an application in the proper form within the time-limit set by the Convention.

61. The Judicial Committee could refer a case to the Court either if it considered that it lacked jurisdiction or if it considered that the case raised admissibility or substantive issues which would warrant consideration by the Court.

62. The Court could also refer a case to the Judicial Committee if it considered that the case fell within the jurisdiction of the latter. It could, however, decide to keep the case if it deemed this preferable in the interests of the proper administration of justice, for example for reasons of procedural economy.

63. The Group believes that it would be inappropriate to provide for the possibility of appealing against the decisions of the Judicial Committee. Providing for such a possibility would place an additional burden on the control system and jeopardise the aim of easing the Court’s workload.

64. However, the Court should be given a special power allowing it, of its own motion, to assume jurisdiction to review any decision adopted by the Judicial Committee. This procedure could be initiated by the President of the Court or by the Chair of the Committee (him/herself a member of the Court).

65. The decisions of the Judicial Committee should, in principle, be taken by benches of three judges. However, since the Judicial Committee would perform, among others, functions which, under Protocol No. 14, are assigned to a single judge, the Group considers it appropriate that provision should also be made for manifestly inadmissible cases to be heard by a single judge.
B. CONCERNING THE RELATIONS BETWEEN THE COURT AND THE STATES PARTIES TO THE CONVENTION

3. Enhancing the authority of the Court’s case-law in the States Parties

66. The dissemination of the Court’s case-law and recognition of its authority above and beyond the judgment’s binding effect on the parties would no doubt be important elements in ensuring the effectiveness of the Convention’s judicial control mechanism.

67. It was with this in mind that, in the interim report, the Group referred to the possibility of making certain recommendations on “judgments of principle”.

68. After discussing the matter in greater depth, the Group believes that it would be difficult to arrive at a precise definition of this category of judgments. Furthermore, it is not always possible to identify in advance all the cases that might give rise to judgments of principle.

69. The Group therefore does not make any proposal as to a specific procedure for dealing with such cases. It merely recommends that judgments of principle – like all judgments which the Court considers particularly important – be more widely disseminated.

70. The authority of the Court’s case-law could also be enhanced through judicial co-operation with national courts. This aspect is dealt with in paragraphs 76 et seq.

71. The Group considers that national judicial and administrative institutions should be able to have access to the case-law of the Court in their respective language. This would assist them in identifying any judgments which might be relevant to deciding the cases before them.

72. In the Group’s view, responsibility for translation, publication and dissemination of case-law lies with the member states and their competent bodies. Each country should make its own arrangements while taking due account of the importance of these texts.

73. On the other hand, it is for the Court to decide, as is already the case, which judgments to publish in full (or in summary form, as the case may be, including judgments on the admissibility of applications) and to ensure a structured presentation of these documents. Regular production of handbooks or other summaries in languages other than the Council of Europe official languages, in hard copy and/or in electronic form, might also constitute a useful means of dissemination.

74. These publications should be distributed as widely as possible, particularly within public institutions such as courts, investigative bodies and prison administrations, and non-state entities such as bar associations and professional organisations. Law faculties should also figure among the most important recipients of these publications. The basic principles of international and European law should be compulsory subjects in both secondary and university-level education.

75. In this connection, the Group emphasises the importance of implementing Committee of Ministers Recommendation (2002) 13 and Resolution (2002)58 of 18 December 2002, on the publication and dissemination in the member states of the text of the Convention and the case-law of the European Court of Human Rights.

4. Forms of co-operation between the Court and the national courts – Advisory opinions

76. The Group paid close attention to the relations between the Court and the national courts. The latter have responsibility for protecting human rights by upholding the Convention within their sphere of competence.

77. It should be noted in this connection that the national courts are called upon in particular to guarantee the effectiveness of domestic remedies and, where appropriate, the award of just sat-
isfaction and proper execution of the Court’s judgments. The Group therefore recommends that the Council of Europe continue and expand as far as possible its activities relating to human rights training for national judges.

78. The role of the member states’ highest courts in applying the Convention is of paramount importance. The Group notes with satisfaction that the Court is maintaining and expanding its contacts with these courts. It emphasises the usefulness of those contacts and the importance of maintaining and even strengthening them.

79. The Group studied the possibility of institutionalising the links between the Court and the highest courts in the member states.

80. In this connection, the introduction of a preliminary ruling mechanism on the model of that existing in the European Union was discussed. However, the Group reached the conclusion that the EU system is unsuitable for transposition to the Council of Europe. The preliminary ruling mechanism represents an alternative model to the judicial control established by the Convention, which requires domestic remedies to be exhausted. The combination of the two systems would create significant legal and practical problems and would considerably increase the Court’s workload.

81. On the other hand, the Group considers that it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto. This is an innovation which would foster dialogue between courts and enhance the Court’s “constitutional” role.

82. Requests for an opinion would always be optional for the national courts and the opinions given by the Court would not be binding.

83. The rules governing this category of advisory opinions should differ from those governing opinions given at the request of the Committee of Ministers, which are provided for under Article 47 of the Convention. Opinions given at the request of a national court should not be subject to the restrictions laid down in paragraph 2 of that provision.

84. The Group also believes that, to enhance the judicial authority of this type of advisory opinion, all the States Parties to the Convention should have the opportunity to submit observations to the Court on the legal issues on which an opinion is requested.

85. The Group is aware of the repercussions which the proliferation of requests for opinions might have on the Court’s workload and resources, since the requests for opinions and the member states’ observations would also need to be translated. In addition, providing such opinions would not be the Court’s principal judicial function. Accordingly, the Court’s new advisory jurisdiction should be subject to strict conditions.

86. It is proposed in this connection that:
   a. only constitutional courts or courts of last instance should be able to submit a request for an opinion;
   b. the opinions requested should only concern questions of principle or of general interest relating to the interpretation of the Convention or the protocols thereto.
   c. the Court should have discretion to refuse to answer a request for an opinion. For example, the Court might consider that it should not give an answer in view of the state of its caselaw or because the subject matter of the request overlaps with that of a pending case. It would not have to give reasons for its refusal.

5. Improvement of domestic remedies for redressing violations of the Convention

87. The Group considers that, to ensure effective judicial protection of the rights secured by the Convention, domestic remedies for redressing violations of those rights should be improved.
88. The length of proceedings in civil, criminal and administrative cases, which is one of the main sources of litigation before the Court, highlights the need for such an improvement. Registry statistics show that the relevant cases represent a considerable workload for the Court. It has been estimated that this category of cases accounted for 25% of all judgments delivered in 2005.

89. One of the reasons for this profusion of cases is the fact that the majority of states do not have domestic procedures for redressing the damage resulting from the length of proceedings. The same question arises with regard to other violations, such as excessive length of detention pending trial, which is prohibited by Article 5, paragraph 3 of the Convention.

90. Several countries have introduced legislative, judicial and other machinery to remedy this type of shortcoming. The purpose of these solutions is to enhance the subsidiary nature of the central control mechanism by giving potential applicants satisfaction at domestic level before they submit an application to the Court.

91. Provided it is effective, the introduction of such a mechanism at domestic level would relieve the Court of a considerable number of cases. Persons seeking justice would not need to apply to the Court to obtain redress. In accordance with the rule of subsidiarity, it would be for the States Parties to pass appropriate legislation. States should, however, comply with a number of uniform criteria which can be derived from the Court’s case-law.

92. Indeed, in a Grand Chamber judgment (cf. Scordino v. Italy No. 1 of 29 March 2006 – No. 183), the Court set out the guidelines to be adopted:

- a combination of two types of remedy, one designed to expedite the proceedings, the other to afford compensation;
- in the latter case, there is a margin of appreciation depending, inter alia, on the standard of living in the country concerned;
- an application for compensation must remain an effective, adequate and accessible remedy. It must comply with the reasonable-time requirement;
- the same applies to the execution of the decision;
- the applicable procedural rules may not be exactly the same as for ordinary applications for damages;
- procedural and registration costs must not significantly reduce the compensation requested;
- where the national court has not afforded appropriate and sufficient “redress”, the applicants can still claim to be “victims” and obtain compensation from the Court for pecuniary and non-pecuniary damage and the payment of costs and expenses.

93. Going beyond Recommendation (2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies, a Convention text should be introduced placing an explicit obligation on the States Parties to introduce domestic legal mechanisms consistent with the criteria noted above to redress the damage resulting from any violation of the Convention, and especially those resulting from structural or general shortcomings in a state’s law or practice.

6. The award of just satisfaction

94. The Group considers that changes to the rules laid down in Article 41 of the Convention are necessary. The proposed reform would concern the function assigned both to the Court and to the Judicial Committee, which, in cases where it was competent to find a violation of the Convention, would exercise the same powers as the Court in this regard. The proposal is based on the principle of subsidiarity and is inspired by a concern to relieve the Court and the Judicial Committee of tasks which could be carried out more effectively by national bodies. This would apply in particular where expert reports were needed owing to the factual complexity of a case.

95. The question does not arise where the Court or, where appropriate, the Judicial Committee, finds a violation of the Convention but considers that there are no grounds for awarding com-
pensation to the victim, in particular because full reparation is possible or because the judgment finding the violation constitutes sufficient reparation in itself.

96. On the other hand, where the Court or, where appropriate, the Judicial Committee holds that the victim must be awarded compensation, it is proposed that the general rule should be that the decision on the amount of compensation is referred to the state concerned. However, the Court and the Judicial Committee would have the power to depart from this rule and give their own decision on just satisfaction where such a decision is found to be necessary to ensure effective protection of the victim, and especially where it is a matter of particular urgency.

97. Where the decision on the amount of compensation is referred to the state, it should discharge this obligation within the time-limit set by the Court or the Judicial Committee.

98. It would be for the state to determine the arrangements for affording just satisfaction while complying with the following requirements:

– each state should designate a judicial body with responsibility for determining the amount of compensation and inform the Committee of Ministers of the Council of Europe of the body so designated;

– the progress of the procedure should not be hindered by unnecessary formalities or the charging of unreasonable costs or fees.

99. Lastly, the determination of the amount of compensation should be consistent with the criteria laid down in the Court’s case-law and the victim would be able to apply to the Court, or to the Judicial Committee where the latter gave the decision finding a violation of the Convention, to challenge the national decision by reference to those criteria, or where a state failed to comply with the deadline set for determining the amount of compensation.

7. The “pilot judgment” procedure

100. Among the many different initiatives taken by the Court to speed up the processing of the cases brought before it, the Group focused particular attention on the measures to facilitate increased use of the “pilot judgment” procedure.

101. In its judgment of 22 June 2004 in the Broniowski v. Poland case, which concerned the compatibility with the Convention of legislative provisions affecting a large number of people (approximately 80,000), the Court for the first time found a systemic violation, which it defined as a situation where “the facts of the case disclose the existence, within the [domestic] legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of [a right safeguarded by the Convention]” and where “the deficiencies in national law and practice identified in the applicant’s individual case may give rise to numerous subsequent well-founded applications”. The Court also found in this case that the violation originated in a “widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons”.

102. In that connection, the Court directed that “the respondent state must, through appropriate legal measures and administrative practice, secure the implementation of the property right in question in respect of the remaining […] claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1”.

103. The object in the Court’s designating a case for a “pilot-judgment procedure” is to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the Convention right in question in the national legal order. One of the relevant factors considered by the Court in devising and applying that procedure has been the growing threat to the Convention system resulting from large numbers of repetitive cases that derive from, among other things, the same structural or systemic problem (see judgment of 19 June 2006 in the case of Hutten-Czapska v. Poland, paragraph 234).
104. In its Rules for the supervision of the execution of judgments of 10 May 2006 [CM (2006) 90], the Committee of Ministers said that it will give priority to supervision of judgments in which the Court has identified a systemic problem (Rule 4, paragraph 1). In addition, Resolution (2004) 3 of the Committee of Ministers on judgments revealing an underlying systemic problem invited the Court to identify in these judgments what it considered to be the underlying systemic problem and the source of this problem and to notify such judgments to, among others, the states concerned and the Committee of Ministers.

105. The Group supports these developments. In the light of practical experience, consideration would need to be given in future to the question of whether the existing judicial machinery, including the Court’s rules of procedure, will suffice for this model to be able to produce the desired results or whether a reform of the Convention should be contemplated in this connection. In any event, the Group encourages the Court to use the “pilot judgment” procedure as far as possible in future. To ensure that victims who have already applied to the Court do not have to wait indefinitely for just satisfaction, time-limits subject to supervision by the Court should be laid down.

C. CONCERNING ALTERNATIVE (NON-JUDICIAL) OR COMPLEMENTARY MEANS OF RESOLVING DISPUTES

8. Friendly settlements and mediation

106. The Group notes that Protocol No. 14, in an amendment to Article 39 of the Convention, provides that the Court “may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights”.

107. The Group also notes with approval that the Registry of the Court is already stepping up its efforts to encourage parties to reach friendly settlements in cases that lend themselves to the mediation approach.

108. In order to reduce the Court’s workload still further and to assist both victims and member states, recourse to mediation at national or Council of Europe level should be encouraged where the Court, and more particularly the Judicial Committee, considers that an admissible case lends itself to such a solution. Proceedings in the cases concerned would be suspended for a limited and identified period pending the outcome of the mediation. This method of settlement would in any event be subject to the parties’ agreement.

9. Extension of the duties of the Commissioner for Human Rights

109. Appointed under Resolution (99) 50 of the Committee of Ministers, the Commissioner for Human Rights functions independently and impartially 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, promote the effective implementation of these standards by member states and assist them, with their agreement, in their efforts to remedy such shortcomings”. Protocol No. 14 introduces a provision allowing the Commissioner to submit written observations and take part in hearings before the Court.

110. The Group considers that the Commissioner should have the necessary resources to be able to play a more active role in the Convention’s control system, acting either alone or in cooperation with European and national non-judicial bodies. In particular, the Commissioner should respond actively to the announcement of Court decisions finding serious violations of
human rights. The Commissioner could also promote the setting up of bodies with responsibility for resolving human rights violations through mediation at national level.

111. Under his mandate, the Commissioner facilitates the activities of national ombudsmen and similar institutions. However, these are not always competent in human rights matters. The Committee of Ministers might consider adopting a recommendation with the aim of assigning such competence to them.

112. The Group notes with approval that the Commissioner is extending his current co-operation with national and regional ombudsmen and national human rights institutes in order to form an active network of all these institutions, so as to disseminate appropriate information on human rights and, as far as their competence permits, take action on alleged violations and abuses.

113. This network could help to reduce the Court’s workload with the active support of the Commissioner, who could identify a specific problem in a state likely to trigger a large number of applications to the Court and help to find a solution to the problem at national level in conjunction with the national ombudsman. National ombudsmen could also play a role in informing the public about the right to apply to the Court by distributing application forms and, above all, informing the public about the Court’s mandate and competence and about the admissibility criteria contained in the Convention.

D. CONCERNING THE INSTITUTIONAL STATUS OF THE COURT AND THE JUDGES

10. The institutional dimension of the control mechanism

114. The Group considered a number of institutional issues which are of undoubted importance for the effectiveness of the Convention’s judicial control system.

115. They looked first of all at the question of whether the existing legal framework offers all the guarantees that are essential to ensure the independence of judges.

116. In this connection, they noted the total lack of any social security scheme (coverage for medical expenses and pension entitlement). It considers the setting up of such a scheme to be of vital importance.

117. Secondly, the Group considers that the professional qualifications and knowledge of languages of candidates for the post of judge should be carefully examined during the election procedure.

118. For this purpose, before the Parliamentary Assembly considers the candidatures, an opinion on the suitability of the candidates could be given by a committee of prominent personalities possibly chosen from among former members of the Court, current and former members of national supreme or constitutional courts and lawyers with acknowledged competence.

119. The Group also looked at the particularly sensitive issue of the number of judges. It noted that the present system as provided for under Article 20 of the Convention is based on the principle that the Court consists of a number of judges equal to the number of States Parties to the Convention.

120. In the Group’s opinion, the logic underlying the new role proposed for the Court and the setting up of the Judicial Committee should lead in due course to a reduction in the number of judges, bringing it into line with the Court’s functional requirements and the need to ensure consistency of case-law.

121. The Group therefore recommends limiting the number of members of the Court while ensuring the presence of a national judge of the State Party to a dispute through the appointment of an ad hoc judge. In order to respect the principle of equality between States Parties to the Conven-
vention, it would be appropriate if the judges were elected on the basis of a system of rotation between states.

122. It should be noted that, in most international courts, the number of judges is significantly less than the number of States Parties. It need only be pointed out that the International Court of Justice consists of 15 judges and that the Inter-American Court of Human Rights based in San José (Costa Rica) – which, like the European Court, protects human rights in a regional framework – has only 7 judges for 23 States Parties.

123. The foregoing considerations may be applied to the proposed Judicial Committee, subject to the following reservations: first, it would be appropriate for the Court to participate in the procedure for electing the members of this Committee, and secondly, it would be disproportionate to provide for the presence of a national judge of the respondent member state in all cases coming under this Committee’s jurisdiction.

124. Lastly, in the interests of enhancing the Court’s independence and effectiveness, the Group recommends granting it the greatest possible operational autonomy, as regards in particular the presentation and management of its budget and the appointment, deployment and promotion of its staff.
III. SUMMARY

125. The survival of the machinery for the judicial protection of human rights and the Court's ability to cope with its workload are seriously under threat from an exponential increase in the number of individual applications which jeopardises the proper functioning of the Convention's control system. It is essential to recommend effective measures to remedy this situation on a permanent basis, thus making it possible to ensure the long-term effectiveness of the Convention's control mechanism, without the right of individual application being affected, and allowing the Court to concentrate on its function as the custodian of human rights by relieving it of a whole body of litigation which places an unnecessary burden on it.

The proposed reform measures

126. The Group has adopted a set of proposals of different kinds, which, combined, should ensure the efficient functioning of the control mechanism in the long term.

A. Concerning the structure and modification of the judicial machinery

1. Greater flexibility of the procedure for reforming the judicial machinery

127. The Group believes that it is essential to make the judicial system of the Convention more flexible. This could be achieved through an amendment to the Convention authorising the Committee of Ministers to carry out reforms by way of unanimously adopted resolutions without an amendment to the Convention being necessary each time. This method would make the Convention system more flexible and capable of adapting to new circumstances, but would not apply to the substantive rights set forth in the Convention or to the principles governing the judicial system.

128. The system created would be structured around three levels of rules, namely:
   – the Convention itself and its protocols, for which the amendment procedure would remain unchanged;
   – the "statute" of the Court, i.e. a legal level whose content would need to be defined, comprising provisions relating to the operating procedures of the Court. This second level would be an innovation. The provisions of this statute could be amended by the Committee of Ministers with the Court's approval;
   – texts such as the Rules of Court, which could be amended by the Court itself.

2. Establishment of a new judicial filtering mechanism

129. A judicial filtering body should be set up which would be attached to, but separate from, the Court, in order to guarantee, on the one hand, that individual applications result in a judicial decision and, on the other, that the Court can be relieved of a large number of cases and focus on its essential role.

130. The members of the Judicial Committee would be judges enjoying full guarantees of independence. Their number should be less than the number of member states. It would be decided – and could be modified – by the Committee of Ministers on a proposal from the Court. The composition of the Judicial Committee should reflect a geographical balance as well as a harmonious gender balance and should be based on a system of rotation between states. The term of office of its members would be limited in duration in accordance with rules to be laid down by the Committee of Ministers.

131. The members of the Judicial Committee, like those of the Court, should be of high moral character and possess the qualifications required for appointment to judicial office. They would be subject to the same requirements as the members of the Court with regard to impartiality and meeting the demands of a full-time office. Candidates' professional qualifications and knowledge of languages should be assessed by the Court in an opinion prior to their election by the Parliamentary Assembly.
132. The Judicial Committee would have jurisdiction to hear all applications raising admissibility issues and all cases which could be decided on the basis of well-established case-law of the Court allowing an application to be declared either manifestly well founded or manifestly ill founded. The Judicial Committee’s jurisdiction to decide cases on the merits would involve, where such cases are concerned, the exercise of the same powers as the Court in respect of just satisfaction.

133. Institutionally and administratively, the Judicial Committee would come under the Court’s authority. It would be chaired by a member of the Court, appointed by the latter for a set period, and would draw on the support of the Registry of the Court, thus enabling it to make optimum use of the Registry’s human resources. There would be no possibility of appealing against the decisions of the Judicial Committee, although the Court would have a special power allowing it, of its own motion, to assume jurisdiction in order to review any decision adopted by the Judicial Committee.

B. Concerning the relations between the Court and the States Parties to the Convention

3. Enhancing the authority of the Court’s case-law in the States Parties

134. The dissemination of the Court’s case-law and recognition of its authority above and beyond the judgment’s binding effect on the parties would no doubt be important elements in ensuring the effectiveness of the Convention’s judicial control mechanism. The Group recommends that judgments of principle and judgments which the Court considers particularly important be more widely disseminated in line with the recommendations of the Committee of Ministers.

4. Forms of co-operation between the Court and the national courts – Advisory opinions

135. The Group considers that it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto, in order to foster dialogue between courts and enhance the Court’s “constitutional” role. Requests for an opinion, which would be submitted only by constitutional courts or courts of last instance, would always be optional and the opinions given by the Court would not be binding.

5. Improvement of domestic remedies for redressing violations of the Convention

136. Domestic remedies for redressing violations of the rights secured by the Convention should be improved. The length of proceedings in civil, criminal and administrative cases, which is one of the main sources of litigation before the Court, highlights the need for such an improvement, which would be achieved by means of a Convention text placing an explicit obligation on the States Parties to introduce domestic legal mechanisms to redress the damage resulting from any violation of the Convention, and especially those resulting from structural or general shortcomings in a state’s law or practice.

6. The award of just satisfaction

137. Changes to the rules laid down in Article 41 of the Convention are necessary to relieve the Court and the Judicial Committee of tasks which could be carried out more effectively by national bodies (especially when expert reports are needed).

138. Where the Court or, where appropriate, the Judicial Committee holds that the victim must be awarded compensation, the decision on the amount of compensation would be referred to the state concerned. However, the Court or, as appropriate, the Judicial Committee would have the power to depart from this rule and give its own decision on just satisfaction where such a decision was found to be necessary.

139. The state should discharge its obligation to award compensation within the time-limit set by the Court or the Judicial Committee. It would be for the state to determine the arrangements for this, while complying with certain requirements. The amount of compensation should be consistent with the criteria laid down in the Court’s case-law. The victim would be able to apply to the Court or to the Judicial Committee where the latter gave the decision finding a violation
of the Convention, to set aside the national decision by reference to those criteria, or where the state failed to comply with the time-limit set for determining the amount of compensation.

7. The “pilot judgment” procedure

140. The Group encourages the Court to make the fullest possible use of the “pilot judgment” procedure. In the light of practical experience, consideration would need to be given in future to the question of whether the existing judicial machinery, including the Court’s rules of procedure, will suffice for this model to be able to produce the desired results or whether a reform of the Convention should be contemplated in this connection.

C. Concerning alternative (non-judicial) or complementary means of resolving disputes

8. Friendly settlements and mediation

141. In order to reduce the Court’s workload, recourse to mediation at national or Council of Europe level should be encouraged where the Court, and more particularly the Judicial Committee, considers that an admissible case lends itself to such a solution. Proceedings in the cases concerned would be suspended pending the outcome of mediation. This method of settlement would be subject to the parties’ agreement.

9. Extension of the duties of the Commissioner for Human Rights

142. The Group considers that the Commissioner should have the necessary resources to be able to play a more active role in the Convention’s control system, acting either alone or in cooperation with European and national non-judicial bodies. In particular, the Commissioner should respond actively to the announcement of Court decisions finding serious violations of human rights. The Commissioner could also lend his assistance to mediation machinery at national level. Under his mandate, the Commissioner facilitates the activities of national ombudsmen and similar institutions. The Committee of Ministers might consider adopting a recommendation aimed at assigning them competence in human rights matters in all cases. The Group notes with approval that the Commissioner is extending his current cooperation with national and regional ombudsmen and national human rights institutes in order to form an active network of all these institutions. This network could help to reduce the Court’s workload with the active support of the Commissioner.

D. Concerning the institutional status of the Court and judges

10. The institutional dimension of the control mechanism

143. The Group thought that the existing legal framework should offer all the guarantees that are essential to ensure the independence of judges. In this connection, it considers the setting up of a social security scheme (coverage for medical expenses and pension entitlement) to be of vital importance.

144. The professional qualifications and knowledge of languages of candidates for the post of judge should be carefully examined during the election procedure. For this purpose, before the Parliamentary Assembly considers the candidatures, an opinion on the suitability of the candidates could be given by a committee of prominent personalities possibly chosen from among former members of the Court, current and former members of national supreme or constitutional courts and lawyers with acknowledged competence. As regards the members of the proposed Judicial Committee, the prior opinion should be given by the Court.

145. The Group also looked at the particularly sensitive issue of the number of judges. In the Group’s opinion, the logic underlying the new role proposed for the Court and the setting up of the Judicial Committee should lead in due course to a reduction in the number of judges.

146. Lastly, in the interests of enhancing the Court’s independence and effectiveness, the Group recommends granting it the greatest possible operational autonomy, as regards in particular the presentation and management of its budget and the appointment, deployment and promotion of its staff.
APPENDIX II: IMPACT OF PROTOCOL NO. 14
The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

ARTICLE 1

Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

1. This document reproduces an unofficial consolidated version of the Convention, as it will look once Protocol No. 14 amending the control system of the Convention (CETS No. 194), which was opened for signature on 13 May 2004, has entered into force. The original text of the Convention of 4 November 1950 (ETS No. 5) had previously been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these protocols were replaced by Protocol No. 11 (ETS No. 155), which entered into force on 1 November 1998. On that date, Protocol No. 9 (ETS No. 140), which had entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS No. 146) lost its purpose.

The current state of signatures and ratifications of the Convention and its protocols is available at http://conventions.coe.int/.

2. Heading added according to the provisions of Protocol No. 11 (ETS No. 155).
SECTION I

RIGHTS AND FREEDOMS

ARTICLE 2

Right to life

1 Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   a in defence of any person from unlawful violence;
   b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   c in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4

Prohibition of slavery and forced labour

1 No one shall be held in slavery or servitude.

2 No one shall be required to perform forced or compulsory labour.

3 For the purpose of this article the term “forced or compulsory labour” shall not include:
   1. a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
   2. b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
   3. c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
   4. d any work or service which forms part of normal civic obligations.

ARTICLE 5

Right to liberty and security

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   a the lawful detention of a person after conviction by a competent court;
   b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
   c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
   d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

1. Heading added according to the provisions of Protocol No. 11 (ETS No. 155).
the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

ARTICLE 6¹

Right to a fair trial

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:
   a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b to have adequate time and facilities for the preparation of his defence;
   c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7¹

No punishment without law

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

1. Heading added according to the provisions of Protocol No. 11 (ETS No. 155).
Appendix II: Impact of Protocol No. 14

2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

Freedom of thought, conscience and religion

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11

Freedom of assembly and association

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of

1. Heading added according to the provisions of Protocol No. 11 (ETS No. 155).
lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

ARTICLE 12¹
Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 13¹
Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

ARTICLE 14¹
Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 15¹
Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ARTICLE 16¹
Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17¹
Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

¹ Heading added according to the provisions of Protocol No. 11 (ETS No. 155).
Appendix II: Impact of Protocol No. 14

ARTICLE 18

Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Section II

EUROPEAN COURT OF HUMAN RIGHTS

ARTICLE 19

Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as “the Court”. It shall function on a permanent basis.

ARTICLE 20

Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

ARTICLE 21

Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

ARTICLE 22

Election of judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

ARTICLE 23

Terms of office and dismissal

1. The judges shall be elected for a period of nine years. They may not be re-elected.
2. The terms of office of judges shall expire when they reach the age of 70.
3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

1. Heading added according to the provisions of Protocol No. 11 (ETS No. 155).
2. New Section II according to the provisions of Protocol No. 11 (ETS No. 155).
3. Text amended according to the provisions of Protocol No. 14 (CETS No. 194).
ARTICLE 24

Registry and rapporteurs

1 The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court.

2 When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court’s registry.

ARTICLE 25

Plenary Court

The plenary Court shall

- elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- set up Chambers, constituted for a fixed period of time;
- elect the Presidents of the Chambers of the Court; they may be re-elected;
- adopt the rules of the Court;
- elect the Registrar and one or more Deputy Registrars;
- make any request under Article 26, paragraph 2.

ARTICLE 26

Single-judge formation, committees, Chambers and Grand Chamber

1 To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges.

2 The Court’s Chambers shall set up committees for a fixed period of time.

3 At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.

4 When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.

5 There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

6 The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

ARTICLE 27

Competence of single judges

1 A single judge may declare inadmissible or strike out of the Court’s list of cases an application submitted under Article 34, where such a decision can be taken without further examination.

2 The decision shall be final.

3 If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.

---

1. Article renumbered and text amended according to the provisions of Protocol No. 14 (CETS No. 194).
2. New article according to the provisions of Protocol No. 14 (CETS No. 194).
ARTICLE 28\(^1\)

**Competence of committees**

1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote, 
   \(a\) declare it inadmissible or strike it out of its list of cases, where such decision can be taken 
   without further examination; or
   \(b\) declare it admissible and render at the same time a judgment on the merits, if the underly-
   ing question in the case, concerning the interpretation or the application of the Convention 
   or the Protocols thereto, is already the subject of well-established case-law of the Court.

2. Decisions and judgments under paragraph 1 shall be final.

3. If the judge elected in respect of the High Contracting Party concerned is not a member of the 
   committee, the committee may at any stage of the proceedings invite that judge to take the place 
   of one of the members of the committee, having regard to all relevant factors, including 
   whether that Party has contested the application of the procedure under paragraph 1.\(b\).

ARTICLE 29\(^2\)

**Decisions by Chambers on admissibility and merits**

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a 
   Chamber shall decide on the admissibility and merits of individual applications submitted 
   under Article 34. The decision on admissibility may be taken separately.

2. A Chamber shall decide on the admissibility and merits of inter-state applications submitted 
   under Article 33. The decision on admissibility shall be taken separately unless the Court, in 
   exceptional cases, decides otherwise.

ARTICLE 30

**Relinquishment of jurisdiction to the Grand Chamber**

Where a case pending before a Chamber raises a serious question affecting the interpretation 
of the Convention or the protocols thereto, or where the resolution of a question before the 
Chamber might have a result inconsistent with a judgment previously delivered by the Court, the 
Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of 
the Grand Chamber, unless one of the parties to the case objects.

ARTICLE 31\(^2\)

**Powers of the Grand Chamber**

The Grand Chamber shall

\(a\) determine applications submitted either under Article 33 or Article 34 when a Chamber 
   has relinquished jurisdiction under Article 30 or when the case has been referred to it under 
   Article 43;

\(b\) decide on issues referred to the Court by the Committee of Ministers in accordance with 
   Article 46, paragraph 4; and

\(c\) consider requests for advisory opinions submitted under Article 47.

---

1. New article according to the provisions of Protocol No. 14 (CETS No. 194).
2. Text amended according to the provisions of Protocol No. 14 (CETS No. 194).
ARTICLE 32

Jurisdiction of the Court

1 The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2 In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

ARTICLE 33

Inter-state cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

ARTICLE 34

Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

ARTICLE 35

Admissibility criteria

1 The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2 The Court shall not deal with any application submitted under Article 34 that
   a is anonymous; or
   b is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3 The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
   a the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
   b the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

4 The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

ARTICLE 36

Third party intervention

1 In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

1. Text amended according to the provisions of Protocol No. 14 (CETS No. 194).
The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

**ARTICLE 37**

**Striking out applications**

1 The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
   a the applicant does not intend to pursue his application; or
   b the matter has been resolved; or
   c for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

2 The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

**ARTICLE 38**

**Examination of the case**

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

**ARTICLE 39**

**Friendly settlements**

1 At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

2 Proceedings conducted under paragraph 1 shall be confidential.

3 If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

4 This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

**ARTICLE 40**

**Public hearings and access to documents**

1 Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

2 Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

1. Text amended according to the provisions of Protocol No. 14 (CETS No. 194).
ARTICLE 41

**Just satisfaction**

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

ARTICLE 42

**Judgments of Chambers**

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

ARTICLE 43

**Referral to the Grand Chamber**

1 Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2 A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

3 If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

ARTICLE 44

**Final judgments**

1 The judgment of the Grand Chamber shall be final.

2 The judgment of a Chamber shall become final
   a when the parties declare that they will not request that the case be referred to the Grand Chamber; or
   b three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
   c when the panel of the Grand Chamber rejects the request to refer under Article 43.

3 The final judgment shall be published.

ARTICLE 45

**Reasons for judgments and decisions**

1 Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.

2 If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

ARTICLE 46¹

**Binding force and execution of judgments**

1 The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2 The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

¹ Text amended according to the provisions of Protocol No. 14 (CETS No. 194).
Appendix II: Impact of Protocol No. 14

3 If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.

4 If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5 If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

ARTICLE 47

Advisory opinions

1 The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.

2 Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3 Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

ARTICLE 48

Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

ARTICLE 49

Reasons for advisory opinions

1 Reasons shall be given for advisory opinions of the Court.

2 If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3 Advisory opinions of the Court shall be communicated to the Committee of Ministers.

ARTICLE 50

Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

ARTICLE 51

Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.
SECTION III¹,²
MISCELLANEOUS PROVISIONS

ARTICLE 52¹
Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

ARTICLE 53¹
Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

ARTICLE 54¹
Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

ARTICLE 55¹
Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

ARTICLE 56¹
Territorial application

¹³ Any state may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.

² The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.

³ The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

⁴³ Any state which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals,

---

¹ Heading added according to the provisions of Protocol No. 11 (ETS No. 155).
² The articles of this section are renumbered according to the provisions of Protocol No. 11 (ETS No. 155).
³ Text amended according to the provisions of Protocol No. 11 (CETS No. 155).
non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

**ARTICLE 57**

**Reservations**

1. Any state may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2. Any reservation made under this article shall contain a brief statement of the law concerned.

**ARTICLE 58**

**Denunciation**

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months’ notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

**ARTICLE 59**

**Signature and ratification**

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2. The European Union may accede to this Convention.

3. The present Convention shall come into force after the deposit of ten instruments of ratification.

4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

---

1. Heading added according to the provisions of Protocol No. 11 (CETS No. 155).
2. Text amended according to the provisions of Protocol No. 11 (CETS No. 155).
3. Text amended according to the provisions of Protocol No. 14 (CETS No. 194).
ARTICLE 22
Election of judges

[...]

2 The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

ARTICLE 23
Terms of office

1 The judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.

2 The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election.

3 In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.

4 In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.

5 A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor’s term.

6 The terms of office of judges shall expire when they reach the age of 70.

7 The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

ARTICLE 24
Dismissal

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

ARTICLE 25
Registry and legal secretaries

The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.

ARTICLE 26
Plenary Court

The plenary Court shall
Appendix II: Impact of Protocol No. 14

644 Reforming the European Convention on Human Rights

a elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
b set up Chambers, constituted for a fixed period of time;
c elect the Presidents of the Chambers of the Court; they may be re-elected;
d adopt the rules of the Court, and
e elect the Registrar and one or more Deputy Registrars.

ARTICLE 27
Committees, Chambers and Grand Chamber

1 To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court’s Chambers shall set up committees for a fixed period of time.
2 There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.
3 The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.

ARTICLE 28
Declarations of inadmissibility by committees

A committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an application submitted under Article 34 where such a decision can be taken without further examination. The decision shall be final.

ARTICLE 29
Decisions by Chambers on admissibility and merits

1 If no decision is taken under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34.
2 A Chamber shall decide on the admissibility and merits of inter-state applications submitted under Article 33.
3 The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

ARTICLE 31
Powers of the Grand Chamber

The Grand Chamber shall
a determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43; and
b consider requests for advisory opinions submitted under Article 47.

ARTICLE 32
Jurisdiction of the Court

1 The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.
In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

**ARTICLE 35**

**Admissibility criteria**

[...]

The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.

[...]

**ARTICLE 36**

**Third party intervention**

1 In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2 The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

**ARTICLE 38**

**Examination of the case and friendly settlement proceedings**

1 If the Court declares the application admissible, it shall
   a pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the states concerned shall furnish all necessary facilities;
   b place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.

2 Proceedings conducted under paragraph 1.b shall be confidential.

**ARTICLE 39**

**Finding of a friendly settlement**

If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

**ARTICLE 46**

**Binding force and execution of judgments**

1 The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2 The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

**ARTICLE 59**

**Signature and ratification**

1 This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
Appendix II: Impact of Protocol No. 14

2 The present Convention shall come into force after the deposit of ten instruments of ratification.

3 As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

4 The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently. ★
APPENDIX III: ADOPTED TEXTS
RECOMMENDATION NO. R (2000) 2
OF THE COMMITTEE OF MINISTERS TO MEMBER STATES

on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights

Adopted by the Committee of Ministers on 19 January 2000
at the 694th meeting of the Ministers’ Deputies

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to bring about a closer union between its members;

Having regard to the Convention for the protection of Human Rights and Fundamental Freedoms (hereinafter “the Convention”);

Noting that under Article 46 of the Convention on Human Rights and Fundamental Freedoms (“the Convention”) the Contracting Parties have accepted the obligation to abide by the final judgment of the European Court of Human Rights (“the Court”) in any case to which they are parties and that the Committee of Ministers shall supervise its execution;

Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (restitutio in integrum);

Noting that it is for the competent authorities of the respondent state to decide what measures are most appropriate to achieve restitutio in integrum, taking into account the means available under the national legal system;

Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court’s judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving restitutio in integrum;

I. INVITES, in the light of these considerations the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, restitutio in integrum;

II. ENCOURAGES the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:

(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and

1. Considering that the quasi-judicial functions of the Committee of Ministers under the former Article 32 of the Convention will cease in the near future, no mention of the Committee of Ministers’ decisions is made. It is understood, however, that should certain cases still be under examination when the recommendation is adopted, the principles of this recommendation will also apply to such cases.
(ii) the judgment of the Court leads to the conclusion that
   
   a. the impugned domestic decision is on the merits contrary to the Convention, or
   
   b. the violation found is based on procedural errors or shortcomings of such gravity that a
      serious doubt is cast on the outcome of the domestic proceedings complained of.
**Resolution (Rome Conference)**

**Resolution 1**

**From the European Ministerial Conference on Human Rights**

**On institutional and functional arrangements for the protection of human rights at national and European level**

*Adopted in Rome, 3-4 November 2000*


2. Noting with satisfaction the outstanding work accomplished in Europe over the last fifty years with regard to the protection and development of human rights, and stressing the unique and crucial role played in this respect by the Convention and its judicial enforcement machinery;

3. Stressing that the development of the legal protection of human rights within the framework of the Council of Europe constitutes a significant contribution towards the realisation of the aims stated in the Charter of the United Nations and of the rights stated in the Universal Declaration of Human Rights;

4. Recalling the political impetus given to the human rights work of the Council of Europe at the First and Second Summits of Heads of State and Governments of 1993 and 1997;

5. Noting, however, that there remains a need to reinforce the effective protection of human rights in domestic legal systems as well as at the European level;

6. Calling upon the member states of the Council of Europe to give new impetus to their commitments in the human rights field, essential for the security and the wellbeing of individuals and for the stability of the continent;

   **A. Improving the implementation of the Convention in member states**

7. Recalling that the Convention contains common basic standards that must be implemented at national level;

8. Recalling that the status of member state of the Council of Europe implies respect for the obligations under the Convention;

9. Recalling the subsidiary nature of the control mechanism of the Convention, which presupposes that the rights guaranteed by the Convention should, first and foremost, be fully protected at national level and implemented by national authorities, in particular the courts;

10. Stressing that everyone whose rights and freedoms, as set forth in the Convention, are violated shall have the right to an effective remedy before a national authority in accordance with Article 13 of the Convention;

11. Welcoming the efforts made by member states to give full effect to the Convention in their domestic law and to conform to the judgments of the European Court of Human Rights ("the Court");

12. Welcoming in this respect the fact that the Convention has been given direct effect in the domestic legal order of almost all member states;

13. Stressing, in any case, the need to improve even further the implementation of the Convention by the member states,
Appendix III: Adopted texts

14. ENCOURAGES member states to:
   i. ensure that the exercise of the rights and freedoms guaranteed by the Convention benefits from an effective remedy at national level;
   ii. undertake systematic screening of draft legislation and regulations, as well as of administrative practice, in the light of the Convention, to ensure that they are compatible with the latter’s standards;
   iii. ensure that the text of the Convention is translated and widely disseminated to national authorities, notably the courts, and that the developments in the case-law of the Court are sufficiently accessible in the language(s) of the country;
   iv. introduce or reinforce training in human rights for all sectors responsible for law enforcement, notably the police and the prison service, particularly with regard to the Convention and the case-law of the Court;
   v. examine regularly the reservations they have made to the Convention with a view gradually to withdrawing them or limiting their scope;
   vi. consider the ratification of protocols to the Convention to which they are not yet Party.

B. Ensuring the effectiveness of the European Court of Human Rights

15. Paying tribute to the exceptional achievements of the Court and the former European Commission of Human Rights;

16. Concerned by the difficulties that the Court has encountered in dealing with the ever-increasing volume of applications and considering that it is the effectiveness of the Convention system which is now at issue;

17. Noting with interest the creation by the Committee of Ministers of the Council of Europe of the Liaison Committee with the European Court of Human Rights on 11 April 2000 which has the task of maintaining a dialogue between the Committee of Ministers and the Court on the future of the protection of human rights in Europe and on questions relating to the Court,

18. CALLS upon the Committee of Ministers to:
   i. identify without delay the most urgent measures to be taken to assist the Court in fulfilling its functions;
   ii. initiate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation through the Liaison Committee with the European Court of Human Rights and the Steering Committee for Human Rights.

C. Improving the Committee of Ministers’ supervision of the execution of Court judgments

19. Stressing the importance of the supervision of the execution of judgments for the effectiveness and credibility of the control system of the Convention;

20. Convinced of the need to exercise optimum supervision of the execution of Court judgments, which would help to avoid new violations, and to render such supervision more transparent;

21. Welcoming the adoption of Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights,

22. CALLS upon the Committee of Ministers to:
   i. continue consideration of the ways in which this supervision can be made more effective and transparent;
   ii. pursue the revision of its Rules of Procedure concerning Article 46 of the Convention;
iii. pursue examination of issues such as the necessity to keep applicants better informed during the supervision phase, the possible reopening or re-examination of the case, and possible responses in the event of slowness or negligence in giving effect to a judgment or even non-execution thereof;

iv. keep the public better informed of the result of the supervision phase.

**D. Improving the protection of social rights**

23. Recalling the indivisibility and interdependence of all human rights;

24. Recalling the contribution of the case-law of the Convention to the protection of social rights;

25. Reaffirming the importance of the European Social Charter (1961) and the Revised Social Charter (1996) and recalling that a new decisive impetus for the Charter was given by the Declaration of the second Summit of Heads of State and Government (Strasbourg, 10-11 October 1997), which called for the widest possible adherence to the Charter, and welcoming the ratifications which followed or which are being processed;


27. ENCOURAGES member states to accept the greatest possible number of provisions of the European Social Charter and Revised European Social Charter, to ratify the Protocol relating to collective complaints, to apply fully in their domestic systems those provisions of the Charter which they have accepted and to implement the above-mentioned Recommendation No. R (2000) 3;

28. INVITES the Committee of Ministers to continue consideration in order to improve the protection of social rights in Europe, including through intergovernmental co-operation and assistance. ⭐️
DECLARATION
FROM THE EUROPEAN MINISTERIAL
CONFERENCE ON HUMAN RIGHTS


Adopted in Rome, 3-4 November 2000

The European Ministerial Conference on Human Rights ("the Conference"), meeting in Rome on the 50th Anniversary of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), opened for signature in Rome on 4 November 1950,

Recalling that the inherent dignity of every human being is the basis of human rights;
Reaffirming the central role of the Council of Europe in the promotion and protection of human rights in Europe and the eminent position of the Convention, with its unique system of control, as a concrete realisation of the Universal Declaration of Human Rights with regard to civil and political rights;
Emphasising the impact of the Convention and the case-law of the European Court of Human Rights ("the Court") on the States Parties, and the resulting unification in Europe and welcoming the significant progress achieved in this respect across our Continent and notably, through the enlargement of the Council of Europe after 1989, in new member states;
Stressing that the Committee of Ministers’ function of supervising the execution of Court judgments is absolutely essential for the effectiveness and credibility of the control system of the Convention;
Expressing willingness to strengthen further the human rights mechanisms of the Council of Europe, and in particular the control mechanism set up by the Convention, to enable them to continue to perform their function of protecting human rights in Europe;
Welcoming the commitment of other international organisations to the advancement of human rights on the continent;
Welcoming the increasing attention given to human rights within the European Union, as expressed recently through the elaboration of a Charter of Fundamental Rights,
PAYS tribute to the real progress in human rights protection made in the past 50 years;
DEPLORES the fact that, nevertheless, massive violations of the most fundamental human rights still persist in the world, including in our continent, and calls upon states to put them to an end immediately;
RECALLS that it falls in the first place to the member states to ensure that human rights are respected, in full implementation of their international commitments;
CALLS upon all member states, to this end, to ensure constantly that their law and practice conform to the Convention and to execute the judgments of the Court;
BELIEVES that it is indispensable, having regard to the ever increasing number of applications, that urgent measures be taken to assist the Court in carrying out its functions and that an in-depth reflection be started as soon as possible on the various possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation;
STRESSES the need for synergy and complementarity between the Council of Europe and other institutions, particularly the United Nations, the OSCE, and the European Union, each acting in co-operation with the others and within its own field of competence.
STRESSES also the need, in regard to the European Union Charter of Fundamental Rights, to find means to avoid a situation in which there are competing and potentially conflicting systems of human rights protection, with the risk of weakening the overall protection of human rights in Europe;

EXPRESSES the wish that the Council of Europe bring together all European states and calls on the latter to make the necessary progress in the fields of democracy, the rule of law and human rights, in order to achieve a greater unity in those key fields for the stability of the continent;

REAFFIRMS 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. ★
RULES (2001)
ADOPTED BY THE COMMITTEE OF MINISTERS

for the application of Article 46, paragraph 2, of the European Convention on Human Rights

on 10 January 2001 at the 736th meeting of the Ministers’ Deputies

RULE 1
General provisions

a. The Committee of Ministers’ supervision of the execution of judgments of the Court will in principle take place at special human rights meetings, the agenda of which is public.

b. Unless otherwise provided in the present rules, the general rules of procedure of the meetings of the Committee of Ministers and of the Ministers’ Deputies shall apply to the examination of cases under Article 46, paragraph 2, of the Convention.

c. If the chairmanship of the Committee of Ministers is held by the representative of a state which is a party to a case referred to the Committee of Ministers under Article 46, paragraph 2, of the Convention, that representative shall relinquish the chairmanship during any discussion of that case.

RULE 2
Inscription of cases on the agenda

When a judgment is transmitted to the Committee of Ministers in accordance with Article 46, paragraph 2, of the Convention, the case shall be inscribed on the agenda of the Committee without delay.

RULE 3
Information to the Committee of Ministers on the measures taken in order to abide by the judgment

a. When, in a judgment transmitted to the Committee of Ministers in accordance with Article 46, paragraph 2, of the Convention, the Court has decided that there has been a violation of the Convention or its protocols and/or has awarded just satisfaction to the injured party under Article 41 of the Convention, the Committee shall invite the state concerned to inform it of the measures which the state has taken in consequence of the judgment, having regard to its obligation to abide by it under Article 46, paragraph 1, of the Convention.

b. When supervising the execution of a judgment by the respondent state, pursuant to Article 46, paragraph 2, of the Convention, the Committee of Ministers shall examine whether:

– any just satisfaction awarded by the Court has been paid, including as the case may be default interest;
and, if required, and taking into account the discretion of the state concerned to choose the means necessary to comply with the judgment, whether
– individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;
– general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.
RULE 4

Control intervals

a. Until the state concerned has provided information on the payment of the just satisfaction awarded by the Court or concerning possible individual measures, the case shall be placed on the agenda of each human rights meeting of the Committee of Ministers, unless the Committee decides otherwise.

b. If the state concerned informs the Committee of Ministers that it is not yet in a position to inform the Committee that the general measures necessary to ensure compliance with the judgment have been taken, the case shall be placed again on the agenda of a meeting of the Committee of Ministers taking place no more than six months later, unless the Committee decides otherwise; the same rule shall apply when this period expires and for each subsequent period.

RULE 5

Access to information

Without prejudice to the confidential nature of Committee of Ministers’ deliberations, in accordance with Article 21 of the Statute of the Council of Europe, information provided by the state to the Committee of Ministers in accordance with Article 46 of the Convention and the documents relating thereto shall be accessible to the public, unless the Committee decides otherwise in order to protect legitimate public or private interests. In deciding such matters, the Committee of Ministers shall take into account reasoned requests by the state or states concerned, as well as the interest of an injured party or a third party not to disclose their identity.

RULE 6

Communications to the Committee of Ministers

a. The Committee of Ministers shall be entitled to consider any communication from the injured party with regard to the payment of the just satisfaction or the taking of individual measures.

b. The Secretariat shall bring such communications to the attention of the Committee of Ministers.

2. For instance, the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit or the re-opening of impugned domestic proceedings (see on this latter point Recommendation No. R (2000) 2 of the Committee of Ministers to the member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted on 19 January 2000 at the 694th meeting of the Ministers’ Deputies).

3. For instance, legislative or regulatory amendments, changes of case-law or administrative practice or publication of the Court’s judgment in the language of the respondent state and its dissemination to the authorities concerned.
Appendix III: Adopted texts

**Recommendation Rec (2002) 13 of the Committee of Ministers to member states**

**on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights**

Adopted by the Committee of Ministers on 18 December 2002 at the 822nd meeting of the Ministers’ Deputies

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering the importance of the European Convention on Human Rights (hereafter referred to as “the Convention”) as a constitutional instrument for safeguarding public order in Europe, and in particular of the case-law of the European Court of Human Rights (hereafter referred to as “the Court”);

Considering that easy access to the Court’s case-law is essential for the effective implementation of the Convention at national level, as it enables to ensure the conformity of national decisions with this case-law and to prevent violations;

Considering the respective practices of the Court, of the Committee of Ministers in the framework of its control of the execution of the Court’s judgments, and of the member states with respect to publication and dissemination of the Court’s case-law;

Considering that member states were encouraged, at the European Ministerial Conference on Human Rights (Rome, 3-4 November 2000), to “ensure that the text of the Convention is translated and widely disseminated to national authorities, notably the courts, and that the developments in the case-law of the Court are sufficiently accessible in the language(s) of the country”;

Taking into account the diversity of traditions and practice in the member states as regards the publication and dissemination of judicial decisions;

Recalling Article 12 of the Statute of the Council of Europe, according to which the official languages of the Council of Europe are English and French,

RECOMMENDS that the governments of the member states review their practice as regards the publication and dissemination of:

- the text of the Convention in the language(s) of the country,
- the Court’s judgments and decisions,

in the light of the following considerations.

It is important that the governments of member states:

i. ensure that the text of the Convention, in the language(s) of the country, is published and disseminated in such a manner that it can be effectively known and that the national authorities, notably the courts, can apply it;

ii. ensure that judgments and decisions which constitute relevant case-law developments, or which require special implementation measures on their part as respondent states, are rapidly and widely published, through state or private initiatives, in their entirety or at least in the form of substantial summaries or excerpts (together with appropriate references to the original texts) in the language(s) of the country, in particular in official gazettes, information bulletins...
from competent ministries, law journals and other media generally used by the legal community, including, where appropriate, the Internet sites;

iii. encourage where necessary the regular production of textbooks and other publications, in the language(s) of the country, in paper and/or electronic form, facilitating knowledge of the Convention system and the main case-law of the Court;

iv. publicise the Internet address of the Court’s site (http://www.echr.coe.int/), notably by ensuring that links to this site exist in the national sites commonly used for legal research;

v. ensure that the judiciary has copies of relevant case-law in paper and/or electronic form (CD-Rom, DVD, etc.), or the necessary equipment to access case-law through the Internet;

vi. ensure, where necessary, the rapid dissemination to public bodies such as courts, police authorities, prison administrations or social authorities, as well as, where appropriate, to non-state entities such as bar associations, professional associations etc., of those judgments and decisions which may be of specific relevance for their activities, where appropriate together with an explanatory note or a circular;

vii. ensure that the domestic authorities or other bodies directly involved in a specific case are rapidly informed of the Court’s judgment or decision, for example by receiving copies thereof;

viii. consider the possibility of co-operating, with a view to publishing compilations, in paper or in electronic form, of Court judgments and decisions that are available in non-official languages of the Council of Europe. ★
RESOLUTION RES (2002) 58

on the publication and dissemination of the case-law of the European Court of Human Rights

Adopted by the Committee of Ministers on 18 December 2002
at the 822nd meeting of the Ministers’ Deputies

The Committee of Ministers, under the terms of Article 16 of the Statute of the Council of Europe,

Considering the importance of the European Convention on Human Rights (hereafter referred to as “the Convention”) as a constitutional instrument for safeguarding public order in Europe, and in particular of the case-law of the European Court of Human Rights (hereafter referred to as “the Court”);

Considering that easy access to the Court’s case-law is essential for the effective implementation of the Convention at national level, as it enables to ensure the conformity of national decisions with this case-law and to prevent violations;

Considering the respective practices of the Court, of the Committee of Ministers in the framework of its control of the execution of the Court’s judgments, and of the member states with respect to the publication and dissemination of the Court’s case-law;

Considering that member states were encouraged, at the European Ministerial Conference on Human Rights (Rome, 3-4 November 2000), to “ensure that the text of the Convention is translated and widely disseminated to national authorities, notably the courts, and that the developments in the case-law of the Court are sufficiently accessible in the language(s) of the country”;

Taking into account the diversity of traditions and practice in the member states as regards the publication and dissemination of judicial decisions;

Recalling Article 12 of the Statute of the Council of Europe, according to which the official languages of the Council of Europe are English and French,

INVITES the Court to review its practice as regards the publication and dissemination of its judgments and decisions. It stresses in this respect the importance for the Court that:

i. its judgments and decisions are made available immediately in an electronic database on the Internet;

ii. its main judgments, important decisions on admissibility and information notes on case-law are made accessible rapidly, in both paper and electronic form (CD-Rom, DVD, etc.);

iii. it indicates rapidly and in an appropriate manner, in particular in its electronic database, the judgments and decisions which constitute significant developments of its case-law.

Appendix III: Adopted texts

Reforming the European Convention on Human Rights
Resolution Res (2002) 59

concerning the practice in respect of friendly settlements

Adopted by the Committee of Ministers on 18 December 2002
at the 822nd meeting of the Ministers’ Deputies

The Committee of Ministers,

Recalling that the European Convention on Human Rights (hereinafter referred to as “the Convention”) must continue to play a central role as a constitutional instrument for safeguarding public order in Europe;

Having noted the significant increase in the number of individual applications lodged with the European Court of Human Rights (hereinafter referred to as “the Court”);

Recalling that Article 38, paragraph 1.b, of the Convention provides that if the Court declares an application admissible, it shall “place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto”;

Noting in this respect with interest the increasing practice of resorting to friendly settlements in order to solve repetitive cases or cases that do not raise any question of principle or of changes of the domestic legal situation;

Considering that the conclusion of a friendly settlement, while remaining a matter left entirely to the discretion of the parties to the case, may constitute a means of alleviating the workload of the Court, as well as a means of providing a rapid and satisfactory solution for the parties,

UNDERLINES the importance:

– of giving further consideration in all cases to the possibilities of concluding friendly settlements and,

– if any such friendly settlement is concluded, of ensuring that its terms are duly fulfilled. ⭐
Appendix III: Adopted texts

FINAL ACTIVITY REPORT OF THE CDDH
“GUARANTEEING THE LONG-TERM EFFECTIVENESS OF THE EUROPEAN COURT OF HUMAN RIGHTS”

Implementation of the declaration adopted by the Committee of Ministers at its 112th session (14-15 May 2003)

Adopted by the CDDH on 8 April 2004 and transmitted to the Ministers’ Deputies, which took note on 5 May 2004, at their 883rd meeting, document CM (2004) 65


2. They noted however that, having regard to the ever-increasing number of applications, it was indispensable that “urgent measures be taken to assist the Court in carrying out its functions and that an in-depth reflection be started as soon as possible on the various possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation”.4

3. In February 2001, the Ministers’ Deputies set up an Evaluation Group to consider ways of guaranteeing the effectiveness of the European Court of Human Rights. Concurrently, the Steering Committee for Human Rights (CDDH) set up a Reflection Group on the Reinforcement of the Human Rights Protection Mechanism. Its Activity Report was sent to the Evaluation Group in June 2001, so that the latter could take it into account in its work.5 For their part, the Deputies also undertook in 2001 a reflection on specific questions relating to the monitoring of the execution of judgments of the Court.

4. In November 2001, at its 109th Ministerial Session, the Committee of Ministers adopted the Declaration on “The protection of human rights in Europe: Guaranteeing the long-term effectiveness of the European Court of Human Rights”.6 In this text, it welcomed the report submitted by the Evaluation Group and, with a view to giving it effect, it instructed the CDDH7 to (i) carry out a feasibility study of the most appropriate way to conduct the preliminary examination of applications,8 particularly by reinforcing the filtering of applications, and (ii) to examine and, if appropriate, submit proposals for amendments of the Convention, notably on the basis of the recommendations in the report of the Evaluation Group.9 On this occasion, it also invited the CDDH to accelerate the work in progress on measures that could be taken at national level.

5. In October 2002, the CDDH reported on progress in these two areas in an interim report.10

4. Declaration of the Ministerial Conference.
7. 21 November 2001 at the 773rd meeting of the Ministers’ Deputies.
6. In November 2002, at its 111th Ministerial Session, the Committee of Ministers adopted a Declaration on “The Court of Human Rights for Europe”,11 in which it took note of the reflections of the CDDH and wished to be in a position to examine a set of concrete, coherent proposals at its May 2003 Ministerial Session12 in the three following areas:

- prevention of violations on a national level and improvement of domestic remedies;
- optimisation of the efficiency of filtering and dealing with subsequent applications;
- improvement and acceleration of the execution of judgments of the European Court of Human Rights.

7. In April 2003, the CDDH submitted a final report13 to the Ministers’ Deputies containing its proposals in these three areas. In its report, it also referred to several relevant instruments that it elaborated and that were adopted by the Committee of Ministers after the Ministerial Conference, namely Recommendation Rec (2002) 2 of the Committee of Ministers to member states on the re-examination or the reopening of certain cases at domestic level following judgments of the European Court of Human Rights;14 Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2, of the European Convention on Human Rights;15 Recommendation Rec (2002) 13 of the Committee of Ministers to member states on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights;16 Resolution Res (2002) 58 of the Committee of Ministers on the publication and dissemination of the case-law of the European Court of Human Rights;17 and Resolution Res (2002) 59 of the Committee of Ministers concerning the practice in respect of friendly settlements.18

8. In May 2003, at its 112th Ministerial Session, the Committee of Ministers adopted its Declaration “Guaranteeing the long-term effectiveness of the European Court of Human Rights”, in which it welcomed the CDDH’s report and instructed the Ministers’ Deputies to implement the proposals, taking account of certain issues referred to in the Declaration, so that it could examine the texts for adoption at its 114th session, in 2004. It also asked them to take account of other questions raised in the report, such as the possible accession of the European Union to the Convention, the term of office of judges of the Court, and the need to ensure that future amendments to the Convention were given effect as rapidly as possible.

9. In the light of these instructions, the CDDH continued its work on the following draft legal instruments:

(i) draft Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, with an explanatory report;
(ii) draft recommendation of the Committee of Ministers to member states on the European Convention on Human Rights in university education and professional training, with an explanatory memorandum;
(iii) draft recommendation of the Committee of Ministers to member states on verification of the compatibility of draft laws, existing legislation and administrative practices with the standards laid down in the European Convention on Human Rights, with an explanatory memorandum;

12. Decisions of the Ministers’ Deputies adopted on 13 November 2002 at the 816th meeting, item 1.5.
15. Approved on 10 January 2001 at the 736th meeting of the Ministers’ Deputies.
16. Adopted on 18 December 2002 at the 822nd meeting of the Ministers’ Deputies.
17. Adopted on 18 December 2002 at the 822nd meeting of the Ministers’ Deputies.
18. Adopted on 18 December 2002 at the 822nd meeting of the Ministers’ Deputies.
Appendix III: Adopted texts

(iv) draft recommendation of the Committee of Ministers to member states on the improvement of domestic remedies, with an explanatory memorandum;
(v) draft resolution of the Committee of Ministers on judgments revealing an underlying systemic problem.

10. In November 2003 the CDDH submitted an interim activity report on this subject to the Committee of Ministers.19

11. In April 2004 the CDDH adopted this final report and submitted it to the Committee of Ministers. It contains all the above-mentioned draft legal instruments, together with a draft Declaration on “Ensuring the effective implementation of the European Convention on Human Rights at national and European level”, for examination and adoption by the Committee of Ministers at the 114th Ministerial Session (12-13 May 2004).

12. The draft Declaration prepared by the CDDH for the Ministerial Session is the response to the Declaration of the Ministerial Conference in Rome. It contains a triple political commitment on behalf of the Committee of Ministers of the Council of Europe:

– Firstly, it urges member states to take all necessary steps to sign and ratify Protocol No. 14 as speedily as possible, so as to ensure its entry into force within two years of its opening for signature, and to implement speedily and effectively the above-mentioned recommendations.

– Secondly, it asks the Ministers’ Deputies to take specific and effective measures to improve and accelerate the execution of the Court’s judgments, notably those revealing an underlying systemic problem; undertake a review, on a regular and transparent basis, of the implementation of the above-mentioned recommendations with a view to improving the implementation of the Convention at national level; take the necessary steps to ensure that adequate resources are directed to the rapid and efficient implementation of Protocol No. 14, in particular for the Court and its registry in the framework of the new mechanism for the filtering of applications.

– Finally, it invites the Secretary General of the Council of Europe and the states concerned to take the necessary steps to disseminate appropriately, in the national language(s), the Declaration and the various instruments mentioned in it.

13. This final activity report summarises the main results of the work done.

14. Concerning the drafting of Protocol No. 14, which was the most delicate and complex part of the process, it should be noted that the CDDH carefully examined the opinions and proposals submitted by the Parliamentary Assembly’s Committee on Legal Affairs and Human Rights, the Court, the Commissioner for Human Rights and certain member states, as well as national human rights institutions and non-governmental organisations. The CDDH set about its task in a transparent manner. Its reports, those of its reflection and drafting groups and those of its committee of experts were published. These various meetings were attended by representatives of the Parliamentary Assembly, the Court’s registry, the Department for the Execution of Judgments and the Office of the Council of Europe Commissioner for Human Rights, who played an active part in their work. The CDDH and its subordinate bodies also made good use of some particularly rewarding exchanges of views, inter alia with non-governmental organisations or national judges. The Ministers’ Deputies were closely involved throughout. Draft Protocol No. 14 is thus the fruit of a collective reflection.

SECTION A
Prevention of violations at national level and improvement of domestic remedies

15. It became clear from the outset that a fundamental element of the effort to guarantee the long-term effectiveness of the control system set up by the Convention had to be an improvement in the prevention of violations of the Convention at national level. It was therefore decided to

appeal for increased efforts from the member states to this end. The chosen method was to set up non-binding legal instruments to encourage member states to take effective national steps to ensure proper protection of Convention rights at the domestic level, in full conformity with the principle of subsidiarity and the obligations of member states under Article 1 of the Convention.

16. This work led to the preparation of the five recommendations mentioned in paragraphs 7 and 9 above. They aim in particular at improving the quality of national laws, the efficiency of remedies, including the reopening of domestic procedures to give effect to the Court judgments, and the awareness of the requirements of the Convention, including those ensuing from the judgments of the Court, by measures in the fields of publication, dissemination, education and training. The CDDH express the wish that the implementation be reviewed on a regular and transparent manner.

**SECTION B**

**Optimising the effectiveness of filtering and subsequent processing of applications**

17. It is worth noting that, unlike Protocol No. 11, draft Protocol No. 14 prepared by the CDDH does not radically alter the control system set up by the Convention. The changes concern the functioning rather than the nature of the system. They aim above all to improve it in order to give the Court the procedural tools and flexibility it needs to process all applications in a reasonable time, while allowing it to concentrate on the most important cases, which require as thorough a judicial examination as possible. These changes should also enable the Committee of Ministers to ensure swifter execution of the judgments and decisions of the Court. To achieve this, amendments are made at three main areas:

- reinforcement of the Court’s filtering capacity in respect of the numerous applications which are without foundation;
- a new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage and which in terms of respect for human rights do not otherwise require an examination on the merits by the Court;
- a considerably simplified procedure for dealing with repetitive cases.

18. The CDDH considered that, together, these aspects of the reform will help to reduce the time the Court devotes to applications which are manifestly not admissible, thereby allowing it to concentrate on well-founded applications, particularly those which raise important human rights issues.

19. Furthermore, it should be noted that the draft protocol prepared by the CDDH provides henceforth for a single nine-year term of office for the judges, for the possibility of increasing the number of judges and a procedure for so doing, and for the possibility for the European Union to accede to the Convention. In response to a wish expressed by the Parliamentary Assembly, the CDDH has also devised a new procedure for selecting ad hoc judges, whereby they are selected by the President of the Court from a list submitted by each State Party. The draft protocol provides a transitional provision concerning the duration of the term of office of judges on the date of entry into force of the protocol, so as to ensure that the renewal of judges takes place gradually.

20. The explanatory report, particularly paragraphs 34 to 48, gives an overview of the changes made to the control system of the Convention by Protocol No. 14.

21. It should be noted that, in addition to the changes proposed in the draft protocol, the CDDH submitted two other proposals to the Committee of Ministers in its 2003 report, which the Committee of Ministers accepted:

- Encouraging more frequent third party intervention by other states in cases of principle pending before the Court. Both the States Parties themselves and the Court should be more attentive
Appendix III: Adopted texts

666

Reforming the European Convention on Human Rights

to the possibilities for requesting and allowing such intervention. The Court could also adopt an annual report on trends in its case-law;

– Strengthening the registry of the Court to enable it to deal with the influx of cases whilst maintaining the quality of the judgments. The following measures could be envisaged: (i) recruiting experienced national lawyers for a determined period of time, in addition to the lawyers/international civil servants of the registry; (ii) increasing the research resources and other support staff available to judges in the exercise of their judicial functions; (iii) optimising the internal control functions of the registry in order to maintain the quality of the judgments.

SECTION C

Improving and accelerating the execution of the Court’s judgments

22. The Rome Declaration not only emphasised that it falls in the first place to the member states to ensure that human rights are respected, in full implementation of their international commitments; it also stressed the obligation of member states to execute the Court’s judgments.

23. First, it should be noted that the draft protocol prepared by the CDDH gives the Committee of Ministers new powers in its supervision of the execution of judgments (an expansion of the monitoring of the friendly settlements, the possibility of asking the Court to interpret a judgment, and even of referring the matter to the Court if it considers that the contracting party is refusing to comply with a judgment).

24. Furthermore, the CDDH submitted to the Committee of Ministers, in April 2004, a draft resolution on judgments revealing an underlying systemic problem. And in its 2003 report, the CDDH submitted another three proposals, which the Committee of Ministers accepted:

– developing the Committee of Ministers’ procedures and practice under Article 46, paragraph 2 of the Convention to give priority to the rapid execution of judgments revealing systemic problems (without detriment to the priority attention accorded to important other judgments) and to strengthen the Service of the execution of judgments;

– ensuring maximum publicity during the execution process in such cases;

– associating the Parliamentary Assembly more closely with the exercise.

25. It is important to note that the various recommendations that aim at improving the implementation of the Convention at national level also invite the member states to take measures to improve and accelerate the execution of judgments of the Court.

26. Finally, as accompanying measures, the CDDH recommended making optimum use of other existing institutions, mechanisms and activities in promoting the execution of judgments. In particular the CDDH mentioned:

– the Council of Europe Commissioner for Human Rights;

– the Secretary General of the Council of Europe (Article 52 of the Convention);

– the assistance and expertise of the Council of Europe and of the Venice Commission;

– other treaty bodies;

– the Parliamentary Assembly;

– the Committee of Ministers’ monitoring system.

27. With the adoption of this final activity report and the draft texts appended to it, the CDDH considers that it has fulfilled the ad hoc terms of reference given to it by the Ministers’ Deputies.
Declaration (2004)

of the Committee of Ministers

ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels

Adopted by the Committee of Ministers on 12 May 2004 at its 114th session

The Committee of Ministers,


Reaffirming the central role that the Convention must continue to play as a constitutional instrument of European public order, on which the democratic stability of the Continent depends;

Recalling that the Ministerial Conference Declaration emphasised that it falls in the first place to the member states to ensure that human rights are respected, in full implementation of their international commitments;

Considering that it is indispensable that any reform of the Convention aimed at guaranteeing the long-term effectiveness of the European Court of Human Rights be accompanied by effective national measures by the legislature, the executive and the judiciary to ensure protection of Convention rights at the domestic level, in full conformity with the principle of subsidiarity and the obligations of member states under Article 1 of the Convention;

Recalling that, according to Article 46, paragraph 1 of the Convention, “the High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties”;

Recalling the various recommendations it adopted to help member states to fulfil their obligations:

– Recommendation Rec (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights;
– Recommendation Rec (2004) 6 on the improvement of domestic remedies;
Recalling that the following resolutions were brought to the attention of the Court:
Recalling that, on 10 January 2001, it adopted new Rules for the supervision of the execution of the Court’s judgments under Article 46, paragraph 2 of the Convention, following the instructions given at the Ministerial Conference;

Considering that the Ministerial Conference Declaration gave the decisive political impetus for a determined initiative of member states aimed at guaranteeing the long-term effectiveness of the Court so as to enable it to continue to protect human rights in Europe;

Welcoming the fact that the work which began immediately after the Conference has made it possible for the Committee of Ministers, at its 114th Session on 12-13 May 2004, to open for signature amending Protocol No. 14 to the Convention;

Considering that the reform introduced by the Protocol aims at preserving the effectiveness of the right of individual application in the context of steadily growing numbers of applications;

Considering, in particular, that the Protocol addresses the main problems with which the Court is confronted, on the one hand, the filtering of the very numerous individual applications and, on the other hand, the so-called repetitive cases;

Considering that a new provision has been introduced by the Protocol to ensure respect for the Court’s judgments and that the Ministers’ Deputies are developing their practices under Article 46, paragraph 2 of the Convention with a view to helping member states to improve and accelerate the execution of the judgments, notably those revealing an underlying systemic problem;

Considering that these texts, measures and provisions are interdependent and that their implementation is necessary for ensuring the effectiveness of the Convention at national and European levels;

Paying tribute to the significant contribution to this work made by the Court, the Parliamentary Assembly and the Council of Europe Commissioner for Human Rights, as well as by representatives of national courts, national institutions for the promotion and protection of human rights and non-governmental organisations;

I. URGES member states to:

– take all necessary steps to sign and ratify Protocol No. 14 as speedily as possible, so as to ensure its entry into force within two years of its opening for signature;

– implement speedily and effectively the above-mentioned Recommendations;

II. ASKS the Ministers’ Deputies to:

– take specific and effective measures to improve and accelerate the execution of the Court’s judgments, notably those revealing an underlying systemic problem;

– undertake a review, on a regular and transparent basis, of the implementation of the above-mentioned Recommendations;

– assess the resources necessary for the rapid and efficient implementation of the Protocol, in particular for the Court and its registry in the framework of the new mechanism for the filtering of applications, and to take measures accordingly;

III. INVITES the Secretary General of the Council of Europe and the states concerned to take the necessary steps to disseminate appropriately, in the national language(s), this Declaration and the various instruments mentioned in it. ★
RECOMMENDATION REC (2004) 4
OF THE COMMITTEE OF MINISTERS TO MEMBER STATES

on the European Convention on Human Rights in university education
and professional training

Adopted by the Committee of Ministers
on 12 May 2004 at its 114th Session

The Committee of Ministers, in accordance with Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity among
its members, and that one of the most important methods by which that aim is to be pursued is the
maintenance and further realisation of human rights and fundamental freedoms;

Reiterating its conviction that the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”) must remain the essential reference point for the protection of human rights in Europe, and recalling its commitment to take measures in order to guarantee the long-term effectiveness of the control system instituted by the Convention;

Recalling the subsidiary character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article 1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities;

Welcoming in this context that the Convention has now become an integral part of the domestic legal order of all States Parties;

Stressing the preventive role played by education in the principles inspiring the Convention, the standards that it contains and the case-law deriving from them;

Recalling that, while measures to facilitate a wide publication and dissemination in the member states of the text of the Convention and of the case-law of the European Court of Human Rights (hereinafter referred to as “the Court”) are important in order to ensure the implementation of the Convention at national level, as has been indicated in Recommendation Rec (2002) 13, it is crucial that these measures are supplemented by others in the field of education and training, in order to achieve their aim;

Stressing the particular importance of appropriate university education and professional training programmes in order to ensure that the Convention is effectively applied, in the light of the case-law of the Court, by public bodies including all sectors responsible for law enforcement and the administration of justice;

Recalling the resolutions and recommendations it has already taken on different aspects of the issue of human rights education, in particular: Resolution (78) 41 on the teaching of human rights; Resolution (78) 40 containing regulations on Council of Europe fellowships for studies and research in the field of human rights; Recommendation No. R (79) 16 concerning the promotion of human rights research in the member states of the Council of Europe; Recommendation No. R (85) 7 on teaching and learning about human rights in schools, as well as its appendix containing suggestions for teaching and learning about human rights in schools;

Recalling the role that may be played by the national institutions for the promotion and protection of human rights and by non-governmental organisations, particularly in the field of training
Appendix III: Adopted texts

of personnel responsible for law enforcement, and welcoming the initiatives already undertaken in this area;

Taking into account the diversity of traditions and practice in the member states as regards university education, professional training and awareness-raising regarding the Convention system;

RECOMMENDS that member states:

I. ascertain that adequate university education and professional training concerning the Convention and the case-law of the Court exist at national level and that such education and training are included, in particular:
   – as a component of the common core curriculum of law and, as appropriate, political and administrative science degrees and, in addition, that they are offered as optional disciplines to those who wish to specialise;
   – as a component of the preparation programmes of national or local examinations for access to the various legal professions and of the initial and continuous training provided to judges, prosecutors and lawyers;
   – in the initial and continuous professional training offered to personnel in other sectors responsible for law enforcement and/or to personnel dealing with persons deprived of their liberty (for example, members of the police and the security forces, the personnel of penitentiary institutions and that of hospitals), as well as to personnel of immigration services, in a manner that takes account of their specific needs;

II. enhance the effectiveness of university education and professional training in this field, in particular by:
   – providing for education and training to be incorporated into stable structures – public and private – and to be given by persons with a good knowledge of the Convention concepts and the case-law of the Court as well as an adequate knowledge of professional training techniques;
   – supporting initiatives aimed at the training of specialised teachers and trainers in this field;

III. encourage non-state initiatives for the promotion of awareness and knowledge of the Convention system, such as the establishment of special structures for teaching and research in human rights law, moot court competitions, awareness-raising campaigns;

INSTRUCTS the Secretary General of the Council of Europe to transmit this recommendation to the governments of those States Parties to the European Cultural Convention which are not members of the Council of Europe.

Appendix to Recommendation Rec (2004) 4

Introduction

1. The Ministerial Conference held in Rome on 3 and 4 November 2000 to commemorate the 50th anniversary of the European Convention on Human Rights (hereinafter referred to as “the Convention”), invited the member states of the Council of Europe to “take all appropriate measures with a view to developing and promoting education and awareness of human rights in all sectors of society, in particular with regard to the legal profession”.20

2. This effort that national authorities are requested to make is only a consequence of the subsidiary character of the supervision mechanism set up by the Convention, which implies that the rights guaranteed by the Convention be fully protected in the first place at national level and applied by national authorities.21 The Committee of Ministers has already adopted resolutions and recommendations dealing with different aspects of this issue22 and encouraging initiatives

---

21. See Article 1 of the Convention.
that may be undertaken notably by independent national human rights institutions and NGOs, with a view to promoting greater understanding and awareness of the Convention and the case-law of the European Court of Human Rights (hereinafter referred to as “the Court”).

3. Guaranteeing the long-term effectiveness of the Convention system is among the current priorities of the Council of Europe and, in this context, the need for a better implementation of the Convention at national level has been found to be vital. Thus, it appears necessary that all member states ensure that adequate education on the Convention is provided, in particular concerning legal and law enforcement professions. This might contribute to reducing, on the one hand, the number of violations of rights guaranteed by the Convention resulting from insufficient knowledge of the Convention and, on the other hand, the lodging of applications which manifestly do not meet admissibility requirements.

4. This recommendation refers to three complementary types of action, namely:
   i. the incorporation of appropriate education and training on the Convention and the case-law of the Court, notably in the framework of university law and political science studies, as well as professional training of legal and law enforcement professions;
   ii. guaranteeing the effectiveness of the education and training, which implies in particular a proper training for teachers and trainers; and
   iii. the encouragement of initiatives for the promotion of knowledge and/or awareness of the Convention system.

5. Bearing in mind the diversity of traditions and practice in the member states in respect of university education, professional training and awareness-raising regarding the Convention, it is the member states’ responsibility to shape their own education programmes according to their respective national situations, in accordance with the principle of subsidiarity, while ensuring that the standards of the Convention are fully presented.

University education and professional training

6. Member states are invited to ensure that appropriate education on the Convention and the case-law of the Court is included in the curricula of university law degrees and Bar examinations as well as in the continuous training of judges, prosecutors and lawyers.

University education

7. It is essential that education on the Convention be fully incorporated into faculty of law programmes, not only as an independent subject, but also horizontally in each legal discipline (criminal law, civil law, etc.) so that law students, whatever their specialisation, are aware, when they graduate, of the implications of the Convention in their field.

8. The creation of post-graduate studies specialised in the Convention, such as certain national master’s degrees or the European Master in Human Rights and Democratisation (E.MA) which involves twenty-seven universities over fifteen European states, as well as shorter university programmes such as the summer courses of the *Institut international des droits de l'homme René Cassin* (Strasbourg) or those of the European University Institute (Florence), should be encouraged.

Professional training

9. Professional training should facilitate a better incorporation of Convention standards and the Court’s case-law in the reasoning adopted by domestic courts in their judgments. Moreover,

22. In particular: Resolution (78) 41 on the teaching of human rights; Resolution (78) 40 containing regulations on Council of Europe fellowships for studies and research in the field of human rights; Recommendation No. R (79) 16 concerning the promotion of human rights research in the member states of the Council of Europe; Recommendation No. R (85) 7 on teaching and learning about human rights in schools, as well as its appendix containing suggestions for teaching and learning about human rights in schools.
legal advice which would be given to potential applicants by lawyers having an adequate knowl-
edge of the Convention could prevent applications that manifestly do not meet the admissibil-
ity requirements. In addition, a better knowledge of the Convention by legal professionals
should contribute to reducing the number of applications reaching the Court.

10. Specific training on the Convention and its standards should be incorporated in the pro-
grammes of law schools and schools for judges and prosecutors. This could entail the organi-
sation of workshops as part of the professional training for lawyers, judges and prosecutors. In
so far as lawyers are concerned, such workshops could be organised at the initiative of Bar as-
sociations, for instance. Reference may be made to a current project within the International
Bar Association to set up, with the assistance of the Court, training for lawyers on the rules of
procedure of the Court and the practice of litigation, as well as the execution of judgments. In
certain countries, the Ministry of Justice has the task of raising awareness and participating in
the training of judges on the case-law of the European Court: judges in post may take advantage
of sessions of one or two days organised in their jurisdiction and of a traineeship of one week
every year; “justice auditors” (student judges) are provided with training organised within the
judges’ national school (Ecole nationale de magistrature). Workshops are also organised on a
regular basis within the framework of the initial and continuous training of judges.

11. Moreover, seminars and colloquies on the Convention could be regularly organised for judges,
lawyers and prosecutors.

12. In addition, a journal on the case-law of the Court could be published regularly for judges and
lawyers. In some member states, the Ministry of Justice publishes a supplement containing ref-
erences to the case-law of the Court and issues relating to the Convention. This publication is
distributed to all courts.

13. It is recommended that member states ensure that the standards of the Convention be covered
by the initial and continuous professional training of other professions dealing with law en-
forcement and detention, such as security forces, police officers and prison staff but also im-
migration services, hospitals, etc. Continuous training on the Convention standards is partic-
ularly important given the evolving nature of the interpretation and application of these
standards in the Court’s case-law. Staff of the authorities dealing with persons deprived of their
liberty should be fully aware of these persons’ rights as guaranteed by the Convention and as
interpreted by the Court in order to prevent any violation, in particular of Articles 3, 5 and 8.
It is therefore of paramount importance that in each member state there is adequate training
within these professions.

14. A specific training course on the Convention and its standards and, in particular, aspects relat-
ing to rights of persons deprived of their liberty should be incorporated in the programmes of
police schools, as well as schools for prison warders. Workshops could also be organised as part
of continuous training of members of the police forces, warders and other authorities con-
cerned.

Effectiveness of university education and professional training

15. For this purpose, member states are recommended to ensure that university education and
professional training in this field are carried out within permanent structures (public and pri-
ivate) by well-qualified teachers and trainers.

16. In this respect, training teachers and trainers is a priority. The aim is to ensure that their level
of knowledge corresponds with the evolution of the case-law of the Court and meets the spe-
cific needs of each professional sector. Member states are invited to support initiatives (re-
search in fields covered by the Convention, teaching techniques, etc.) aimed at guaranteeing a
quality training of specialised teachers and trainers in this sensitive and evolving field.

Promotion of knowledge and/or awareness of the Convention system

17. Member states are finally recommended to encourage initiatives for the promotion of knowl-
edge and/or awareness of the Convention system. Such initiatives, which can take various
forms, have proved very positive in the past where they have been launched and should therefore be encouraged by member states.

18. One example could be the setting-up of moot court competitions for law students on the Convention and the Court’s case-law, involving at the same time students, university professors and legal professionals (judges, prosecutors, lawyers), for example the Sporrong and Lönnroth competition organised in the Supreme Courts of the Nordic countries, and the pan-European French-speaking René Cassin competition, organised by the association Juris Ludi in the premises of the Council of Europe. ⭐
RECOMMENDATION REC (2004) 5
OF THE COMMITTEE OF MINISTERS TO MEMBER STATES

on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights

Adopted by the Committee of Ministers on 12 May 2004 at its 114th Session

The Committee of Ministers, in accordance with Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity among its members, and that one of the most important methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reiterating its conviction that the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”) must remain the essential reference point for the protection of human rights in Europe, and recalling its commitment to take measures in order to guarantee the long-term effectiveness of the control system instituted by the Convention;

Recalling the subsidiary character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article 1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities;

Welcoming in this context that the Convention has now become an integral part of the domestic legal order of all States Parties and noting in this respect the important role played by national courts;

Recalling that, according to Article 46, paragraph 1, of the Convention, the high contracting parties undertake to abide by the final judgments of the European Court of Human Rights (hereinafter referred to as “the Court”) in any case to which they are parties;

Considering however, that further efforts should be made by member states to give full effect to the Convention, in particular through a continuous adaptation of national standards in accordance with those of the Convention, in the light of the case-law of the Court;

Convinced that verifying the compatibility of draft laws, existing laws and administrative practice with the Convention is necessary to contribute towards preventing human rights violations and limiting the number of applications to the Court;

Stressing the importance of consulting different competent and independent bodies, including national institutions for the promotion and protection of human rights and non-governmental organisations;

Taking into account the diversity of practices in member states as regards the verification of compatibility;

RECOMMENDS that member states, taking into account the examples of good practice appearing in the appendix:
I. ensure that there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the Convention in the light of the case-law of the Court;
II. ensure that there are such mechanisms for verifying, whenever necessary, the compatibility of existing laws and administrative practice, including as expressed in regulations, orders and circulars;

III. ensure the adaptation, as quickly as possible, of laws and administrative practice in order to prevent violations of the Convention;

INSTRUCTS the Secretary General of the Council of Europe to ensure that the necessary resources are made available for proper assistance to member states which request help in the implementation of this recommendation.

Appendix to Recommendation Rec (2004) 5

Introduction

1. Notwithstanding the reform, resulting from Protocol No. 11, of the control system established under the European Convention on Human Rights (hereinafter referred to as “the Convention”), the number of applications submitted to the European Court of Human Rights (hereinafter referred to as “the Court”) is increasing steadily, giving rise to considerable delays in the processing of cases.

2. This development reflects a greater ease of access to the European Court, as well as the constantly improving human rights protection in Europe, but it should not be forgotten that it is the parties to the Convention, which, in accordance with the principle of subsidiarity, remain the prime guarantors of the rights laid down in the Convention. According to Article 1 of the Convention, “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”. It is thus at national level that the most effective and direct protection of the rights and freedoms guaranteed in the Convention should be ensured. This requirement concerns all state authorities, in particular the courts, the administration and the legislature.

3. The prerequisite for the Convention to protect human rights in Europe effectively is that states give effect to the Convention in their legal order, in the light of the case-law of the Court. This implies, notably, that they should ensure that laws and administrative practice conform to it.

4. This recommendation encourages states to set up mechanisms allowing for the verification of compatibility with the Convention of both draft laws and existing legislation, as well as administrative practice. Examples of good practice are set out below. The implementation of the recommendation should thus contribute to the prevention of human rights violations in member states, and consequently help to contain the influx of cases reaching the Court.

Verification of the compatibility of draft laws

5. It is recommended that member states establish systematic verification of the compatibility with the Convention of draft laws, especially those which may affect the rights and freedoms protected by it. It is a crucial point: by adopting a law verified as being in conformity with the Convention, the state reduces the risk that a violation of the Convention has its origin in that law and that the Court will find such a violation. Moreover, the state thus imposes on its administration a framework in line with the Convention for the actions it undertakes vis-à-vis everyone within its jurisdiction.

6. Council of Europe assistance in carrying out this verification may be envisaged in certain cases. Such assistance is already available, particularly in respect of draft laws on freedom of religion, conscientious objection, freedom of information, freedom of association, etc. It is none the less for each state to decide whether or not to take into account the conclusions reached within this framework.
Verification of the compatibility of laws in force

7. Verification of compatibility should also be carried out, where appropriate, with respect to laws in force. The evolving case-law of the Court may indeed have repercussions for a law which was initially compatible with the Convention or which had not been the subject of a compatibility check prior to adoption.

8. Such verification proves particularly important in respect of laws touching upon areas where experience shows that there is a particular risk of human rights violations, such as police activities, criminal proceedings, conditions of detention, rights of aliens, etc.

Verification of the compatibility of administrative practice

9. This recommendation also covers, wherever necessary, the compatibility of administrative regulations with the Convention, and therefore aims to ensure that human rights are respected in daily practice. It is indeed essential that bodies, notably those with powers enabling them to restrict the exercise of human rights, have all the necessary resources to ensure that their activity is compatible with the Convention.

10. It has to be made clear that the recommendation also covers administrative practice which is not attached to the text of a regulation. It is of utmost importance that states ensure verification of their compatibility with the Convention.

Procedures allowing follow-up of the verification undertaken

11. In order for verification to have practical effects and not merely lead to the statement that the provision concerned is incompatible with the Convention, it is vital that member states ensure follow-up to this kind of verification.

12. The recommendation emphasises the need for member states to act to achieve the objectives it sets down. Thus, after verification, member states should, when necessary, promptly take the steps required to modify their laws and administrative practice in order to make them compatible with the Convention. In order to do so, and where this proves necessary, they should improve or set up appropriate revision mechanisms which should systematically and promptly be used when a national provision is found to be incompatible. However, it should be pointed out that often it is enough to proceed to changes in case-law and practice in order to ensure this compatibility. In certain member states compatibility may be ensured through the non-application of the offending legislative measures.

13. This capacity for adaptation should be facilitated and encouraged, particularly through the rapid and efficient dissemination of the judgments of the Court to all the authorities concerned with the violation in question, and appropriate training of the decision makers. The Committee of Ministers has devoted two specific recommendations to these important aspects: one on the publication and the dissemination in member states of the text of the Convention and the case-law of the Court (Rec (2002) 13) and the other on the Convention in university education and professional training (Rec (2004) 4).

14. When a court finds that it does not have the power to ensure the necessary adaptation because of the wording of the law at stake, certain states provide for an accelerated legislative procedure.

15. Within the framework of the above, the following possibilities could be considered.

Examples of good practice

16. Each member state is invited to give information as to its practice and its evolution, notably by informing the General Secretariat of the Council of Europe. The latter will, in turn, periodically inform all member states of existing good practice.

I. Publication, translation and dissemination of, and training in, the human rights protection system

17. As a preliminary remark, one should recall that effective verification first demands appropriate publication and dissemination at national level of the Convention and the relevant case-law of
the Court, in particular through electronic means and in the language(s) of the country concerned, and the development of university education and professional training programmes in human rights.

II. Verification of draft laws

18. Systematic supervision of draft laws is generally carried out both at the executive and at the parliamentary level, and independent bodies are also consulted.

By the executive

19. In general, verification of conformity with the Convention and its protocols starts within the ministry which initiated the draft law. In addition, in some member states, special responsibility is entrusted to certain ministries or departments, for example, the Chancellery, the Ministry of Justice and/or the Ministry of Foreign Affairs, to verify such conformity. Some member states entrust the agent of the government to the Court in Strasbourg, among other functions, with seeking to ensure that national laws are compatible with the provisions of the Convention. The agent is therefore empowered, on this basis, to submit proposals for the amendment of existing laws or of any new legislation which is envisaged.

20. The national law of numerous member states provides that when a draft text is forwarded to parliament, it should be accompanied by an extensive explanatory memorandum, which must also indicate and set out possible questions under the constitution and/or the Convention. In some member states, it should be accompanied by a formal statement of compatibility with the Convention. In one member state, the minister responsible for the draft text has to certify that, in his or her view, the provisions of the bill are compatible with the Convention, or to state that he or she is not in a position to make such a statement, but that he or she nevertheless wishes parliament to proceed with the bill.

By the parliament

21. In addition to verification by the executive, examination is also undertaken by the legal services of the parliament and/or its different parliamentary committees.

Other consultations

22. Other consultations to ensure compatibility with human rights standards can be envisaged at various stages of the legislative process. In some cases, consultation is optional. In others, notably if the draft law is likely to affect fundamental rights, consultation of a specific institution, for example the Conseil d’État in some member states, is compulsory as established by law. If the government has not consulted as required, the text will be tainted by procedural irregularity. If, after having consulted, it decides not to follow the opinion received, it accepts responsibility for the political and legal consequences that may result from such a decision.

23. Optional or compulsory consultation of non-judicial bodies competent in the field of human rights is also often foreseen. In particular these may be independent national institutions for the promotion and protection of human rights, the ombudspersons, or local or international non-governmental organisations, institutes or centres for human rights, or the Bar, etc.

24. Council of Europe experts or bodies, notably the European Commission for Democracy through Law (“the Venice Commission”), may be asked to give an opinion on the compatibility with the Convention of draft laws relating to human rights. This request for an opinion does not replace an internal examination of compatibility with the Convention.
III. Verification of existing laws and administrative practice

25. While member states cannot be asked to verify systematically all their existing laws, regulations and administrative practice, it may be necessary to engage in such an exercise, for example as a result of national experience in applying a law or regulation or following a new judgment by the Court against another member state. In the case of a judgment that concerns it directly, by virtue of Article 46, the state is under obligation to take the measures necessary to abide by it.

By the executive

26. In some member states, the ministry that initiates legislation is also responsible for verifying existing regulations and practices, which implies knowledge of the latest developments in the case-law of the Court. In other member states, governmental agencies draw the attention of independent bodies, and particularly courts, to certain developments in the case-law. This aspect highlights the importance of initial education and continuous training with regard to the Convention system. The competent organs of the state have to ensure that those responsible in local and central authorities take into account the Convention and the case-law of the Court in order to avoid violations.

By the parliament

27. Requests for verification of compatibility may be made within the framework of parliamentary debates.

By judicial institutions

28. Verification may also take place within the framework of court proceedings brought by individuals with legal standing to act or even by state organs, persons or bodies not directly affected (for example before the Constitutional Court).

By independent non-judicial institutions

29. In addition to their other roles when seized by the government or the parliament, independent non-judicial institutions, and particularly national institutions for the promotion and protection of human rights, as well as ombudspersons, play an important role in the verification of how laws are applied and, notably, the Convention which is part of national law. In some countries, these institutions may also, under certain conditions, consider individual complaints and initiate enquiries on their own initiative. They strive to ensure that deficiencies in existing legislation are corrected, and may for this purpose send formal communications to the parliament or the government.
Recommendation Rec (2004) 6
OF THE COMMITTEE OF MINISTERS TO MEMBER STATES

on the improvement of domestic remedies

Adopted by the Committee of Ministers
on 12 May 2004 at its 114th Session

The Committee of Ministers, in accordance with Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity among its members, and that one of the most important methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reiterating its conviction that the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”) must remain the essential reference point for the protection of human rights in Europe, and recalling its commitment to take measures in order to guarantee the long-term effectiveness of the control system instituted by the Convention;

Recalling the subsidiary character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article 1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities;

Welcoming in this context that the Convention has now become an integral part of the domestic legal order of all States Parties;

Emphasising that, as required by Article 13 of the Convention, member states undertake to ensure that any individual who has an arguable complaint concerning the violation of his rights and freedoms as set forth in the Convention has an effective remedy before a national authority;

Recalling that in addition to the obligation of ascertaining the existence of such effective remedies in the light of the case-law of the European Court of Human Rights (hereinafter referred to as “the Court”), states have the general obligation to solve the problems underlying violations found;

Emphasising that it is for member states to ensure that domestic remedies are effective in law and in practice, and that they can result in a decision on the merits of a complaint and adequate redress for any violation found;

Noting that the nature and the number of applications lodged with the Court and the judgments it delivers show that it is more than ever necessary for the member states to ascertain efficiently and regularly that such remedies do exist in all circumstances, in particular in cases of unreasonable length of judicial proceedings;

Considering that the availability of effective domestic remedies for all arguable claims of violation of the Convention should permit a reduction in the Court’s workload as a result, on the one hand, of the decreasing number of cases reaching it and, on the other hand, of the fact that the detailed treatment of the cases at national level would make their later examination by the Court easier;

Emphasising that the improvement of remedies at national level, particularly in respect of repetitive cases, should also contribute to reducing the workload of the Court;
RECOMMENDS that member states, taking into account the examples of good practice appearing in the appendix:

I. ascertain, through constant review, in the light of case-law of the Court, that domestic remedies exist for anyone with an arguable complaint of a violation of the Convention, and that these remedies are effective, in that they can result in a decision on the merits of the complaint and adequate redress for any violation found;

II. review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court;

III. pay particular attention, in respect of aforementioned items I and II, to the existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings;

INSTRUCTS the Secretary General of the Council of Europe to ensure that the necessary resources are made available for proper assistance to member states which request help in the implementation of this recommendation.

Appendix to Recommendation Rec (2004) 6

Introduction

1. The Ministerial Conference held in Rome on 3 and 4 November 2000 to commemorate the 50th anniversary of the European Convention on Human Rights (hereinafter referred to as “the Convention”) emphasised that it is States Parties who are primarily responsible for ensuring that the rights and freedoms laid down in the Convention are observed and that they must provide the legal instruments needed to prevent violations and, where necessary, to redress them. This necessitates, in particular, the setting-up of effective domestic remedies for all violations of the Convention, in accordance with its Article 13. The case-law of the European Court of Human Rights (hereinafter referred to as “the Court”) has clarified the scope of this obligation which is incumbent on the States Parties to the Convention by indicating notably that:

– Article 13 guarantees the availability in domestic law of a remedy to secure the rights and freedoms as set forth by the Convention.

– this article has the effect of requiring a remedy to deal with the substance of any “arguable claim” under the Convention and to grant appropriate redress. The scope of this obligation varies depending on the nature of the complaint. However, the remedy required must be “effective” in law as well as in practice;

– this notably requires that it be able to prevent the execution of measures which are contrary to the Convention and whose effects are potentially irreversible;

– the “authority” referred to in Article 13 does not necessarily have to be a judicial authority, but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy it provides is indeed effective;

23. European Ministerial Conference on Human Rights, see paragraph 14.i of Resolution No. 1 on institutional and functional arrangements for the protection of human rights at national and European levels, section A (“Improving the implementation of the Convention in member states”).

24. Article 13 provides: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority”. It is noted that this appendix does not contain particular reference to the procedural guarantees resulting from substantive rights, such as Articles 2 and 3.

25. See for instance, Conka v. Belgium judgment of 5 February 2002 (paragraphs 64 et seq.)
Recommendation Rec (2004) 6

the “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant; but it implies a certain minimum requirement of speediness.

2. In the recent past, the importance of having such remedies with regard to unreasonably long proceedings has been particularly emphasised, as this problem is at the origin of a great number of applications before the Court, though it is not the only problem.

3. The Court is confronted with an ever-increasing number of applications. This situation jeopardises the long-term effectiveness of the system and therefore calls for a strong reaction from contracting parties. It is precisely within this context that the availability of effective domestic remedies becomes particularly important. The improvement of available domestic remedies will most probably have quantitative and qualitative effects on the workload of the Court:

– on the one hand, the volume of applications to be examined ought to be reduced: fewer applicants would feel compelled to bring the case before the Court if the examination of their complaints before the domestic authorities was sufficiently thorough;

– on the other hand, the examination of applications by the Court will be facilitated if an examination of the merits of cases has been carried out beforehand by a domestic authority, thanks to the improvement of domestic remedies.

4. This recommendation therefore encourages member states to examine their respective legal systems in the light of the case-law of the Court and to take, if need be, the necessary and appropriate measures to ensure, through legislation or case-law, effective remedies as secured by Article 13. The examination may take place regularly or following a judgment by the Court.

5. The governments of member states might, initially, request that experts carry out a study of the effectiveness of existing domestic remedies in specific areas with a view to proposing improvements. National institutions for the promotion and protection of human rights, as well as nongovernmental organisations, might also usefully participate in this work. The availability and effectiveness of domestic remedies should be kept under constant review, and in particular should be examined when drafting legislation affecting Convention rights and freedoms. There is an obvious connection between this recommendation and the recommendation on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the Convention.

6. Within the framework of the above, the following considerations might be taken into account.

The Convention as an integral part of the domestic legal order

7. A primary requirement for an effective remedy to exist is that the Convention rights be secured within the national legal system. In this context, it is a welcome development that the Convention has now become an integral part of the domestic legal orders of all States Parties. This development has improved the availability of effective remedies. It is further assisted by the fact that courts and executive authorities increasingly respect the case-law of the Court in the application of domestic law, and are conscious of their obligation to abide by judgments of the Court in cases directly concerning their state (see Article 46 of the Convention). This tendency has been reinforced by the improvement, in accordance with Recommendation Rec (2000) 2, of the possibilities of having competent domestic authorities re-examine or reopen certain proceedings which have been the basis of violations established by the Court.

27. See Declaration of the Committee of Ministers of the Council of Europe of 14 May 2003 “Guaranteeing the long-term effectiveness of the European Court of Human Rights”.
28. Recommendation Rec (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted on 19 January 2000, at the 694th meeting of the Ministers’ Deputies.
8. The improvement of domestic remedies also requires that additional action be taken so that, when applying national law, national authorities may take into account the requirements of the Convention and particularly those resulting from judgments of the Court concerning their state. This notably means improving the publication and dissemination of the Court’s case-law (where necessary by translating it into the national language(s) of the state concerned) and the training, with regard to these requirements, of judges and other state officials. Thus, the present recommendation is also closely linked to the two other recommendations adopted by the Committee of Ministers in these areas.29

Specific remedies and general remedy

9. Most domestic remedies for violations of the Convention have been set up with a targeted scope of application. If properly construed and implemented, experience shows that such systems of “specific remedies” can be very efficient and limit both the number of complaints to the Court and the number of cases requiring a time-consuming examination.

10. Some states have also introduced a general remedy (for example before the Constitutional Court) which can be used to deal with complaints which cannot be dealt with through the specific remedies available. In some member states, this general remedy may also be exercised in parallel with or even before other legal remedies are exhausted. Some member states add the requirement that the measure being challenged would grossly infringe constitutional rights and that a refusal to deal with the appeal would have serious and irreparable consequences for the appellant. It should be pointed out that states which have such a general remedy tend to have fewer cases before the Court.

11. This being said, it is for member states to decide which system is most suited to ensuring the necessary protection of Convention rights, taking into consideration their constitutional traditions and particular circumstances.

12. Whatever the choice, present experience testifies that there are still shortcomings in many member states concerning the availability and/or effectiveness of domestic remedies, and that consequently there is an increasing workload for the Court.

Remedies following a “pilot” judgment

13. When a judgment which points to structural or general deficiencies in national law or practice (“pilot case”) has been delivered and a large number of applications to the Court concerning the same problem (“repetitive cases”) are pending or likely to be lodged, the respondent state should ensure that potential applicants have, where appropriate, an effective remedy allowing them to apply to a competent national authority, which may also apply to current applicants. Such a rapid and effective remedy would enable them to obtain redress at national level, in line with the principle of subsidiarity of the Convention system.

14. The introduction of such a domestic remedy could also significantly reduce the Court’s workload. While prompt execution of the pilot judgment remains essential for solving the structural problem and thus for preventing future applications on the same matter, there may exist a category of people who have already been affected by this problem prior to its resolution. The existence of a remedy aimed at providing redress at national level for this category of people might allow the Court to invite them to have recourse to the new remedy and, if appropriate, declare their applications inadmissible.

15. Several options with this objective are possible, depending, among other things, on the nature of the structural problem in question and on whether the person affected by this problem has applied to the Court or not.

16. In particular, further to a pilot judgment in which a specific structural problem has been found, one alternative might be to adopt an ad hoc approach, whereby the state concerned would assess the appropriateness of introducing a specific remedy or widening an existing remedy by legislation or by judicial interpretation.

17. Within the framework of this case-by-case examination, states might envisage, if this is deemed advisable, the possibility of reopening proceedings similar to those of a pilot case which has established a violation of the Convention, with a view to saving the Court from dealing with these cases and where appropriate to providing speedier redress for the person concerned. The criteria laid out in Recommendation Rec (2000) 2 of the Committee of Ministers might serve as a source of inspiration in this regard.

18. When specific remedies are set up following a pilot case, governments should speedily inform the Court so that it can take them into account in its treatment of subsequent repetitive cases.

19. However, it would not be necessary or appropriate to create new remedies, or give existing remedies a certain retroactive effect, following every case in which a Court judgment has identified a structural problem. In certain circumstances, it may be preferable to leave the cases to the examination of the Court, particularly to avoid compelling the applicant to bear the further burden of having once again to exhaust domestic remedies, which, moreover, would not be in place until the adoption of legislative changes.

Remedies in the case of an arguable claim of unreasonable length of proceedings

20. The question of effective remedies is particularly topical in cases involving allegations of unreasonable length of proceedings, which account for a large number of applications to the Court. Thus the Court has emphasised in the Kudla v. Poland judgment of 26 October 2000 that it is important to make sure there is an effective remedy in such cases, as required by Article 13 of the Convention. Following the impetus given by the Court in this judgment, several solutions have been put forward by member states in order to provide effective remedies allowing violations to be found and adequate redress to be provided in this field.

Reasonable length of proceedings

21. In their national law, many member states provide, by various means (maximum lengths, possibility of asking for proceedings to be speeded up) that proceedings remain of reasonable length. In certain member states, a maximum length is specified for each stage in criminal, civil and administrative proceedings. The integration of the Convention into the domestic legal systems of member states, particularly the requirement of trial within a reasonable time, as provided for in Article 6, has reinforced and completed these national law requirements.

Preventing delays, accelerating proceedings

22. If time limits in judicial proceedings – particularly in criminal proceedings – are not respected or if the length of proceedings is considered unreasonable, the national law of many member states provides that the person concerned may file a request to accelerate the procedure. If this request is accepted, it may result in a decision fixing a time limit within which the court – or the prosecutor, depending on the case – has to take specific procedural measures, such as closing the investigation or setting a date for the trial. In some member states, courts may decide that the procedure has to be finished before a certain date. Where a general remedy exists before a Constitutional Court, the complaint may be submitted, under certain circumstances, even before the exhaustion of other domestic remedies.

Different forms of redress

23. In most member states, there are procedures providing for redress for unreasonable delays in proceedings, whether ongoing or concluded. A form of redress which is commonly used, es-
Appendix III: Adopted texts

pecially in cases already concluded, is that of financial compensation. In certain cases, the failure by the responsible authority to issue a decision within the specified time limit means that the application shall be deemed to have been granted. Where the criminal proceedings have exceeded a reasonable time, this may result in a more lenient sentence being imposed.

Possible assistance for the setting-up of effective remedies

24. The recommendation instructs the Secretary General of the Council of Europe to ensure that the necessary resources are made available for proper assistance to member states which request help in setting up the effective remedies required by the Convention. It might take the form, for instance, of surveys carried out by expert consultants on available domestic remedies, with a view to improving their effectiveness. ✪

on judgments revealing an underlying systemic problem

Adopted by the Committee of Ministers
on 12 May 2004 at its 114th Session

The Committee of Ministers, in accordance with Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity among its members, and that one of the most important methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reiterating its conviction that the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”) must remain the essential reference point for the protection of human rights in Europe, and recalling its commitment to take measures in order to guarantee the long-term effectiveness of the control system instituted by the Convention;

Recalling the subsidiary character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article 1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities;

Welcoming in this context that the Convention has now become an integral part of the domestic legal order of all States Parties;

Recalling that, according to Article 46 of the Convention, the high contracting parties undertake to abide by the final judgment of the European Court of Human Rights (hereinafter referred to as “the Court”) in any case to which they are parties and that the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution;

Emphasising the interest in helping the state concerned to identify the underlying problems and the necessary execution measures;

Considering that the execution of judgments would be facilitated if the existence of a systemic problem is already identified in the judgment of the Court;

Bearing in mind the Court’s own submission on this matter to the Committee of Ministers session on 7 November 2002;

INVITES the Court:

I. as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments;

II. to specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the Court. ★
The member states of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”),

Having regard to Resolution No. 1 and the Declaration adopted at the European Ministerial Conference on Human Rights, held in Rome on 3 and 4 November 2000;

Having regard to the Declarations adopted by the Committee of Ministers on 8 November 2001, 7 November 2002 and 15 May 2003, at their 109th, 111th and 112th Sessions, respectively;

Having regard to Opinion No. 251 (2004) adopted by the Parliamentary Assembly of the Council of Europe on 28 April 2004;

Considering the urgent need to amend certain provisions of the Convention in order to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the European Court of Human Rights and the Committee of Ministers of the Council of Europe;

Considering, in particular, the need to ensure that the Court can continue to play its pre-eminent role in protecting human rights in Europe,

Have agreed as follows:

ARTICLE 1
Paragraph 2 of Article 22 of the Convention shall be deleted.

ARTICLE 2
Article 23 of the Convention shall be amended to read as follows:

"Article 23
Terms of office and dismissal
1 The judges shall be elected for a period of nine years. They may not be re-elected.
2 The terms of office of judges shall expire when they reach the age of 70.
3 The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
4 No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions."

ARTICLE 3
Article 24 of the Convention shall be deleted.
ARTICLE 4

Article 25 of the Convention shall become Article 24 and its text shall be amended to read as follows:

"Article 24
Registry and rapporteurs

1 The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court.

2 When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's registry."

ARTICLE 5

Article 26 of the Convention shall become Article 25 ("Plenary Court") and its text shall be amended as follows:

1 At the end of paragraph d, the comma shall be replaced by a semi-colon and the word “and” shall be deleted.

2 At the end of paragraph e, the full stop shall be replaced by a semi-colon.

3 A new paragraph f shall be added which shall read as follows:

"f make any request under Article 26, paragraph 2."

ARTICLE 6

Article 27 of the Convention shall become Article 26 and its text shall be amended to read as follows:

"Article 26
Single-judge formation, committees, Chambers and Grand Chamber

1 To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court’s Chambers shall set up committees for a fixed period of time.

2 At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.

3 When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.

4 There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

5 The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned."

ARTICLE 7

After the new Article 26, a new Article 27 shall be inserted into the Convention, which shall read as follows:

"Article 27
Competence of single judges

1 A single judge may declare inadmissible or strike out of the Court’s list of cases an application submitted under Article 34, where such a decision can be taken without further examination.

2 The decision shall be final.

3 If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination."
ARTICLE 8

Article 28 of the Convention shall be amended to read as follows:

"Article 28

Competence of committees

1 In respect of an application submitted under Article 34, a committee may, by a unanimous vote, a declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or

b declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.

2 Decisions and judgments under paragraph 1 shall be final.

3 If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.b."

ARTICLE 9

Article 29 of the Convention shall be amended as follows:

1 Paragraph 1 shall be amended to read as follows:

"If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately."

2 At the end of paragraph 2 a new sentence shall be added which shall read as follows:

"The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise."

3 Paragraph 3 shall be deleted.

ARTICLE 10

Article 31 of the Convention shall be amended as follows:

1 At the end of paragraph a, the word “and” shall be deleted.

2 Paragraph b shall become paragraph c and a new paragraph b shall be inserted and shall read as follows:

"b decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and."

ARTICLE 11

Article 32 of the Convention shall be amended as follows:

At the end of paragraph 1, a comma and the number 46 shall be inserted after the number 34.

ARTICLE 12

Paragraph 3 of Article 35 of the Convention shall be amended to read as follows:

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

a the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

b the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."
ARTICLE 13
A new paragraph 3 shall be added at the end of Article 36 of the Convention, which shall read as follows:

“3 In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.”

ARTICLE 14
Article 38 of the Convention shall be amended to read as follows:

“Article 38
Examination of the case
The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.”

ARTICLE 15
Article 39 of the Convention shall be amended to read as follows:

“Article 39
Friendly settlements
1 At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.
2 Proceedings conducted under paragraph 1 shall be confidential.
3 If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.
4 This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.”

ARTICLE 16
Article 46 of the Convention shall be amended to read as follows:

“Article 46
Binding force and execution of judgments
1 The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2 The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3 If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the Committee.
4 If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
5 If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.”

ARTICLE 17
Article 59 of the Convention shall be amended as follows:

1 A new paragraph 2 shall be inserted which shall read as follows:

“2 The European Union may accede to this Convention.”

2 Paragraphs 2, 3 and 4 shall become paragraphs 3, 4 and 5 respectively.
Appendix III: Adopted texts

FINAL AND TRANSITIONAL PROVISIONS

ARTICLE 18
1 This Protocol shall be open for signature by member states of the Council of Europe signatories to the Convention, which may express their consent to be bound by
   a signature without reservation as to ratification, acceptance or approval; or
   b signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2 The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

ARTICLE 19
This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 18.

ARTICLE 20
1 From the date of the entry into force of this Protocol, its provisions shall apply to all applications pending before the Court as well as to all judgments whose execution is under supervision by the Committee of Ministers.

2 The new admissibility criterion inserted by Article 12 of this Protocol in Article 35, paragraph 3.b of the Convention, shall not apply to applications declared admissible before the entry into force of the Protocol. In the two years following the entry into force of this Protocol, the new admissibility criterion may only be applied by Chambers and the Grand Chamber of the Court.

ARTICLE 21
The term of office of judges serving their first term of office on the date of entry into force of this Protocol shall be extended ipso jure so as to amount to a total period of nine years. The other judges shall complete their term of office, which shall be extended ipso jure by two years.

ARTICLE 22
The Secretary General of the Council of Europe shall notify the member states of the Council of Europe of:
   a any signature;
   b the deposit of any instrument of ratification, acceptance or approval;
   c the date of entry into force of this Protocol in accordance with Article 19; and
   d any other act, notification or communication relating to this Protocol.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 13th day of May 2004, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member state of the Council of Europe.
EXPLANATORY REPORT TO PROTOCOL NO. 14
TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

amending the control system of the Convention

Adopted by the CDDH on 7 April 2004

INTRODUCTION

1. Since its adoption in 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”) has been amended and supplemented several times: the High Contracting Parties have used amending or additional protocols to adapt it to changing needs and to developments in European society. In particular, the control mechanism established by the Convention was radically reformed in 1994 with the adoption of Protocol No. 11 which entered into force on 1 November 1998.

2. Ten years later, at a time when nearly all of Europe’s countries have become party to the Convention, the urgent need has arisen to adjust this mechanism, and particularly to guarantee the long-term effectiveness of the European Court of Human Rights (hereinafter referred to as “the Court”), so that it can continue to play its pre-eminent role in protecting human rights in Europe.

I. Need to increase the effectiveness of the control system established by the Convention

Protocol No. 11

3. Protocol No. 11 substituted a full-time single Court for the old system established by the 1950 Convention, namely, a Commission, a Court and the Committee of Ministers which played a certain “judicial” role.

4. Protocol No. 11, which was opened for signature on 11 May 1994 and came into force on 1 November 1998, was intended, firstly, to simplify the system so as to reduce the length of proceedings, and, secondly, to reinforce their judicial character. This protocol made the system entirely judicial (abolition of the Committee of Ministers’ quasi-judicial role, deletion of the optional clauses concerning the right of individual application and the compulsory jurisdiction of the Court) and created a single full-time Court.

5. In this way Protocol No. 11 contributed to enhancing the effectiveness of the system, notably by improving the accessibility and visibility of the Court and by simplifying the procedure in order to cope with the influx of applications generated by the constant increase in the number of states. Whereas the Commission and Court had given a total of 38,389 decisions and judgments in the 44 years up to 1998 (the year in which Protocol No. 11 took effect), the single Court has given 61,633 in five years. None the less, the reformed system, which originated in pro-

30. In early 2004, Belarus and Monaco were the only potential or actual candidates for membership still outside the Council of Europe.
posals first made in the 1980s, proved inadequate to cope with the new situation. Indeed, since 1990, there has been a considerable and continuous rise in the number of individual applications as a result, amongst other things, of the enlargement of the Council of Europe. Thus the number of applications increased from 5 279 in 1990 to 10 335 in 1994 (+96%), 18 164 in 1998 (+76%) and 34 546 in 2002 (+90%). Whilst streamlining measures taken by the Court enabled no less than 1 500 applications to be disposed of per month in 2003, this remains far below the nearly 2 300 applications allocated to a decision body every month.

6. This increase is due not only to the accession of new States Parties (between the opening of Protocol No. 11 for signature in May 1994 and the adoption of Protocol No. 14, thirteen new States Parties ratified the Convention, extending the protection of its provisions to over 240 million additional individuals) and to the rapidity of the enlargement process, but also to a general increase in the number of applications brought against States which were party to the Convention in 1993. In 2004 the Convention system was open to no fewer than 800 million people. As a result of the massive influx of individual applications, the effectiveness of the system, and thus the credibility and authority of the Court, were seriously endangered.

The problem of the Court’s excessive case-load

7. It is generally recognised that the Court’s excessive caseload (during 2003, some 39 000 new applications were lodged and at the end of that year, approximately 65 000 applications were pending before it) manifests itself in two areas in particular: i. processing the very numerous individual applications which are terminated without a ruling on the merits, usually because they are declared inadmissible (more than 90% of all applications), and ii. processing individual applications which derive from the same structural cause as an earlier application which has led to a judgment finding a breach of the Convention (repetitive cases following a so-called “pilot judgment”). A few figures will illustrate this. In 2003 there were some 17 270 applications declared inadmissible (or struck out of the list of cases), and 753 applications declared admissible. Thus, the great majority of cases are terminated by inadmissibility or strike-out decisions (96% of cases disposed of in 2003). In the remaining cases, the Court gave 703 judgments in 2003, and some 60% of these concerned repetitive cases.

8. Such an increase in the caseload has an impact both on the registry and on the work of the judges and is leading to a rapid accumulation of pending cases not only before committees (see paragraph 5 in fine above) but also before Chambers. In fact, as is the case with committees, the output of Chambers is far from being sufficient to keep pace with the influx of cases brought before them. A mere 8% of all cases terminated by the Court in 2003 were Chamber cases. This stands in stark contrast with the fact that no less than 20% of all new cases assigned to a decision-making body in the same year were assigned to a Chamber. This difference between input and output has led to the situation that, in 2003, 40% of all cases pending before a decision-making body were cases before a Chamber. In absolute terms, this accumulation of cases pending before a Chamber is reflected by the fact that, on 1 January 2004, approximately 16 500 cases were pending before Chambers. It is clear that the considerable amount of time spent on filtering work has a negative effect on the capacity of judges and the registry to process Chamber cases.

9. The prospect of a continuing increase in the workload of the Court and the Committee of Ministers (supervising execution of judgments) in the next few years is such that a set of concrete and coherent measures – including reform of the control system itself – was considered necessary to preserve the system in the future.

31. Unless otherwise stated, the figures given here are taken from the document “Survey of Activities 2003” produced by the European Court of Human Rights or based on more recent information provided by its registry.
10. At the same time – and this was one of the major challenges in preparing the present protocol – it was vital that reform should in no way affect what are rightly considered the principal and unique features of the Convention system. These are the judicial character of European supervision, and the principle that any person claiming to be the victim of a breach of the rights and freedoms protected by the Convention may refer the matter to the Court (right of individual application).

11. Indeed, the Convention’s control system is unique: the Parties agree to subject themselves to international judicial supervision of their obligation to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention. This control is exercised by the Court, which gives judgments on individual applications brought under Article 34 of the Convention and on state applications – which are extremely rare – brought under Article 33. The Court’s judgments are binding on respondent Parties and their execution is supervised by the Committee of Ministers of the Council of Europe.

12. The principle of subsidiarity underlies all the measures taken to increase the effectiveness of the Convention’s control system. Under Article 1 of the Convention, it is with the High Contracting Parties that the obligation lies “to secure to everyone within their jurisdiction the rights and freedoms” guaranteed by the Convention, whereas the role of the Court, under Article 19, is “to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention”. In other words, securing rights and freedoms is primarily the responsibility of the Parties; the Court’s role is subsidiary.

13. Forecasts from the current figures by the registry show that the Court’s caseload would continue to rise sharply if no action were taken. Moreover, the estimates are conservative ones. Indeed, the cumulative effects of greater awareness of the Convention in particular in new States Parties, and of the entry into force of Protocol No. 12, the ratification of other additional protocols by states which are not party to them, the Court’s evolving and extensive interpretation of rights guaranteed by the Convention and the prospect of the European Union’s accession to the Convention, suggest that the annual number of applications to the Court could in the future far exceed the figure for 2003.

14. Measures required to ensure the long-term effectiveness of the control system established by the Convention in the broad sense are not restricted to Protocol No. 14. Measures must also be taken to prevent violations at national level and improve domestic remedies, and also to enhance and expedite execution of the Court’s judgments. Only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the Court’s present overload.

Measures to be taken at national level

15. In accordance with the principle of subsidiarity, the rights and freedoms enshrined in the Convention must be protected first and foremost at national level. Indeed this is where such protection is most effective. The responsibility of national authorities in this area must be reaffirmed and the capacity of national legal systems to prevent and redress violations must be reinforced. States have a duty to monitor the conformity of their legislation and administrative practice with the requirements of the Convention and the Court’s case-law. In order to achieve this, they may have the assistance of outside bodies. If fully applied, these measures will relieve the pressure on the Court in several ways: they should not only help to reduce the number of well-founded individual applications by ensuring that national laws are compatible with the Convention, or by making findings of violations or remedying them at national level, they will also alleviate the Court’s work in that well-reasoned judgments already given on cases at national level make adjudication by the Court easier. It goes without saying, however, that these effects will be felt only in the medium term.

32. As at 1 January 2004, there have only been 20 interstate applications.
Measures to be taken concerning execution of judgments

16. Execution of the Court’s judgments is an integral part of the Convention system. The measures that follow are designed to improve and accelerate the execution process. The Court’s authority and the system’s credibility both depend to a large extent on the effectiveness of this process. Rapid and adequate execution has, of course, an effect on the influx of new cases: the more rapidly general measures are taken by States Parties to execute judgments which point to a structural problem, the fewer repetitive applications there will be. In this regard, it would be desirable for states, over and above their obligations under Article 46, paragraph 1, of the Convention, to give retroactive effect to such measures and remedies. Several measures advocated in the above-mentioned recommendations and resolutions pursue this aim. In addition, it would be useful if the Court and, as regards the supervision of the execution of judgments, the Committee of Ministers, adopted a special procedure so as to give priority treatment to judgments that identify a structural problem capable of generating a significant number of repetitive applications, with a view to securing speedy execution of the judgment. The most important Convention amendment in the context of execution of judgments of the Court involves empowering the Committee of Ministers to bring infringement proceedings in the Court against any state which refuses to comply with a judgment.

17. The measures referred to in the previous paragraph are also designed to increase the effectiveness of the Convention system as a whole. While the supervision of the execution of judgments generally functions satisfactorily, the process needs to be improved to maintain the system’s effectiveness.

Effectiveness of filtering and of subsequent processing of applications by the Court

18. Filtering and subsequent processing of applications by the Court are the main areas in which Protocol No. 14 makes concrete improvements. These measures are outlined in Chapter III below, and described in greater detail in Chapter IV, which comments on each of the provisions in the protocol.

33. The Committee of Ministers has adopted a series of specific instruments for this purpose:
– Recommendation No. R (2000) 2 of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights;
– Recommendation Rec (2004) 5 of the Committee of Ministers on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down by the European Convention on Human Rights;
– Recommendation Rec (2004) 6 of the Committee of Ministers on the improvement of domestic remedies;
– Resolution Res (2002) 58 of the Committee of Ministers on the publication and dissemination of the case-law of the European Court of Human Rights;

All these instruments, as well as this protocol, are referred to in the general declaration of the Committee of Ministers “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels”, adopted on 12 May 2004.
19. During the preparatory work on Protocol No. 14, there was wide agreement as to the importance of several other issues linked to the functioning of the control system of the Convention which, however, did not require an amendment of the Convention. These are the need to strengthen the registry of the Court to enable it to deal with the influx of cases whilst maintaining the quality of the judgments, the need to encourage more frequent third party interventions by other states in cases pending before the Court which raise important general issues, and, in the area of supervision of execution, the need to strengthen the department for the execution of judgments of the General Secretariat of the Council of Europe and to make optimum use of other existing Council of Europe institutions, mechanisms and activities as a support for promoting rapid execution of judgments.

II. Principal stages in the preparation of Protocol No. 14

20. The European Ministerial Conference on Human Rights, held in Rome in November 2000 to mark the 50th anniversary of the signing of the Convention, found that “the effectiveness of the Convention system [...] is now at issue” because of “the difficulties that the Court has encountered in dealing with the ever-increasing volume of applications” (Resolution I on institutional and functional arrangements for the protection of human rights at national and European level).\(^\text{34}\) It accordingly called on the Committee of Ministers to “initiate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation”.\(^\text{35}\) The conference also thought it “indispensable, having regard to the ever-increasing number of applications, that urgent measures be taken to assist the Court in carrying out its functions and that an in-depth reflection be started as soon as possible on the various possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation”.\(^\text{36}\)

21. As a follow-up to the ministerial conference, the Ministers’ Deputies set up, in February 2001, an Evaluation group to consider ways of guaranteeing the effectiveness of the Court. The group submitted its report to the Committee of Ministers on 27 September 2001.\(^\text{37}\)

22. Concurrently, the Steering Committee for Human Rights (CDDH) set up its own Reflection Group on the Reinforcement of the Human Rights Protection Mechanism. Its activity report was sent to the Evaluation group in June 2001, so that the latter could take it into account in its work.\(^\text{38}\)

23. To give effect to the conclusions of the Evaluation group’s report, the Committee of Ministers agreed in principle to additional budgetary appropriations for the period from 2003 to 2005, to allow the Court to recruit a significant number of extra lawyers, as well as administrative and auxiliary staff. It took similar action to reinforce the Council of Europe Secretariat departments involved in execution of the Court’s judgments.

24. The Court also took account of the Evaluation group’s conclusions and those of its Working party on working methods.\(^\text{39}\) On this basis it adopted a number of measures concerning its own

---

34. Paragraph 16 of the resolution.
35. Paragraph 18.ii of the resolution.
Appendix III: Adopted texts

working methods and those of the registry. It also amended its Rules of Court in October 2002
and again in November 2003.

25. At its 109th session (8 November 2001) the Committee of Ministers adopted its declaration on
“The protection of human rights in Europe – Guaranteeing the long-term effectiveness of the
European Court of Human Rights.”40 In this text it welcomed the Evaluation group’s report and,
with a view to giving it effect, instructed the CDDH to:

– carry out a feasibility study on the most appropriate way to conduct the preliminary examina-
tion of applications, particularly by reinforcing the filtering of applications;

– examine and, if appropriate, submit proposals for amendments to the Convention, notably on
the basis of the recommendations in the report of the Evaluation group.

26. In the light of the work done, particularly by its Reflection Group on the Reinforcement of the
Human Rights Protection Mechanism (CDDH-GDR) and its Committee of Experts for the Im-
provement of Procedures for the Protection of Human Rights (DH-PR), the CDDH reported
on progress in these two areas in an interim report, adopted in October 2002 (document
CM (2002) 146). It focused on three main issues: preventing violations at national level and
improving domestic remedies, optimising the effectiveness of filtering and subsequent processing
of applications, and improving and accelerating the execution of the Court’s judgments.

27. In the light of this interim report, and following the declaration, “The Court of Human Rights
for Europe”, which it adopted at its 111th session (6-7 November 2002),41 the Committee of
Ministers decided that it wished to examine a set of concrete and coherent proposals at its min-
isterial session in May 2003. In April 2003, the CDDH accordingly submitted a final report, de-
tailing its proposals in these three areas (document CM (2003) 55). These served as a basis for
preparation of the Committee of Ministers’ recommendations to the member states and for the
amendments made to the Convention.

28. In its declaration, “Guaranteeing the long-term effectiveness of the European Court of Human
Rights”, adopted at its 112th session (14-15 May 2003), the Committee of Ministers welcomed
this report and endorsed the CDDH’s approach. It instructed the Ministers’ Deputies to imple-
ment the CDDH’s proposals, so that it could examine texts for adoption at its 114th session in
2004, taking account of certain issues referred to in the declaration. It also asked them to take
account of other questions raised in the report, such as the possible accession of the European
Union to the Convention, the term of office of judges of the Court, and the need to ensure that
future amendments to the Convention were given effect as rapidly as possible.

29. The CDDH was accordingly instructed to prepare, with a view to their adoption by the Com-
mittee of Ministers, not only a draft amending protocol to the Convention with an explanatory
report, but also a draft declaration, three draft recommendations and a draft resolution. Work
on the elaboration of Protocol No. 14 and its explanatory report was carried out within the
CDDH-GDR (renamed Drafting Group on the Reinforcement of the Human Rights Protection
Mechanism), while work concerning the other texts was undertaken by the DH-PR.

30. The Committee of Ministers also encouraged the CDDH to consult civil society, the Court and
the Parliamentary Assembly. With this in view, the CDDH carefully examined the opinions and
proposals submitted by the Parliamentary Assembly’s Committee on Legal Affairs and Human
Rights, the Court, the Council of Europe Commissioner for Human Rights and certain member
states, as well as non-governmental organisations (NGOs) and national institutions for the pro-
motion and protection of human rights. The CDDH-GDR and CDDH have benefited greatly
from the contributions of representatives of the Parliamentary Assembly, the Court’s registry
and the Commissioner’s office, who played an active part in its work. The reports and draft


696 REFORMING THE EUROPEAN CONVENTION ON HUMAN RIGHTS
texts adopted by the CDDH and the CDDH-GDR were public documents available on the Internet, and copies were sent directly to the Court, Parliamentary Assembly, Commissioner for Human Rights and NGOs. The CDDH-GDR also organised two valuable consultations with NGOs and the CDDH benefited from the contribution of the NGOs accredited to it. The Ministers’ Deputies were closely involved throughout the process. Protocol No. 14 is thus the fruit of a collective reflection, carried out in a very transparent manner.


32. As well as adopting the amending protocol at the 114th ministerial session, held on 12 and 13 May 2004, the Committee of Ministers adopted the declaration “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels”. In that declaration the member states recognised the urgency of the reform, and committed themselves to ratifying Protocol No. 14 within two years.

33. The text of the amending protocol was opened for signature by Council of Europe member states, signatory to the European Convention on Human Rights on 13 May 2004.

III. Overview of the changes made by Protocol No. 14 to the control system of the European Convention on Human Rights

34. During the initial reflection stage on the reform of the Convention’s control system, which started immediately after the European Ministerial Conference on Human Rights in 2000, a wide range of possible changes to the system were examined, both in the Evaluation group and the CDDH’s Reflection group. Several proposals were retained and are taken up in this protocol. Others, including some proposals for radical change of the control system, were for various reasons rejected during the reflection stage. Some of these should be mentioned here. For example, the idea of setting up, within the framework of the Convention, “regional courts of first instance” was rejected because, on the one hand, of the risk it would create of diverging case-law and, on the other hand, the high cost of setting them up. Proposals to empower the Court to give preliminary rulings at the request of national courts or to expand the Court’s competence to give advisory opinions (Articles 47-49 of the Convention) were likewise rejected. Such innovations might interfere with the contentious jurisdiction of the Court and they would, certainly in the short term, result in additional, not less, work for the Court. Two other proposals were rejected because they would have restricted the right of individual application. These were the proposal that the Court should be given discretion to decide whether or not to take up a case for examination (system comparable to the certiorari procedure of the United States Supreme Court) and that it should be made compulsory for applicants to be represented by a lawyer or other legal expert from the moment of introduction of the application (see however Rule 36, paragraph 2, of the Rules of Court). It was felt that the principle according to which anyone had the right to apply to the Court should be firmly upheld. The proposal to create a separate filtering body, composed of persons other than the judges of the Court, was also rejected. In this connection, the protocol is based on two fundamental premises: filtering work

42. See, for a fuller overview, the activity report of the CDDH’s Reflection group (document CDDH-GDR (2001) 10, especially its Appendices I and II), the report of the Evaluation group (see footnote 8 above) as well as the CDDH’s interim report of October 2002 (document CM (2002) 146), which contains a discussion of various suggestions made at the Seminar on Partners for the Protection of Human Rights: Reinforcing Interaction between the European Court of Human Rights and National Courts (Strasbourg, 9-10 September 2002).
must be carried out within the judicial framework of the Court and there should not be different categories of judges within the same body. Finally, in the light of Opinion No. 251 (2004) of the Parliamentary Assembly, it was decided not to make provision for permitting an increase of the number of judges without any new amendment to the Convention.

35. Unlike Protocol No. 11, Protocol No. 14 makes no radical changes to the control system established by the Convention. The changes it does make relate more to the functioning than to the structure of the system. Their main purpose is to improve it, giving the Court the procedural means and flexibility it needs to process all applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination.

36. To achieve this, amendments are introduced in three main areas:

– reinforcement of the Court’s filtering capacity in respect of the mass of unmeritorious applications;
– a new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage; the new criterion contains two safeguard clauses;
– measures for dealing with repetitive cases.

37. Together, these elements of the reform seek to reduce the time spent by the Court on clearly inadmissible applications and repetitive applications so as to enable the Court to concentrate on those cases that raise important human rights issues.

38. The filtering capacity is increased by making a single judge competent to declare inadmissible or strike out an individual application. This new mechanism retains the judicial character of the decision-making on admissibility. The single judges will be assisted by non-judicial rapporteurs, who will be part of the registry.

39. A new admissibility requirement is inserted in Article 35 of the Convention. The new requirement provides the Court with an additional tool which should assist it in concentrating on cases which warrant an examination on the merits, by empowering it to declare inadmissible applications where the applicant has not suffered a significant disadvantage and which, in terms of respect for human rights, do not otherwise require an examination on the merits by the Court. Furthermore, the new requirement contains an explicit condition to ensure that it does not lead to rejection of cases which have not been duly considered by a domestic tribunal. It should be stressed that the new requirement does not restrict the right of individuals to apply to the Court or alter the principle that all individual applications are examined on their admissibility. While the Court alone is competent to interpret the new admissibility requirement and decide on its application, its terms should ensure that rejection of cases requiring an examination on the merits is avoided. The latter will notably include cases which, notwithstanding their trivial nature, raise serious questions affecting the application or the interpretation of the Convention or important questions concerning national law.

40. The competence of the committees of three judges is extended to cover repetitive cases. They are empowered to rule, in a simplified procedure, not only on the admissibility but also on the merits of an application, if the underlying question in the case is already the subject of well-established case-law of the Court.

41. As for the other changes made by the protocol, it should be noted, first of all, that the Court is given more latitude to rule simultaneously on the admissibility and merits of individual applications. In fact, joint decisions on admissibility and merits of individual cases are not only encouraged but become the norm. However, the Court will be free to choose, on a case by case basis, to take separate decisions on admissibility.

42. Furthermore, the Committee of Ministers may decide, by a two-thirds majority of the representatives entitled to sit on the Committee, to bring proceedings before the Grand Chamber of the Court against any High Contracting Party which refuses to comply with the Court’s final judgment in a case to which it is party, after having given it notice to do so. The purpose of such
proceedings would be to obtain a ruling from the Court as to whether that Party has failed to fulfil its obligation under Article 46, paragraph 1, of the Convention.

43. The Committee of Ministers will in certain circumstances also be able to request the Court to give an interpretation of a judgment.

44. Friendly settlements are encouraged at any stage of the proceedings. Provision is made for supervision by the Committee of Ministers of the execution of decisions of the Court endorsing the terms of friendly settlements.

45. It should also be noted that judges are now elected for a single nine-year term. Transitional provisions are included to avoid the simultaneous departure of large numbers of judges.

46. Finally, an amendment has been introduced with a view to possible accession of the European Union to the Convention.

47. For all these, as well as the further amendments introduced by the protocol, reference is made to the explanations in Chapter IV below.

IV. Comments on the provisions of the Protocol

Article 1 of the amending protocol

ARTICLE 22 – ELECTION OF JUDGES

48. The second paragraph of Article 22 has been deleted since it no longer served any useful purpose in view of the changes made to Article 23. Indeed, there will be no more “casual vacancies” in the sense that every judge elected to the Court will be elected for a single term of nine years, including where that judge’s predecessor has not completed a full term (see also paragraph 51 below). In other words, the rule contained in the amended Article 22 (which is identical to paragraph 1 of former Article 22) will apply to every situation where there is a need to proceed to the election of a judge.

49. It was decided not to amend the first paragraph of Article 22 to prescribe that the lists of three candidates nominated by the High Contracting Parties should contain candidates of both sexes, since that might have interfered with the primary consideration to be given to the merits of potential candidates. However, Parties should do everything possible to ensure that their lists contain both male and female candidates.

Article 2 of the amending protocol

ARTICLE 23 – TERMS OF OFFICE AND DISMISSAL

50. The judges’ terms of office have been changed and increased to nine years. Judges may not, however, be re-elected. These changes are intended to reinforce their independence and impartiality, as desired notably by the Parliamentary Assembly in its Recommendation 1649 (2004).

51. In order to ensure that the introduction of a non-renewable term of office does not threaten the continuity of the Court, the system whereby large groups of judges were renewed at three-year intervals has been abolished. This has been brought about by the new wording of paragraph 1 and the deletion of paragraphs 2 to 4 of former Article 23. In addition, paragraph 5 of former Article 23 has been deleted so that it will no longer be possible, in the event of a casual vacancy, for a judge to be elected to hold office for the remainder of his or her predecessor’s term. In the past this has led to undesirable situations where judges were elected for very short terms of office, a situation perhaps understandable in a system of renewable terms of office, but

43. Unless otherwise specified, the references to articles are to the Convention as amended by the Protocol.
which is unacceptable in the new system. Under the new Article 23, all judges will be elected for a non-renewable term of nine years. This should make it possible, over time, to obtain a regular renewal of the Court’s composition, and may be expected to lead to a situation in which each judge will have a different starting date for his or her term of office.

52. Paragraphs 6 and 7 of the former Article 23 remain, and become paragraphs 2 and 3 of the new Article 23.

53. In respect of paragraph 2 (the age limit of 70 years), it was decided not to fix an additional age limit for candidates. Paragraphs 1 and 2, read together, may not be understood as excluding candidates who, on the date of election, would be older than 61. That would be tantamount to unnecessarily depriving the Court of the possibility of benefiting from experienced persons, if elected. At the same time, it is generally recommended that High Contracting Parties avoid proposing candidates who, in view of their age, would not be able to hold office for at least half the nine-year term before reaching the age of 70.

54. In cases where the departure of a judge can be foreseen, in particular for reasons of age, it is understood that the High Contracting Party concerned should ensure that the list of three candidates (see Article 22) is submitted in good time so as to avoid the need for application of paragraph 3 of the new Article 23. As a rule, the list should be submitted at least six months before the expiry of the term of office. This practice should make it possible to meet the concerns expressed by the Parliamentary Assembly in its Recommendation 1649 (2004), paragraph 14.

55. Transitional provisions are set out in Article 21 of the protocol.

56. For technical reasons (to avoid renumbering a large number of Convention provisions as a result of the insertion of a new Article 27), the text of former Article 24 (Dismissal) has been inserted in Article 23 as a new fourth paragraph. The title of Article 23 has been amended accordingly.

**Article 3 of the amending protocol**

57. For the reason set out in the preceding paragraph, former Article 24 has been deleted; the provision it contained has been inserted in a new paragraph 4 of Article 23.

**Article 4 of the amending protocol**

**ARTICLE 24 – REGISTRY AND RAPPORTEURS**

58. Former Article 25 has been renumbered as Article 24; it is amended in two respects. First of all, the second sentence of former Article 25 has been deleted since the legal secretaries, created by Protocol No. 11, have in practice never had an existence of their own, independent from the registry, as is the case at the Court of Justice of the European Communities. Secondly, a new paragraph 2 is added so as to introduce the function of rapporteur as a means of assisting the new single-judge formation provided for in the new Article 27. While it is not strictly necessary from a legal point of view to mention rapporteurs in the Convention text, it was none the less considered important to do so because of the novelty of rapporteur work being carried out by persons other than judges and because it will be indispensable to create these rapporteur functions in order to achieve the significant potential increase in filtering capacity which the institution of single-judge formations aims at. The members of the registry exercising rapporteur functions will assist the new single-judge formations. In principle, the single judge should be assisted by a rapporteur with knowledge of the language and the legal system of the respondent Party. The function of rapporteur will never be carried out by a judge in this context.

59. It will be for the Court to implement the new paragraph 2 by deciding, in particular, the number of rapporteurs needed and the manner and duration of appointment. On this point, it should be stressed that it would be advisable to diversify the recruitment channels for registry lawyers and rapporteurs. Without prejudice to the possibility to entrust existing registry lawyers with
the rapporteur function, it would be desirable to reinforce the registry, for fixed periods, with lawyers having an appropriate practical experience in the functioning of their respective domestic legal systems. Since rapporteurs will form part of the Court’s registry, the usual appointment procedures and relevant staff regulations will apply. This would make it possible to increase the work capacity of the registry while allowing it to benefit from the domestic experience of these lawyers. Moreover, it is understood that the new function of rapporteur should be conferred on persons with a solid legal experience, expertise in the Convention and its case-law and a very good knowledge of at least one of the two official languages of the Council of Europe and who, like the other staff of the registry, meet the requirements of independence and impartiality.

Article 5 of the amending protocol

ARTICLE 25 – PLENARY COURT

60. A new paragraph f has been added to this article (formerly Article 26) in order to reflect the new function attributed to the plenary Court by this protocol. It is understood that the term “Chambers” appearing in paragraphs b and c refers to administrative entities of the Court (which in practice are referred to as “Sections” of the Court) as opposed to the judicial formations envisaged by the term “Chambers” in new Article 26, paragraph 1, first sentence. It was not considered necessary to amend the Convention in order to clarify this distinction.

Article 6 of the amending protocol

ARTICLE 26 – SINGLE-JUDGE FORMATION, COMMITTEES, CHAMBERS AND GRAND CHAMBER

61. The text of Article 26 (formerly Article 27) has been amended in several respects. Firstly, a single-judge formation is introduced in paragraph 1 in the list of judicial formations of the Court and a new rule is inserted in a new paragraph 3 to the effect that a judge shall not sit as a single judge in cases concerning the High Contracting Party in respect of which he or she has been elected. The competence of single judges is defined in the new Article 27. In the latter respect, reference is made to the explanations in paragraph 67 below.

62. Adequate assistance to single judges requires additional resources. The establishment of this system will thus lead to a significant increase in the Court’s filtering capacity, on the one hand, on account of the reduction, compared to the old committee practice, of the number of actors involved in the preparation and adoption of decisions (one judge instead of three; the new rapporteurs who could combine the functions of case-lawyer and rapporteur), and, on the other hand, because judges will be relieved of their rapporteur role when sitting in a single-judge formation and, finally, as a result of the multiplication of filtering formations operating simultaneously.

63. Secondly, some flexibility as regards the size of the Court’s Chambers has been introduced by a new paragraph 2. Application of this paragraph will reduce, for a fixed period, the size of Chambers generally; it should not allow, however, for the setting up of a system of Chambers of different sizes which would operate simultaneously for different types of cases.

64. Finally, paragraph 2 of former Article 27 has been amended to make provision for a new system of appointment of ad hoc judges. Under the new rule, contained in paragraph 4 of the new Article 26, each High Contracting Party is required to draw up a reserve list of ad hoc judges from which the President of the Court shall choose someone when the need arises to appoint an ad hoc judge. This new system is a response to criticism of the old system, which allowed a High Contracting Party to choose an ad hoc judge after the beginning of proceedings. Concerns about this had also been expressed by the Parliamentary Assembly. It is understood that the list of potential ad hoc judges may include names of judges elected in respect of other High Con-
tracting Parties. More detailed rules on the implementation of this new system may be included in the Rules of Court.

65. The text of paragraph 5 is virtually identical to that of paragraph 3 of former Article 27.

Article 7 of the amending protocol

ARTICLE 27 – COMPETENCE OF SINGLE JUDGES

66. Article 27 contains new provisions defining the competence of the new single-judge formation.

67. The new article sets out the competence of the single-judge formations created by the amended Article 26, paragraph 1. It is specified that the competence of the single judge is limited to taking decisions of inadmissibility or decisions to strike the case out of the list “where such a decision can be taken without further examination”. This means that the judge will take such decisions only in clear-cut cases, where the inadmissibility of the application is manifest from the outset. The latter point is particularly important with regard to the new admissibility criterion introduced in Article 35 (see paragraphs 77 to 85 below), in respect of which the Court’s Chambers and Grand Chamber will have to develop case-law first (see, in this connection, the transitional rule contained in Article 20, paragraph 2, second sentence, of this protocol, according to which the application of the new admissibility criterion is reserved to Chambers and the Grand Chamber in the two years following the entry into force of this protocol). Besides, it is recalled that, as was explained in paragraph 58 above, single-judge formations will be assisted by rapporteurs. The decision itself remains the sole responsibility of the judge. In case of doubt as to the admissibility, the judge will refer the application to a committee or a Chamber.

Article 8 of the amending protocol

ARTICLE 28 – COMPETENCE OF COMMITTEES

68. Paragraphs 1 and 2 of the amended Article 28 extend the powers of three-judge committees. Hitherto, these committees could, unanimously, declare applications inadmissible. Under the new paragraph 1.b of Article 28, they may now also, in a joint decision, declare individual applications admissible and decide on their merits, when the questions they raise concerning the interpretation or application of the Convention are covered by well-established case-law of the Court. “Well-established case-law” normally means case-law which has been consistently applied by a Chamber. Exceptionally, however, it is conceivable that a single judgment on a question of principle may constitute “well-established case-law”, particularly when the Grand Chamber has rendered it. This applies, in particular, to repetitive cases, which account for a significant proportion of the Court’s judgments (in 2003, approximately 60%). Parties may, of course, contest the “well-established” character of case-law before the committee.

69. The new procedure is both simplified and accelerated, although it preserves the adversarial character of proceedings and the principle of judicial and collegiate decision-making on the merits. Compared to the ordinary adversarial proceedings before a Chamber, it will be a simplified and accelerated procedure in that the Court will simply bring the case (possibly a group of similar cases) to the respondent Party’s attention, pointing out that it concerns an issue which is already the subject of well-established case-law. Should the respondent Party agree with the Court’s position, the latter will be able to give its judgment very rapidly. The respondent Party may contest the application of Article 28, paragraph 1.b, for example, if it considers that domestic remedies have not been exhausted or that the case at issue differs from the applications which have resulted in the well-established case-law. However, it may never veto the use of this procedure which lies within the committee’s sole competence. The committee rules on all aspects of the case (admissibility, merits, just satisfaction) in a single judgment or decision. This procedure requires unanimity on each aspect. Failure to reach a unanimous decision counts as no decision, in which event the Chamber procedure applies (Article 29). It will then
fall to the Chamber to decide whether all aspects of the case should be covered in a single judgment. Even when the committee initially intends to apply the procedure provided for in Article 28, paragraph 1.b, it may declare an application inadmissible under Article 28, paragraph 1.a. This may happen, for example, if the respondent Party has persuaded the committee that domestic remedies have not been exhausted.

70. The implementation of the new procedure will increase substantially the Court’s decision-making capacity and effectiveness, since many cases can be decided by three judges, instead of the seven currently required when judgments or decisions are given by a Chamber.

71. Even when a three-judge committee gives a judgment on the merits, the judge elected in respect of the High Contracting Party concerned will not be an *ex officio* member of the decision-making body, in contrast with the situation with regard to judgments on the merits under the Convention as it stands. The presence of this judge would not appear necessary, since committees will deal with cases on which well-established case-law exists. However, a committee may invite the judge elected in respect of the High Contracting Party concerned to replace one of its members as, in some cases, the presence of this judge may prove useful. For example, it may be felt that this judge, who is familiar with the legal system of the respondent Party, should join in taking the decision, particularly when such questions as exhaustion of domestic remedies need to be clarified. One of the factors which a committee may consider, in deciding whether to invite the judge elected in respect of the respondent Party to join it, is whether that Party has contested the applicability of paragraph 1.b. The reason why this factor has been explicitly mentioned in paragraph 3 is that it was considered important to have at least some reference in the Convention itself to the possibility for respondent Parties to contest the application of the simplified procedure (see paragraph 69 above). For example, a respondent Party may contest the new procedure on the basis that the case in question differs in some material respect from the established case-law cited. It is likely that the expertise of the “national judge” in domestic law and practice will be relevant to this issue and therefore helpful to the committee. Should this judge be absent or unable to sit, the procedure provided for in the new Article 26, paragraph 4 *in fine* applies.

72. It is for the Court, in its rules, to settle practical questions relating to the composition of three-judge committees and, more generally, to plan its working methods in a way that optimises the new procedure’s effectiveness.

**Article 9 of the amending protocol**

ARTICLE 29 – DECISIONS BY CHAMBERS ON ADMISSIBILITY AND MERITS

73. Apart from a technical change to take into account the new provisions in Articles 27 and 28, paragraph 1 of the amended Article 29 encourages and establishes the principle of the taking of joint decisions by Chambers on the admissibility and merits of individual applications. This article merely endorses the practice which has already developed within the Court. While separate decisions on admissibility were previously the norm, joint decisions are now commonly taken on the admissibility and merits of individual applications, which allows the registry and judges to process cases faster whilst respecting fully the principle of adversarial proceedings. However, the Court may always decide that it prefers to take a separate decision on the admissibility of a particular application.

74. This change does not apply to interstate cases. On the contrary, the rule of former Article 29, paragraph 3, has been explicitly maintained in paragraph 2 of Article 29 as regards such applications. Paragraph 3 of former Article 29 has been deleted.
Appendix III: Adopted texts

**Article 10 of the amending protocol**

**ARTICLE 31 – POWERS OF THE GRAND CHAMBER.**

75. A new paragraph b has been added to this article in order to reflect the new function attributed to the Grand Chamber by this protocol, namely to decide on issues referred to the Court by the Committee of Ministers under the new Article 46, paragraph 4 (question whether a High Contracting Party has failed to fulfil its obligation to comply with a judgment).

**Article 11 of the amending protocol**

**ARTICLE 32 – JURISDICTION OF THE COURT**

76. A reference has been inserted to the new procedures provided for in the amended Article 46.

**Article 12 of the amending protocol**

**ARTICLE 35 – ADMISSIBILITY CRITERIA**

77. A new admissibility criterion is added to the criteria laid down in Article 35. As explained in paragraph 39 above, the purpose of this amendment is to provide the Court with an additional tool which should assist it in its filtering work and allow it to devote more time to cases which warrant examination on the merits, whether seen from the perspective of the legal interest of the individual applicant or considered from the broader perspective of the law of the Convention and the European public order to which it contributes. The new criterion therefore pursues the same aim as some other key changes introduced by this protocol and is complementary to them.

78. The introduction of this criterion was considered necessary in view of the ever-increasing caseload of the Court. In particular, it is necessary to give the Court some degree of flexibility in addition to that already provided by the existing admissibility criteria, whose interpretation has become established in the case-law that has developed over several decades and is therefore difficult to change. This is so because it is very likely that the numbers of individual applications to the Court will continue to increase, up to a point where the other measures set out in this protocol may well prove insufficient to prevent the Convention system from becoming totally paralysed, unable to fulfil its central mission of providing legal protection of human rights at the European level, rendering the right of individual application illusory in practice.

79. The new criterion may lead to certain cases being declared inadmissible which might have resulted in a judgment without it. Its main effect, however, is likely to be that it will in the longer term enable more rapid disposal of unmeritorious cases. Once the Court’s Chambers have developed clear-cut jurisprudential criteria of an objective character capable of straightforward application, the new criterion will be easier for the Court to apply than some other admissibility criteria, including in cases which would at all events have to be declared inadmissible on another ground.

80. The main element contained in the new criterion is the question whether the applicant has suffered a significant disadvantage. These terms are open to interpretation (this is the additional element of flexibility introduced); the same is true of many other terms used in the Convention, including some other admissibility criteria. Like those other terms, they are legal terms capable of, and requiring, interpretation establishing objective criteria through the gradual development of the case-law of the Court.

81. The second element is a safeguard clause to the effect that, even where the applicant has not suffered a significant disadvantage, the application will not be declared inadmissible if respect for human rights as defined in the Convention or the protocols thereto requires an examination on the merits. The wording of this element is drawn from the second sentence of Article 37, par-
agraph 1, of the Convention where it fulfils a similar function in the context of decisions to strike applications out of the Court’s list of cases.

82. A second safeguard clause is added to this first one. It will never be possible for the Court to reject an application on account of its trivial nature if the case has not been duly considered by a domestic tribunal. This clause, which reflects the principle of subsidiarity, ensures that, for the purposes of the application of the new admissibility criterion, every case will receive a judicial examination whether at the national level or at the European level.

83. The wording of the new criterion is thus designed to avoid rejection of cases warranting an examination on the merits. As was explained in paragraph 39 above, the latter will notably include cases which, notwithstanding their trivial nature, raise serious questions affecting the application or interpretation of the Convention or important questions concerning national law.

84. As explained in paragraph 67 above, it will take time for the Court’s Chambers or Grand Chamber to establish clear case-law principles for the operation of the new criterion in concrete contexts. It is clear, having regard to the wording of Articles 27 and 28, that single-judge formations and committees will not be able to apply the new criterion in the absence of such guidance. In accordance with Article 20, paragraph 2, second sentence, of this protocol, single-judge formations and committees will be prevented from applying the new criterion during a period of two years following the entry into force of this protocol.

85. In accordance with the transitional rule set out in Article 20, paragraph 2, first sentence, of this protocol (see also paragraph 105 below), the new admissibility criterion may not be applied to applications declared admissible before the entry into force of this protocol.

**Article 13 of the amending protocol**

**ARTICLE 36 – THIRD PARTY INTERVENTION**


87. It is already possible for the President of the Court, on his or her own initiative or upon request, to invite the Commissioner for Human Rights to intervene in pending cases. With a view to protecting the general interest more effectively, the third paragraph added to Article 36 for the first time mentions the Commissioner for Human Rights in the Convention text by formally providing that the Commissioner has the right to intervene as third party. The Commissioner’s experience may help enlighten the Court on certain questions, particularly in cases which highlight structural or systemic weaknesses in the respondent or other High Contracting Parties.

88. Under the Rules of Court, the Court is required to communicate decisions declaring applications admissible to any High Contracting Party of which an applicant is a national. This rule cannot be applied to the Commissioner, since sending him or her all such decisions would entail an excessive amount of extra work for the registry. The Commissioner must therefore seek this information him- or herself. The rules on exercising this right of intervention, and particularly time limits, would not necessarily be the same for High Contracting Parties and the Commissioner. The Rules of Court will regulate practical details concerning the application of paragraph 3 of Article 36.

89. It was not considered necessary to amend Article 36 in other respects. In particular, it was decided not to provide for a possibility of third party intervention in the new committee pro-

44. The Council of Europe Commissioner for Human Rights was established by Resolution (99) 50, adopted by the Committee of Ministers on 7 May 1999.
Article 14 of the amending protocol

ARTICLE 38 – EXAMINATION OF THE CASE

90. Article 38 incorporates the provisions of paragraph 1.a of former Article 38. The changes are intended to allow the Court to examine cases together with the Parties’ representatives, and to undertake an investigation, not only when the decision on admissibility has been taken, but at any stage in the proceedings. They are a logical consequence of the changes made in Articles 28 and 29, which encourage the taking of joint decisions on the admissibility and merits of individual applications. Since this provision applies even before the decision on admissibility has been taken, High Contracting Parties are required to provide the Court with all necessary facilities prior to that decision. The Parties’ obligations in this area are thus reinforced. It was not considered necessary to amend Article 38 (or Article 34, last sentence) in other respects, notably as regards possible non-compliance with these provisions. These provisions already provide strong legal obligations for the High Contracting Parties and, in line with current practice, any problems which the Court might encounter in securing compliance can be brought to the attention of the Committee of Ministers so that the latter take any steps it deems necessary.

Article 15 of the amending protocol

ARTICLE 39 – FRIENDLY SETTLEMENTS

91. The provisions of Article 39 are partly taken from former Article 38, paragraphs 1.b and 2, and also from former Article 39. To make the Convention easier to read with regard to the friendly settlement procedure, it was decided to address it in a specific article.

92. As a result of the implementation of the new Articles 28 and 29, there should be fewer separate decisions on admissibility. Since under the former Article 38, paragraph 1.b, it was only after an application had been declared admissible that the Court placed itself at the disposal of the parties with a view to securing a friendly settlement, this procedure had to be modified and made more flexible. The Court is now free to place itself at the parties’ disposal for this purpose at any stage in the proceedings.

93. Friendly settlements are therefore encouraged, and may prove particularly useful in repetitive cases, and other cases where questions of principle or changes in domestic law are not involved. It goes without saying that these friendly settlements must be based on respect for human rights, pursuant to Article 39, paragraph 1, as amended.

94. The new Article 39 provides for supervision of the execution of friendly settlements by the Committee of Ministers. This new provision was inserted to reflect a practice which the Court had already developed. In the light of the text of former Article 46, paragraph 2, the Court used to endorse friendly settlements through judgments and not – as provided for in former Article 39 of the Convention – through decisions, whose execution was not subject to supervision by the Committee of Ministers. The practice of the Court was thus in response to the fact that only the execution of judgments was supervised by the Committee of Ministers (former Article 39). It was recognised, however, that adopting a judgment, instead of a decision, might have negative connotations for respondent Parties, and make it harder to secure a friendly settlement. The new procedure should make this easier and thus reduce the Court’s workload. For this reason, the new Article 39 gives the Committee of Ministers authority to supervise the execution of decisions endorsing the terms of friendly settlements. This amendment is in no way in-

tended to reduce the Committee's present supervisory powers, particularly concerning the strike-out decisions covered by Article 37. It would be advisable for the Committee of Ministers to distinguish more clearly, in its practice, between its supervision function by virtue of the new Article 39, paragraph 4 (friendly settlements), on the one hand and that under Article 46, paragraph 2 (execution of judgments), on the other.

**Article 16 of the amending protocol**

**ARTICLE 46 – BINDING FORCE AND EXECUTION OF JUDGMENTS**

95. The first two paragraphs of Article 46 repeat the two paragraphs of the former Article 46. Paragraphs 3, 4 and 5 are new.

96. The new Article 46, in its paragraph 3, empowers the Committee of Ministers to ask the Court to interpret a final judgment, for the purpose of facilitating the supervision of its execution. The Committee of Ministers' experience of supervising the execution of judgments shows that difficulties are sometimes encountered due to disagreement as to the interpretation of judgments. The Court's reply settles any argument concerning a judgment's exact meaning. The qualified majority vote required by the last sentence of paragraph 3 shows that the Committee of Ministers should use this possibility sparingly, to avoid over-burdening the Court.

97. The aim of the new paragraph 3 is to enable the Court to give an interpretation of a judgment, not to pronounce on the measures taken by a High Contracting Party to comply with that judgment. No time-limit has been set for making requests for interpretation, since a question of interpretation may arise at any time during the Committee of Ministers' examination of the execution of a judgment. The Court is free to decide on the manner and form in which it wishes to reply to the request. Normally, it would be for the formation of the Court which delivered the original judgment to rule on the question of interpretation. More detailed rules governing this new procedure may be included in the Rules of Court.

98. Rapid and full execution of the Court's judgments is vital. It is even more important in cases concerning structural problems, so as to ensure that the Court is not swamped with repetitive applications. For this reason, ever since the Rome ministerial conference of 3 and 4 November 2000 (Resolution 1), it has been considered essential to strengthen the means given in this context to the Committee of Ministers. The Parties to the Convention have a collective duty to preserve the Court's authority – and thus the Convention system's credibility and effectiveness – whenever the Committee of Ministers considers that one of the High Contracting Parties refuses, expressly or through its conduct, to comply with the Court’s final judgment in a case to which it is party.

99. Paragraphs 4 and 5 of Article 46 accordingly empower the Committee of Ministers to bring infringement proceedings in the Court (which shall sit as a Grand Chamber – see new Article 31, paragraph b, having first served the state concerned with notice to comply. The Committee of Ministers' decision to do so requires a qualified majority of two thirds of the representatives entitled to sit on the Committee. This infringement procedure does not aim to reopen the question of violation, already decided in the Court's first judgment. Nor does it provide for payment of a financial penalty by a High Contracting Party found in violation of Article 46, paragraph 1. It is felt that the political pressure exerted by proceedings for non-compliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the state concerned.

100. The Committee of Ministers should bring infringement proceedings only in exceptional circumstances. None the less, it appeared necessary to give the Committee of Ministers, as the competent organ for supervising execution of the Court's judgments, a wider range of means of pressure to secure execution of judgments. Currently the ultimate measure available to the

46. See paragraphs 19 to 22 of the resolution.
Committee of Ministers is recourse to Article 8 of the Council of Europe’s Statute (suspension of voting rights in the Committee of Ministers, or even expulsion from the Organisation). This is an extreme measure, which would prove counter-productive in most cases; indeed the High Contracting Party which finds itself in the situation foreseen in paragraph 4 of Article 46 continues to need, far more than others, the discipline of the Council of Europe. The new Article 46 therefore adds further possibilities of bringing pressure to bear to the existing ones. The procedure’s mere existence, and the threat of using it, should act as an effective new incentive to execute the Court’s judgments. It is foreseen that the outcome of infringement proceedings would be expressed in a judgment of the Court.

**Article 17 of the amending protocol**

**ARTICLE 59 – SIGNATURE AND RATIFICATION**

101. Article 59 has been amended in view of possible accession by the European Union to the Convention. A new second paragraph makes provision for this possibility, so as to take into account the developments that have taken place within the European Union, notably in the context of the drafting of a constitutional treaty, with regard to accession to the Convention. It should be emphasised that further modifications to the Convention will be necessary in order to make such accession possible from a legal and technical point of view. The CDDH adopted a report identifying those issues in 2002 (document DG-II (2002) 006). This report was transmitted to the Committee of Ministers, which took note of it. The CDDH accepted that those modifications could be brought about either through an amending protocol to the Convention or by means of an accession treaty to be concluded between the European Union, on the one hand, and the States Parties to the Convention, on the other. While the CDDH had expressed a preference for the latter, it was considered advisable not to refer to a possible accession treaty in the current protocol so as to keep all options open for the future.

102. At the time of drafting of this protocol, it was not yet possible to enter into negotiations – and even less to conclude an agreement – with the European Union on the terms of the latter’s possible accession to the Convention, simply because the European Union still lacked the competence to do so. This made it impossible to include in this protocol the other modifications to the Convention necessary to permit such accession. As a consequence, a second ratification procedure will be necessary in respect of those further modifications, whether they be included in a new amending protocol or in an accession treaty.

**V. Final and transitional provisions**

**Article 18 of the amending protocol**

103. This article is one of the usual final clauses included in treaties prepared within the Council of Europe. This protocol does not contain any provisions on reservations. By its very nature, this amending protocol excludes the making of reservations.

**Article 19 of the amending protocol**

104. This article is one of the usual final clauses included in treaties prepared within the Council of Europe. The period of three months mentioned in it corresponds to the period which was chosen for Protocols Nos. 12 and 13. As the implementation of the reform is urgent, this period was chosen rather than one year, which had been the case for Protocol No. 11. For Protocol No. 11, the period of one year was necessary in order to allow for the setting up of the new Court, and in particular for the election of the judges.
Article 20 of the amending protocol

105. The first paragraph of this transitional provision confirms that, upon entry into force of this protocol, its provisions can be applied immediately to all pending applications so as not to delay the impact of the system’s increased effectiveness which will result from the protocol. In view of Article 35, paragraph 4 *in fine* of the Convention it was considered necessary to provide, in the second paragraph, first sentence, of Article 20 of the amending protocol, that the new admissibility criterion inserted by Article 13 of this protocol in Article 35, paragraph 3.b, of the Convention shall not apply to applications declared admissible before the entry into force of the protocol. The second sentence of the second paragraph explicitly reserves, for a period of two years following the entry into force of this protocol, the application of the new admissibility criteria to the Chambers and the Grand Chamber of the Court. This rule recognises the need to develop case-law on the interpretation of the new criterion before the latter can be applied by single-judge formations or committees.

Article 21 of the amending protocol

106. This article contains transitional rules to accompany the introduction of the new provision in Article 23, paragraph 1, on the terms of office of judges (paragraphs 2 to 4 of new Article 23 are not affected by these transitional rules). The terms of office of the judges will not expire on the date of entry into force of this protocol but continue to run after that date. In addition, the terms of office shall be extended in accordance with the rule of the first or that of the second sentence of Article 21, depending on whether the judges are serving their first term of office on the date of the entry into force of this protocol or not. These rules aim at avoiding a situation where, at any particular point in time, a large number of judges would be replaced by new judges. The rules seek to mitigate the effects, after entry into force of the protocol, of the existence – for election purposes – under the former system of two main groups of judges whose terms of office expire simultaneously. As a result of these rules, the two main groups of judges will be split up into smaller groups, which in turn will lead to staggered elections of judges. Those groups are expected to disappear gradually, as a result of the amended Article 23 (see the commentary in paragraph 51 above).

107. For the purposes of the first sentence of Article 21, judges completing their predecessor’s term in accordance with former Article 23, paragraph 5, shall be deemed to be serving their first term of office. The second sentence applies to the other judges, provided that their term of office has not expired on the date of entry into force of the protocol.

Article 22 of the amending protocol

108. This article is one of the usual final clauses included in treaties prepared within the Council of Europe.
DECLARATION (2006)
OF THE COMMITTEE OF MINISTERS

on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels

Adopted by the Committee of Ministers on 19 May 2006
at its 116th Session

The Committee of Ministers,

Referring to its May 2004 Declaration “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels” containing a comprehensive package of coherent measures for the implementation of the Convention;

Stressing that the Declaration remains a key reference for measures needed to preserve the effectiveness of the Convention system in the long-term;

Recalling that the Heads of State and Government of the member states of the Council of Europe in May 2005 in Warsaw reiterated the commitment to implement all these measures in accordance with all the modalities foreseen in the May 2004 Declaration;

Being determined, two years hence, to take stock of progress achieved in the implementation of its May 2004 Declaration;

Welcoming the activity of the European Court of Human Rights in preparing itself for the entry into force of Protocol No. 14 to the Convention as well as in enhancing the efficiency of its internal methods;

Welcoming also the intensive intergovernmental work carried out to prepare for entry into force of Protocol No. 14 and implement the different strands of the reform package of the May 2004 Declaration;

Noting the interim report presented by the Group of Wise Persons charged with making recommendations on the measures to be taken to ensure the long-term effectiveness of the Convention;

Having examined the conclusions and proposals set out in the report submitted by the Ministers’ Deputies;

Being determined to ensure further sustained work on the basis of guidelines for priority action,

I. WELCOMES the report presented by the Ministers’ Deputies on the implementation of the reform package agreed at its 114th Session in May 2004 and the progress recorded therein;

II. ENDORSES the conclusions and proposals for further sustained action in this report, building on results obtained so far;

III. URGES the remaining states that have not yet done so to ratify Protocol No. 14 to the Convention without delay to enable the Court to benefit from the efficiency and capacity increases that the Protocol’s entry into force will bring;

IV. NOTES the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements which were recently adopted by the Ministers’ Deputies;

V. STRESSES that respondent states must execute fully and more rapidly the judgments of the Court;
VI. REITERATES its call to all member states to implement speedily and effectively the five recommendations mentioned in the May 2004 Declaration, in full conformity with the principle of subsidiarity and the obligations of member states under Article 1 of the Convention;

VII. ENCOURAGES member states to make full use of the possibility to request Council of Europe assistance in this respect;

VIII. WELCOMES in this connection the upcoming examination, within the Council of Europe Development Bank, of ways and means to provide a framework tool for member states by facilitating structural measures at national level to enhance the implementation of the Convention and reduce the workload pressure on the Court;

IX. INVITES all member states to take an active part in the implementation of the European Programme for Human Rights Education for Legal Professionals (HELP) to ensure full integration of Convention standards in the professional training of judges and prosecutors by the end of 2008;

X. INSTRUCTS the Ministers’ Deputies:

a. to intensify their action with regard to taking specific and effective measures to improve and accelerate the execution of the Court’s judgments in the face of the increasing case-load of judgments pending execution, *inter alia*, by carrying forward practical proposals for the supervision of execution of judgments in situations of slow or negligent execution;

b. to draw up a recommendation to member states on efficient domestic capacity for rapid execution of the Court’s judgments and to invite representatives of the Parliamentary Assembly to be associated with it;

c. to initiate annual tripartite meetings between representatives of the Committee of Ministers, the Parliamentary Assembly and the Commissioner for Human Rights to promote stronger interaction with regard to the execution of judgments;

d. to carry forward other practical proposals for the supervision of execution of the Court’s judgments, including the creation of a global database on such execution;

e. to continue their review of implementation of the five recommendations mentioned in the May 2004 Declaration with a view to obtaining a better assessment of the actual impact of implementation measures on the long-term effectiveness of the Convention;

f. to deepen this review by focusing henceforth on verification of the effectiveness of implementation measures and filling outstanding information gaps, particularly in three priority areas: improvement of domestic remedies, re-examination or reopening of cases following judgments of the Court, and verification of compatibility of draft laws, existing laws and administrative practice with the Convention;

g. to involve in this review other Council of Europe bodies as set out in their report, such as the Parliamentary Assembly, the Court and the Commissioner for Human Rights, as well as non-governmental organisations and national human rights institutions;

h. to follow closely the developing practice of the Court and of the Ministers’ Deputies on so-called pilot judgments and, as and when appropriate, to consider developing guidelines for member states on domestic remedies following such judgments;

i. to ensure that arrangements for the enhancement of resources for the Court and other departments concerned are regularly assessed;

Appendix III: Adopted texts

j. to carry out a mid-term review of the implementation of the European Programme for Human Rights Education for Legal Professionals (HELP);

XI. TRANSMITS the report presented by the Ministers’ Deputies to the Parliamentary Assembly, the Court, the Commissioner for Human Rights and the Group of Wise Persons;

XII. ASKS the Ministers’ Deputies to report to it on the implementation of this Declaration at the 117th Session in May 2007.
Recommendation Rec (2008) 2

of the Committee of Ministers to member states

on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights

Adopted by the Committee of Ministers on 6 February 2008
at the 1017th meeting of the Ministers’ Deputies

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

a. Emphasising High Contracting Parties’ legal obligation under Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as “the Convention”) to abide by all final judgments of the European Court of Human Rights (hereinafter referred to as “the Court”) in cases to which they are parties;

b. Reiterating that judgments in which the Court finds a violation impose on the High Contracting Parties an obligation to:
   – pay any sums awarded by the Court by way of just satisfaction;
   – adopt, where appropriate, individual measures to put an end to the violation found by the Court and to redress, as far as possible, its effects;
   – adopt, where appropriate, the general measures needed to put an end to similar violations or prevent them.

c. Recalling also that, under the Committee of Ministers’ supervision, the respondent state remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention to abide by the final judgments of the Court;

d. Convinced that rapid and effective execution of the Court’s judgments contributes to enhancing the protection of human rights in member states and to the long-term effectiveness of the European human rights protection system;

e. Noting that the full implementation of the comprehensive package of coherent measures referred to in the Declaration “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels”, adopted by the Committee of Ministers at its 114th Session (12 May 2004), is, inter alia, intended to facilitate compliance with the legal obligation to execute the Court’s judgments;

f. Recalling also that the Heads of State and Government of the member states of the Council of Europe in May 2005 in Warsaw underlined the need for an accelerated and full execution of the judgments of the Court;

g. Noting therefore that there is a need to reinforce domestic capacity to execute the Court’s judgments;

h. Underlining the importance of early information and effective co-ordination of all state actors involved in the execution process and noting also the importance of ensuring within national systems, where necessary at high level, the effectiveness of the domestic execution process;

i. Noting that the Parliamentary Assembly recommended that the Committee of Ministers induce member states to improve or, where necessary, to set up domestic mechanisms and procedures – both at the level of governments and of parliaments – to secure timely and effective
implementation of the Court’s judgments, through co-ordinated action of all national actors concerned and with the necessary support at the highest political level;48

j. Noting that the provisions of this recommendation are applicable, mutatis mutandis, to the execution of any decision or judgment of the Court recording the terms of any friendly settlement or closing a case on the basis of a unilateral declaration by the state;

RECOMMENDS that member states:

1. designate a co-ordinator – individual or body – of execution of judgments at the national level, with reference contacts in the relevant national authorities involved in the execution process. This co-ordinator should have the necessary powers and authority to:
   – acquire relevant information;
   – liaise with persons or bodies responsible at the national level for deciding on the measures necessary to execute the judgment; and
   – if need be, take or initiate relevant measures to accelerate the execution process;

2. ensure, whether through their Permanent Representation or otherwise, the existence of appropriate mechanisms for effective dialogue and transmission of relevant information between the co-ordinator and the Committee of Ministers;

3. take the necessary steps to ensure that all judgments to be executed, as well as all relevant decisions and resolutions of the Committee of Ministers related to those judgments, are duly and rapidly disseminated, where necessary in translation, to relevant actors in the execution process;

4. identify as early as possible the measures which may be required in order to ensure rapid execution;

5. facilitate the adoption of any useful measures to develop effective synergies between relevant actors in the execution process at the national level either generally or in response to a specific judgment, and to identify their respective competencies;

6. rapidly prepare, where appropriate, action plans on the measures envisaged to execute judgments, if possible including an indicative timetable;

7. take the necessary steps to ensure that relevant actors in the execution process are sufficiently acquainted with the Court’s case-law as well as with the relevant Committee of Ministers’ recommendations and practice;

8. disseminate the vade mecum prepared by the Council of Europe on the execution process to relevant actors and encourage its use, as well as that of the database of the Council of Europe with information on the state of execution in all cases pending before the Committee of Ministers;

9. as appropriate, keep their parliaments informed of the situation concerning execution of judgments and the measures being taken in this regard;

10. where required by a significant persistent problem in the execution process, ensure that all necessary remedial action be taken at high level, political if need be. ★

49. When Protocol No. 14 to the ECHR has entered into force.
INDEX OF SPEAKERS

A
Akçay, Deniz, 405, 417, 425, 442, 477
Ask, Beatrice, 465
Askarov, Chingiz, 441

B
Babunski, Vladimir, 329
Bakopoulos, John, 441
Balcerzak, Michal, 93
Behrens, Hans-Joseph, 405, 443
Bellatti Ceccoli, Guido, 279
Bemelmans-Videc, Marie-Louise, 245, 491
Blasco Lozano, Ignacio, 407, 418, 454
Böcker, Roeland, 534
de Boer-Buquicchio, Maud, 275, 388
Bogojević, Radojko, 286
Boillat, Philippe, 284, 297, 376, 457, 552
Brown, Alec, 124

C
Camerer, Guro, 188
Caric, Slavoljub, 401
Chocheva, Bilyana, 315
Ciampi, Carlo Azeglio, 50
Costa, Jean-Paul, 238, 288, 381, 472
Costiniu, Florin, 363
Crisafuli, Francesco, 105, 404, 420, 428, 444, 454

D
Da Silva Miguel, João Manuel, 400, 421, 444, 452
Davis, Terry, 221, 468
Dini, Lamberto, 14, 35
Drzewicki, Krzysztof, 85, 193

E
Eaton, Martin, 251

F
Fribergh, Erik, 520
Fura-Sandström, Elisabet, 511

G
Grosu, Vladimir, 406

H
Hammarberg, Thomas, 260, 538
Harabin, Štefan, 384
Hion, Mai, 419
Höltzl, Lipot, 417
HRH Crown Prince Haakon of Norway, 55

I
Imbert, Pierre-Henri, 66

J
Jaskowski, Kazimierz, 112
Jeremić, Vuk, 286
Juncher, Hanne, 453, 542

K
Kalmerborn, Inger, 405, 418, 444
Kitsou-Milonas, Irene, 157
Komorowski, Stanislaw, 134
Kosonen, Arto, 423, 441
Kuchár, Emil, 460

L
Lazareska-Gerovska, Radica, 403, 418, 455
Lemmens, Paul, 304
Liddell, Roderick, 140, 530
Łętowska, Ewa, 205
Machińska, Hanna, 132
Makarczyk, Jerzy, 162
Malinverni, Giorgio, 486
Mayer, Geneviève, 443
McBride, Jeremy, 341
McKenzie, Michael, 147
Meneri, Suela, 445
Mężykowska, Aleksandra, 181
Mijić, Monika, 406, 445
Milinchuk, Veronika, 506
Mole, Nuala, 43, 547

Niedlispacher, Isabelle, 407, 442, 449
Nowicki, Marek Antoni, 177

O’Boyle, Michael, 96
Onslow, The Earl of, 515

Petersen, Jan, 56
Petrović-Škero, Vida, 283, 335, 375
Pirošíková, Marica, 391, 422, 442, 453
Pope, John Paul II, 49
Popović, Dragoljub, 352

Radović, Dušanka, 370
Radu, Răzvan Horațiu, 416, 444, 454
Ramascu, Beatrice, 171
Ravera, Jean-Laurent, 421, 453
Reine, Inga, 166
Robinson, Mary, 46
Rodríguez Iglesias, Gil Carlos, 233
Rotfeld, Adam Daniel, 80
Russell-Johnston, Lord, 17, 37

Schokkenbroek, Jeroen, 419
Schorm, Vít A., 101, 396, 421, 482
Schürmann, Frank, 407, 417, 446
Schwimmer, Walter, 12, 13, 19, 24, 38
Siess-Scherz, Ingrid, 226, 496
Sjögren, Per, 557
Skarhed, Anna, 503
Sobczak, Jan, 183
Söderman, Jacob, 152
Stažnik, Štefa, 455
Stolfi, Fiorenzo, 219
Suchocka, Hanna, 200
Sundberg, Fredrik, 99
Szeplak-Nagy, Gabor, 338

Testen, Franc, 324
Thomassen, Wilhelmina, 255
Tissier, Anne-Françoise, 406, 420, 456
Trauttmansdorff, Ferdinand, 403, 452

Walton, Derek, 404, 413
Wardyński, Tomasz, 175
Wildhaber, Luzius, 33, 40, 59, 83
Wołąsiewicz, Jakub, 137, 400, 419, 438, 526

Zaharia, Perikli, 293
The European ministerial conference on human rights, meeting in Rome on the 50th anniversary of the Convention for the Protection of Human Rights and Fundamental Freedoms, emphasised two crucial elements:

• the responsibility of member states, Parties to the Convention, to ensure constantly that their law and practice conform to the Convention and to execute the judgments of the European Court of Human Rights;

• that urgent measures be taken to assist the Court in carrying out its functions, given the ever increasing number of applications. An in-depth reflection should be started as soon as possible on the various possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation.

The Rome conference has sparked intensive work. Ever since January 2001, the intergovernmental co-operation activities of the Steering Committee for Human Rights (CDDH) of the Council of Europe have concentrated on developing normative instruments, of which the most important has been Protocol No. 14 to the Convention. This work has benefited greatly from high-level debates during a series of round-table discussions, within working groups and at seminars organised mainly by the successive presidencies of the Committee of Ministers.

The present volume contains a record of this work.
Reforming the European Convention on Human Rights: a work in progress