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CDDH(2013)R78 Addendum III

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

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CDDH report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court

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I. Introduction

1. The Declaration adopted at the High-level Conference on the Future of the European Court of Human Rights, organised in 2012 by the United Kingdom Chairmanship of the Committee of Ministers at Brighton, called on the "the States Parties, the Committee of Ministers and the Court to work together to find ways to resolve the large numbers of applications arising from systemic issues identified by the Court, considering the various ideas that have been put forward, including their legal, practical and financial implications, and taking into account the principle of equal treatment of all States Parties" (para. 20.c).

2. The Brighton Declaration made additional references to systemic issues and repetitive applications, clarifying the position of the States Parties on the nature of the problem and the respective responsibilities of those involved. "Repetitive applications mostly arise from systemic or structural issues at the national level. It is the responsibility of a State Party, under the supervision of the Committee of Ministers, to ensure that such issues and resulting violations are resolved as part of the effective execution of judgments of the Court…, including by the implementation of general measures to resolve wider systemic issues… The Committee of Ministers must … effectively and fairly consider whether the measures taken by a State Party have resolved a violation. The Committee of Ministers should be able to take effective measures in respect of a State Party that fails to comply with its obligations under Article 46 of the Convention. The Committee of Ministers should pay particular attention to violations disclosing a systemic issue at national level, and should ensure that States Parties quickly and effectively implement pilot judgments."[1]

3. The Committee of Ministers subsequently instructed the Steering Committee for Human Rights (CDDH) to present "conclusions and possible proposals for action to follow up" paragraph 20.c) of the Brighton Declaration. The deadline for this work has been set at 31 December 2013.[2] The CDDH conferred the task on the Committee of experts on the reform of the Court (DH-GDR), where work was initiated in Drafting Group "D" on the reform of the Court (GT-GDR-D).

4. Having carefully studied its terms of reference in the light of the Brighton Declaration as a whole and in particular its paragraphs 18 and 20.c), the CDDH wishes to clarify its understanding of certain essential terms. 'Repetitive applications' are those arising from systemic or structural issues at the national level. The term 'repetitive' implies that the Court has already addressed the underlying issue in a judgment. The CDDH understands its terms of reference, however, to be somewhat broader, in that they refer to "large numbers of applications", which would include both repetitive applications and groups of applications raising *prima facie* systemic issues that the Court has not yet addressed in a judgment.[3] The Court's approach to, for example, the Bug River cases (concerning payment by Poland of compensation for property lost as a result of border revision following the Second World War) and the Hungarian pension cases (concerning alleged violations of the Convention resulting from changes to certain public officials' pension rights), shows that it may identify systemic issues at a procedural stage before judgment. From the perspective of the Strasbourg control mechanism, however, the CDDH considers that the most serious problems relate to repetitive applications, as defined above, and will therefore give priority in this report to ways to resolve these.

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[1] See the Brighton Declaration, paras. 18, 26 and 27.

[2] The original deadline of 15 October 2013, set in the decisions of the May 2012 Ministerial Session, was put back to 31 December 2013 by the Ministers' Deputies at their 1159th meeting (16 January 2013).

[3] In paragraph 7 below, the Court's statistics on 'repetitive applications' in fact include both groups.

5. The present report will address the following aspects:
- the nature and scale of the problem
- general principles for resolving applications arising from systemic issues
- existing procedural tools or practices applicable to repetitive applications
- the Court's envisaged 'default judgment procedure'
- enhancing co-operation between the parties and the Court
- supervision of execution of judgments by the Committee of Ministers
- provision of Council of Europe technical assistance
- previous CDDH work on repetitive applications
- conclusions and possible proposals.

II. The nature and scale of the problem

6. The Court has indicated that as of 17 May 2013, its relevant prioritisation category V contained 45,970 applications. Within this category, the following ten issues gave rise to the most applications: non-enforcement of domestic decisions (11,469, 25% of the total); length of proceedings (8983, 20%); applications against Ukraine concerning non-enforcement of domestic decisions following closure of a pilot judgment procedure (4871, 11%)[4]; applications against Serbia concerning *per diem* payments to soldiers serving during the 1999 NATO intervention (3873, 8%)[5]; applications against Romania concerning restitution of compensation in respect of properties confiscated by the State before 1989 (3221, 7%)[6]; applications against Serbia concerning non-execution of domestic court decisions against socially-owned companies (2586, 6%)[7]; applications against the United Kingdom concerning prisoners' voting rights (2366, 5%)[8]; applications concerning bankruptcy (mainly against Turkey and Italy) (1072, 2%); applications concerning pensions (mainly against Italy) (599, 1%); and length of detention (mainly against Russia and Turkey) (582, 1%).

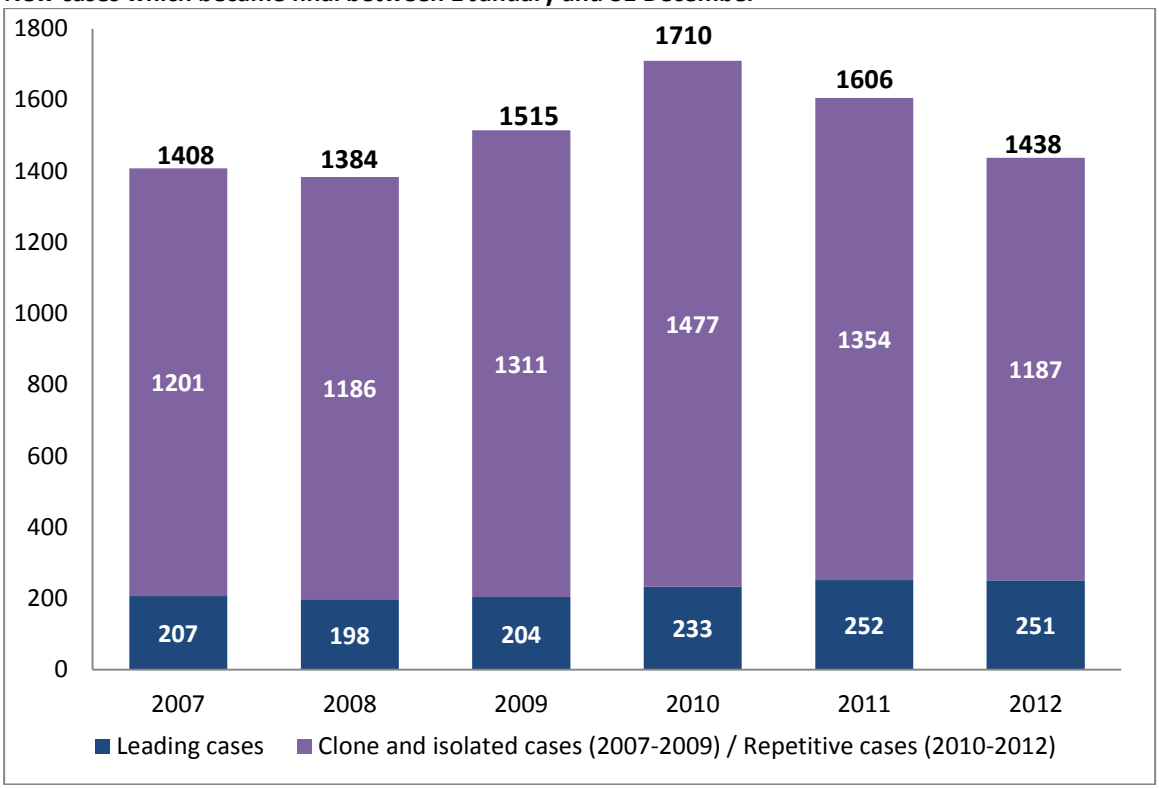
7. Similarly, the 6th Annual Report of the Committee of Ministers on supervision of the execution of judgments and decisions of the Court (2012) indicates that repetitive applications mainly arise from the following categories of systemic issue: excessive length of domestic proceedings; non-enforcement of final judicial decisions; poor detention conditions; various issues concerning property rights; and problems concerning pre-trial detention/ detention on remand.[9]

8. At the first GT-GDR-D meeting, the Court's Registry indicated that at the beginning of 2013, there were nearly 41,000 repetitive applications pending before the Court, a 92% increase since 2010.[10] 64% of those cases concerned either length of proceedings or non-enforcement of final judicial decisions. 87% were brought against six of the 47 States

[4] See the pilot judgment in *Yuriy Nikolayevich Ivanov v. Ukraine*, App. no. 40450/04, 15 October 2009, and the subsequent Committee judgment in *Kharuk & 115 otrs*, App. no. 703/05 & otrs, 26 July 2012.
[5] See *Vučković & otrs v. Serbia*, App. no. 17153/11 and 29 otrs, judgment of 28 August 2012.
[6] See e.g. *Maria Atanasiu & otrs v. Romania*, App. nos. 30767/05 & 33800/06, judgment of 12 October 2010.
[7] See e.g. *Grisevic & otrs v. Serbia*, App. no. 16909/06 & otrs, judgment of 21 July 2009.
[8] See *Greens & M.T. v. United Kingdom*, App. nos. 60041/08 & 60054/08, judgment of 23 November 2010.
[9] See the 2012 Annual Report on supervision of execution, in particular Appendix I, Table C2, p.48ff.
[10] It must be noted that the Court does not use the term "repetitive" in exactly the same sense as does the Committee of Ministers; and furthermore that not all repetitive applications dealt with by the Court are subsequently addressed by the Committee of Ministers, as many may be found inadmissible or be resolved by unilateral declarations, the execution of whose terms it does not supervise.

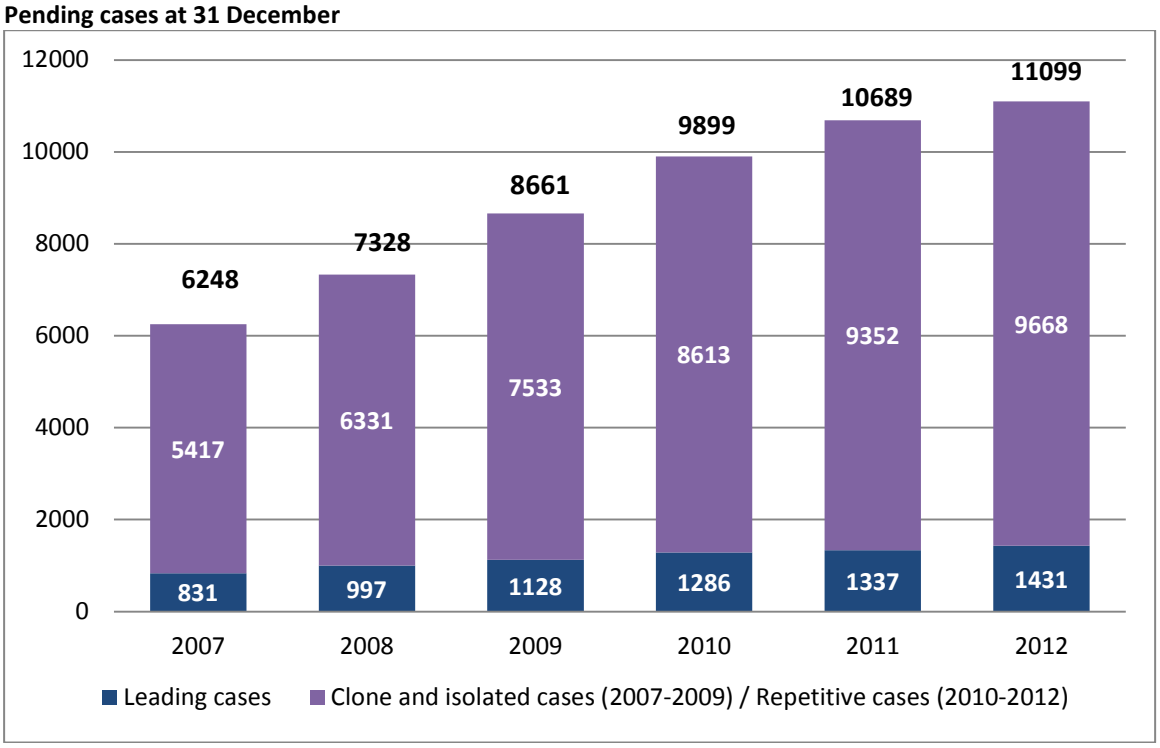
Parties.[11] Information provided in the 2012 Annual Report on supervision of execution sheds light on the situation as regards the number of relevant judgments delivered by the Court and the process of supervision by the Committee of Ministers of their execution by respondent States. The following two tables show the evolution over recent years in terms of leading and repetitive cases.[12] The number of new repetitive cases in particular has decreased (along with the total number of cases, the number of new leading cases increasing from 2010 to 2011 and only marginally decreasing from 2011 to 2012). The number of repetitive cases pending before the Committee of Ministers, however, has increased, albeit at a decelerating rate (as against an accelerating rate for leading cases).

New cases which became final between 1 January and 31 December



[11] See doc. GT-GDR-D(2013)005. This figure corresponds to the number of priority category V cases – under the Court's published priority policy, these consist of "applications raising issues already dealt with in a pilot/leading judgment" – mentioned at p.9 of the Court's Analysis of Statistics 2012.

[12] For the purposes of the supervision of execution, 'leading cases' are considered to be those which have been identified either by the Court or the Committee of Ministers as revealing a new structural or general problem in a respondent States and which thus require the adoption of new general measures; 'repetitive cases' are those relating to a structural or general problem already raised before the Committee of Ministers in one or several leading cases.



III. General principles for resolving applications arising from systemic issues

9. The resolution of repetitive applications and systemic issues under the Convention is subject to the principle of subsidiarity, notably through the following obligations of States Parties to secure Convention rights to everyone within their jurisdiction (Article 1), to provide an effective domestic remedy for arguable complaints of violations of Convention rights (Article 13); and to abide by the final judgment of the Court in any case to which they are party (Article 46).

10. Article 35(1) of the Convention allows the Court to deal with an individual application only after all effective domestic remedies have been exhausted. Introduction of a remedy for systemic issues satisfying the requirements of Article 13 thus has the secondary effect of relieving the Court of the burden of related repetitive applications. Indeed, the Court may require an individual to exhaust an effective remedy introduced after the date on which an application was brought.[13]

11. These observations reflect the fact that the States Parties and the Court "share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity". It has also been noted that they "share responsibility for ensuring the viability of the Convention mechanism".[14] This is reflected in the fact that measures taken in relation to applications to the Court arising from systemic issues require co-operation between the Court and the respondent State in question.

12. A respondent State's execution of a judgment is subject to supervision by the Committee of Ministers (Article 46(2) of the Convention). There is a requirement to implement general measures in execution of 'leading' judgments relating to systemic issues

[13] See, for example, the recent admissibility decision in the case of *Hasan Uzun v. Turkey*, App. no. 10755/13, 30 April 2013, concerning the new Turkish constitutional complaint.
[14] See the Brighton Declaration, paras. 3 and 4; also para. 12.c), the Interlaken Declaration, para. (3) and Action Plan para. E.9, and the Izmir Declaration, para.6.

(see footnote 5 above). These general measures are usually the most complex and difficult to implement and require the closest, most effective supervision by and co-operation with the Committee of Ministers in order to ensure a successful outcome. As noted in the Brighton Declaration, this should be accompanied by targeted Council of Europe technical assistance programmes, upon request (see further under Section VIII below).[15]

13. Whether at the level of the Court or the Committee of Ministers, there is a need for flexibility and adaptability in addressing systemic issues, depending on their specificities and those of the respondent State in question. The need for political will at domestic level to fulfil Convention obligations remains a fundamental consideration in respect of any systemic issue a State may encounter. At the same time, there may be practical constraints posed by the reasonable limits of capacity of a respondent State, including of financial resources; efforts should be made to identify responses to systemic issues that recognise those constraints, whilst still ensuring effective fulfilment of the prevailing Convention obligations.

IV. Existing procedural tools or practices applicable to repetitive applications

14. The CDDH, in its recent report on the advisability and modalities of a 'representative application procedure', listed the following existing procedural tools available to the Court for dealing with 'similar applications'[16] (the term used in the earlier CDDH report, which would to some extent include repetitive applications arising from systemic issues):

- the pilot judgment procedure under Rule 61 of the Rules of Court (and its variants);
- judgment of principle in an individual case from a group, that principle being of general application to the group;
- joinder of applications to be decided in a single judgment;
- an invitation to the respondent State to settle a list of cases on the basis of the levels of compensation awarded in a previous judgment (see further at para. 16 below);
- the 'expedited Committee procedure' (see further at para. 28 below);
- grouping of applications at the very outset of proceedings.[17]

15. On this basis, the CDDH concluded that "very numerous 'similar' applications are a problem for the Court, but in terms of resources rather than the availability of procedural responses: 'similar' applications can be dealt with in various ways within the current framework… The Court has … always been able to find procedural tools when the need has arisen and has tended to use these tools with greater frequency in recent years. It is too early to come to any general conclusion that they are insufficient to respond to the various challenges facing the Court arising from 'similar' applications".[18]

16. In the context of the present report, which is intended to examine ways to resolve the large numbers of applications arising from systemic issues identified by the Court, it should be recalled that the CDDH had concluded that "it would be inadvisable to introduce a 'representative application procedure'" and recommended that "in the current circumstances,

[15] See the Brighton Declaration, paras. 8 and 9.g)iii).
[16] See doc. CDDH(2013)R77 Addendum IV, which defined 'similar' applications as "applications that allege the same violation against the same respondent State, in each of which there is an identical legal issue, based on comparable factual situations, such that resolution of a single, common question would allow determination of all similar cases": see para. 5.
[17] See doc. CDDH(2013)R77 Addendum IV, Section B.
[18] Ibid. paras. 22 and 24.

no further action be taken at inter-governmental level".[19] This conclusion was endorsed by the Ministers' Deputies at their 1169th meeting (30 April 2013).[20]

17. The Italian expert provided the following information on the domestic response to the Court Registrar's invitation to settle a list of some 7,000 cases on the basis of the levels of compensation awarded in the *Gaglione* judgment.[21] Cases were grouped together according to the law firm representing the applicant, and each of those firms was contacted to provide basic information necessary to establish the object of the application and the state of the domestic judicial procedure, so as to permit payment of compensation still due under domestic law, and to propose a friendly settlement of the application to the Strasbourg Court on the basis of the amounts of just satisfaction awarded in *Gaglione*. Once domestic compensation is paid, the lists of applications for which a friendly settlement has been offered is transmitted to the Government Agent's office. A certain amount of time is therefore necessary for the technical purposes of contacting applicants' legal representatives, obtaining consent to the friendly settlement and ascertaining whether domestic compensation has been paid. The Court's decision in *Gaglione* to take a uniform manner to awarding just satisfaction in this group of cases is greatly appreciated, as it has permitted the present process for resolving them and may discourage certain law firms from making further applications on trivial grounds.[22]

18. A noteworthy practice was developed in the course of the procedure following the pilot judgment in the case of *Broniowski v. Poland*. A delegation of the Polish Government visited the Court's Registry and inspected the files in all the 'Bug River' cases (of which *Broniowski* was one). This was done with a view to selecting a group of applicants in respect of whom, on account of their age, health or difficult personal situation, the Government was prepared to secure the accelerated implementation of their right to compensation under the legislation introduced following the *Broniowski* judgment. The Government subsequently supplied the Court with the names of 50 applicants chosen by them for inclusion in the so-called "accelerated payment procedure" on the basis of the above-mentioned criteria.[23]

19. Whatever procedural tool the Court uses to deal with repetitive applications, the making of a unilateral declaration by the respondent State allows the Court to apply Article 37(1) of the Convention to strike the application out of its list. The procedure is set out in Rule 62A of the Rules of Court: a unilateral declaration consists of a request to the Court by the respondent State to strike an application out of the list, accompanied by a declaration clearly acknowledging that there has been a violation of the Convention in the applicant's case together with an undertaking to provide adequate redress and, as appropriate, to take necessary remedial measures, which may include both individual and general measures. Although such requests would normally follow an applicant's refusal of the respondent State's offer of a friendly settlement, Rule 62A makes clear that this need not be the case "where exceptional circumstances so justify"; it is apparent from the Court's practice that it applies this exception to repetitive applications arising from systemic issues.

20. There have been numerous calls in recent years for greater recourse by respondent States to friendly settlements and unilateral declarations to resolve repetitive applications

[19] Ibid. para. 32.
[20] See doc. CM/Del/Dec(2013)1169/4.1.
[21] App. no. 45867/07, judgment of 21 December 2010. These cases relate to the systemic issue of excessive length of proceedings and the effectiveness of the domestic remedy introduced in response to it.
[22] See further doc. DH-GDR(2013)014.
[23] See further *Wolkenberg & otrs v. Poland*, App. no. 50003/99, decision of 4 December 2007, paras. 13 & 14.

arising from systemic issues.[24] The CDDH accompanied its own with an invitation to the Court to "[encourage] the [respondent] State to propose from the outset, in addition to possible compensation and/or individual measures, general measures with a view to remedying a structural problem, where these are possible and appropriate".[25]

21. In its Preliminary Opinion in preparation for the Brighton Conference, the Court stated that "[in] response to recommendations made at Interlaken and Izmir [it] has further developed its practice with regard to friendly settlements and unilateral declarations with the result that the number of applications disposed of in this way has increased substantially. 2010 saw a 94% rise in these decisions and 2011 a further 25%."[26] In the Court's Analysis of Statistics 2012, it was noted that "[the] number of applications struck out … following a friendly settlement or a unilateral declaration increased by 25% in 2012… Friendly settlements increased by 57%, but there were 14% fewer unilateral declarations".[27]

22. It should be noted that, unlike for friendly settlements, a decision to strike out an application following a unilateral declaration is not transmitted to the Committee of Ministers for supervision of the execution of the terms of the declaration (only where the terms of a unilateral declaration are reflected in a judgment would their execution be supervised by the Committee of Ministers). After transmission of a leading judgment, the Committee of Ministers does not therefore supervise the implementation of individual measures, such as payment of compensation,[28] contained in subsequent unilateral declarations; nor does it systematically receive information on subsequent new applications or strike-out decisions. It may therefore not be fully informed of relevant developments or the true scope of the unresolved systemic issue. The Court has, however, developed a practice of using letters to the Committee of Ministers to provide such information; in addition, the Registrar and the Director with responsibility for the Department for the Execution of Court Judgments now meet regularly to exchange information *inter alia* on these matters.[29]

23. The CDDH notes that a careful reading of Article 27 of the Convention, alongside Article 28 and 37, suggests that the Court could confer on Single Judges decisions to strike out applications following unilateral declarations in appropriate cases.

V. The Court's envisaged 'default judgment procedure'

24. The Court, in its Preliminary Opinion in preparation for the Brighton Conference, made several references to systemic issues/ repetitive applications, arguing that "the examination of such large numbers of repetitive complaints is not compatible with the functioning of an international court. The Court considers that Council of Europe member States should make more collective and individual efforts to target the structural and endemic

[24] See, for example, the Interlaken Declaration, Action Plan, para. D.7.a)i) and the Izmir Declaration, Follow-up Plan, para. E.1.
[25] See the CDDH Final Report on measures that result from the Interlaken Declaration that do not require amendment of the ECHR (doc. CDDH(2010)013 Addendum I), para. 8.v.
[26] See the Preliminary Opinion, para. 11.
[27] See Analysis of Statistics 2012, p.4.
[28] In this respect, it can be noted that according to the 6th Annual Report of the Committee of Ministers on supervision of the execution of judgments and decisions of the Court, some 18% of awards of just satisfaction are paid outside the one-year time-limit (see p.59). No statistical data is available on States' compliance with deadlines for payment of compensation or implementation of other individual or general measures indicated in a unilateral declaration.
[29] See the 6th Annual Report of the Committee of Ministers on supervision of the execution of judgments and decisions of the Court, p.17.

situations which generate repetitive cases."[30] The Court also gave notice that it envisaged introducing a new practice for dealing with repetitive cases:

> "As things stand, the Court is not in a position to deal with these cases within a reasonable time. They are cases which commonly reflect a failure of the execution process to secure the adoption of effective general measures. These are cases in which the root cause has by definition already been identified in a previous leading or pilot judgment and the decisive legal issue determined. The Court envisages a practice whereby in relation to clearly repetitive cases the Registry would simply refer a list of cases directly to the Government to be settled in an appropriate way. In the absence of any justified objections from the Government, failure to provide redress within a fixed period of time would lead to a "default judgment" awarding compensation to the applicant."[31]

25. On 22 June 2012, the Court Registrar, in a letter to the Chair of the Ministers' Deputies, wrote that:

> "… the Court's Bureau has now given a mandate to its Committee on Working Methods to examine possible methods of dealing with repetitive cases, including introducing a default judgment procedure."

26. At the first GT-GDR-D meeting, the Registry described subsequent developments. The Court seeks to adapt its procedure to different situations, as it did, for example, with the pilot judgment procedure: default judgment was suggested as another tool for dealing with the problem of structural or systemic violations generating large numbers of cases. The underlying principle is that of 'shared responsibility': more of the burden of processing repetitive cases has to be shifted away from the Court so that it can concentrate its efforts on the real priority cases. On this basis, the Court has developed new practices – as described in the following paragraphs – which it considers to have proved their effectiveness, although the results may be mitigated (see further the examples concerning Serbia and Ukraine, below). It considers that such approaches do not require amendment of the Convention, although as its practice develops and becomes established, they might be included in the Rules of Court. Whether it is helpful to label them as a sort of 'default judgment procedure' is open to question. The Court wishes to see how they work out before investigating further what a default judgment procedure properly so-called might entail. It can be noted that the Court's Committee on Working Methods has not yet in fact addressed the issue.

27. The Registry explained that the starting point for the new practices developed since the Brighton Conference is application of the principle of 'one in/ one out' – every time a file is opened there must be some action – to well-established categories of repetitive cases. An initial analysis identifies that a case falls within one such category and the relevant information is entered into the data-base (CMIS). This information can be automatically extracted to add the case to a table containing a hundred cases or more, setting out the essential data and indicating appropriate amounts of compensation. The table is communicated to the Respondent State, which may make friendly settlement proposals or unilateral declarations on the basis of the indicated amounts. If no such action has been taken by the respondent Government after a certain period of time, the Court can simply transform the grouped communication into a grouped judgment: a default judgment insofar as it is a reaction to the absence of appropriate response by the Government to a grouped communication of applications arising from a clearly identified situation of structural violation. The CDDH understands that the individual initial analysis of each case

[30] See the Court's Preliminary Opinion, para. 35.
[31] Ibid, para. 21.

distinguishes these approaches, and would distinguish a 'default judgment procedure' properly so-called, from the hypothetical 'representative application procedure' mentioned in para. 13 above.

28. In May 2012, 430 cases of non-enforcement of domestic decisions against Serbia were communicated with friendly settlement proposals, followed by a further 270. The Serbian Government did not settle the cases but did inform the Court that the Constitutional Court's case-law had evolved so as to afford an effective remedy. An admissibility decision in January 2013, however, showed this to be only partly true. The Court nevertheless considers that the grouped communication did exert pressure on the national authorities to take action and there was therefore no need for a 'default judgment' at this stage.[32]

29. Another example is to be found in Ukrainian *Ivanov*-type non-enforcement cases, of which there are approximately 4,300 on the Court's docket.[33] When measures to execute the *Ivanov* pilot judgment did not resolve the systemic issue, pending cases were unfrozen and their processing resumed. It was agreed with the Ukrainian Government Agent that a maximum of 250 cases would be communicated per month, with the information that in the absence of any response, judgment would be given after six months. No friendly settlement is proposed and the Government is informed that only unilateral declarations for the whole group of cases would be considered.[34] The Government has submitted observations in 30-35% of cases and a number of applications have been declared inadmissible. Between September 2012 and April 2013, 1,515 cases were thus communicated to the Government and 487 judgments adopted.[35] At the same time, the Court has indicated that awareness in Ukraine of the effectiveness of this approach has had the effect of attracting significant numbers of new applications (1100 in April 2013 alone; previously, this figure had stood at around 300-350 per month).

30. The Ukrainian expert provided the following information on how these cases are dealt with at domestic level. Upon communication of a case by the Court, the Government Agent's office checks whether a court decision concerning the application was indeed delivered, whether it is enforceable in the applicant's favour, whether the State is responsible for its enforcement, and the status of its enforcement. Where analysis of the case suggests that the application is inadmissible or does not involve a violation of the Convention, the Government Agent submits observations to the Court: this happens in around 10-15% of cases. If the Government Agent considers that there are clear indications of a violation but that there are circumstances unknown to the Court that would justify the case being treated differently, the Government Agent informs the Court. If there are clear indications of a violation but no such circumstances, the Government expresses no position on the case: there is no requirement to give a response in such cases. The Government Agent's office lacks the capacity to make unilateral declarations in these cases, given their large number and the short deadlines; as a result, the Government accepts that the Court will then proceed to issue Committee judgments. In this way, the Government Agent's office has managed to deal with all communicated cases, although this often requires exceptional working hours; it would not be possible to process a larger number of cases per month and the current process cannot be

[32] The Serbian expert provided further information on how the Serbian authorities had responded to the systemic issue: see doc. DH-GDR(2013)014.
[33] See *Yuriy Nikolayevich Ivanov v. Ukraine*, App. no. 40450/04, judgment of 15 October 2009.
[34] The Court has indicated a basis for calculating appropriate levels of just satisfaction in the post-*Ivanov* case of *Kharuk v. Ukraine*, App. no. 703/05 and 115 others, Committee judgment of 26 July 2012.
[35] This corresponds to what was described as the 'expedited Committee procedure' in the CDDH report on the advisability and modalities of a 'representative application procedure' – see para. 13 above.

sustained indefinitely. The Ukrainian expert also underlined the importance of resolution of the underlying problems at domestic level, towards which the Ukrainian authorities are actively working, in co-operation with the Committee of Ministers in the context of supervision of execution and with the assistance of Council of Europe technical co-operation programmes.[36]

31. The CDDH considers that the Court should engage with all the States Parties in any further development of a 'default judgment procedure' properly so-called. In particular, the CDDH considers that any such procedure should be applied only after the systemic issue has already been identified in a Court judgment;

VI. Enhancing co-operation between the parties and the Court

32. Building on experience acquired in the course of the *Broniowski* pilot judgment procedure (see paragraph 17 above), the Polish expert gave an idea of how such co-operation could be further developed, bearing in mind the fact that effective execution of general measures contained in a judgment very often requires not only legislative amendment or adoption of new laws but also changes in administrative practices or even of public officials' mentality.[37] In general terms, related repetitive applications identified by the Court would be communicated to the respondent State in the form of a table containing basic information. Officials of the respondent State would then liaise directly with the Registry to identify, by reference to publicly accessible information contained in the case-file,[38] a group of well-founded, admissible cases that could all be resolved by way of unilateral declaration on the basis of previous judgments concerning the systemic issue. For these cases, there would be no need for further examination, for example to determine admissibility, either by the Court or the respondent State. Decisions to strike such cases out of the Court's list on the basis of such unilateral declarations would be taken in the normal way by judges of the Court. Such strike-out decisions, concerning whole groups of related repetitive cases, and the content of underlying unilateral declarations would together provide useful guidance to domestic authorities in addressing such cases at domestic level.

33. The CDDH thanked the Polish expert for this contribution as an example of how new forms of practical co-operation between respondent States and the Court might be developed, with the aim of simplifying and accelerating the administrative process leading to unilateral declarations and strike-out decisions in well-founded, admissible repetitive cases. It noted in particular that it reflected the need for co-operation and burden-sharing between the Court and the respondent State. As an example of only one possible approach, and furthermore one whose suitability to any given situation would depend on the particular circumstances, the CDDH did not consider it necessary to enter into a discussion of the advantages and disadvantages.

34. It was further noted that this example could be yet further developed in the sense of a mediation procedure (in effect, as a variant on the friendly settlement procedure under Article 39 of the Convention) as practiced before many national courts, in particular through greater involvement of applicants. Again, the CDDH has not considered it necessary at this stage to examine this possibility in detail.

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[36] See further doc. DH-GDR(2013)014.
[37] See doc. GT-GDR-D(2013)004.
[38] Under Article 40 (2) of the Convention, documents deposited with the Registrar are accessible to the public unless the President of the Court decides otherwise.

VII. Supervision of execution of judgments by the Committee of Ministers

35. As noted in the Brighton Declaration (see para. 2 above) and the Court's Preliminary Opinion (see para. 20 above), execution of judgments and its supervision by the Committee of Ministers are crucial to resolving systemic issues. The 6th Annual Report of the Committee of Ministers on supervision of the execution of judgments and decisions of the Court (2012) states that "the major challenges in the supervision of execution [are] repetitive cases and the persistence of certain major structural problems".[39] It should be recalled that the principle of subsidiarity also has an application to execution of judgments, with a respondent State in principle free to choose the means for effective implementation, subject to the Committee of Ministers' supervision. That said, the Court increasingly gives indications concerning the general measures expected of a respondent State in response to a systemic issue, notably (although not only) when delivering pilot judgments.

36. In 2011, the Committee of Ministers introduced a 'twin-track' approach by which certain cases are subject to 'enhanced supervision', with others under 'standard supervision'.[40] 'Enhanced supervision' applies *inter alia* to pilot judgments and judgments otherwise disclosing major structural problems, as identified by the Court and/ or the Committee of Ministers; the classification decision is taken when the case is first presented to the Committee, which may also decide to transfer a case to enhanced supervision at a later stage. All supervision is continuous, so that the Committee should receive relevant information from the respondent State in real time, beginning with submission of an Action Plan (proposing future measures) or Action Report (suggesting the sufficiency of measures already taken) within six months of the judgment or decision becoming final. Action Plans and Reports should be promptly made public (in principle, published on the web-site), unless accompanied by a motivated request for confidentiality.

37. Cases subject to enhanced supervision are followed closely by the Committee of Ministers, which supports domestic execution processes, including through interim resolutions expressing satisfaction, encouragement or concern, and/ or making suggestions or recommendations as to appropriate measures. The Committee may also intervene in the execution process through declarations by the Chair or high-level meetings with national authorities. At the request of the national authorities or the Committee, the Secretariat may contribute through various targeted co-operation and assistance activities, which are of particular importance for cases under enhanced supervision.

38. When the respondent State considers that all necessary measures have been taken, it submits a final action report proposing closure of supervision, following which other member States, the applicant or other permitted parties have six months to submit comments or questions and the Secretariat prepares a detailed evaluation. If this evaluation is consistent with that of the respondent State, a draft final resolution is presented for adoption by the Committee of Ministers. If it is not, the Committee must consider the issues raised. Once it is satisfied that all necessary measures have been taken, the Committee adopts the final resolution closing supervision.

39. The CDDH has been given terms of reference to prepare conclusions and possible proposals for action on whether more effective measures are needed in respect of States that fail to implement judgments of the Court in a timely manner, to be fulfilled by 31 December 2013. As stated above, execution of judgments and its supervision by the Committee of

[39] See the 6th Annual Report, p.13.
[40] See docs. CM/Inf/DH(2010)45 final and CM/Del/Dec(2010)1100eE.

Ministers are crucial to resolving systemic issues and the repetitive applications that result from them: it is clear that there is a strong connection between the present report and the forthcoming work.[41]

VIII. Provision of Council of Europe technical assistance

40. The Brighton Declaration "[invited] the Secretary General to propose to States Parties, through the Committee of Ministers, practical ways to improve … the targeting of relevant technical assistance available to each State Party on a bilateral basis, taking into account particular judgments of the Court".[42]

41. On 5 December 2012, the Secretary General submitted to the Committee of Ministers a Preliminary Report on follow-up to the Brighton Declaration.[43] This report notes that the needs identified in the framework of supervision of execution are, as a rule, taken into consideration when designing and implementing bilateral co-operation programmes. This applies in particular to situations revealing systemic or structural issues at national level. Co-ordination is ensured by the Office of the Director General of Programmes when preparing country specific Action Plans, including with the Directorate of Human Rights in DG I. This Directorate includes the secretariat involved in supervision of execution and manages bilateral, regional and multilateral co-operation projects in the field of human rights. The specific objectives and expected results of these projects are set against the evolution of the Committee of Ministers' supervision of execution, as well as against possible new judgments by the Court and the results of other monitoring mechanisms, with a view to ensuring deliverables that best remedy the problems/ challenges identified.

42. The secretariat is currently developing tools to allow co-operation programmes to take the results of the process of supervision of the execution of judgments further into consideration. At the 123rd session of the Committee of Ministers (16 May 2013), the Secretary General presented a report on strengthening the impact of the actions undertaken by the Council of Europe concerning democracy, human rights and rule of law.[44] The objective is to improve the relevance and the effectiveness of assistance programmes, through a better processing of existing data. Where the processing of the data will reveal problems common to all member states, or at least a large number of them, action should be taken in the context of the intergovernmental programme of activities. Problems specific to one or the other country should be addressed through targeted assistance activities. For this purpose, the Secretary General proposed a 3-step method:

i. identification of key challenges in each member State;
ii. a dialogue on appropriate remedies with the member States concerned;
iii. identification of possible assistance from the Council of Europe.

43. The Ministers encouraged the Secretary General to continue his efforts to optimise the functioning and co-ordination of the Organisation's monitoring mechanisms, whilst ensuring that better use was made of the conclusions drawn from the monitoring activities. They invited the Secretary General to present a regular situation report on democracy, human rights and rule of law in Europe, founded on the conclusions of the monitoring mechanisms and

[41] This is also the case as regards the work of the GT-GDR-C on the 'representative application procedure', and the present report, insofar as it concerns the Court's procedures for resolving systemic issues (see Section IV above).
[42] Brighton Declaration, paras. 9.e) and 9.g)iii).
[43] See doc. SG/Inf(2012)34.
[44] See doc. SG/Inf(2013)15

accompanied by specific proposals for action. Though discussion on the follow-up to the decisions adopted at the 123rd session has only just begun and nothing has yet been decided, it can be expected that they will contribute to better focusing Council of Europe technical assistance including in particular as regards systemic and structural issues.

IX. Previous CDDH work on repetitive applications

44. As part of the Interlaken process, the CDDH has previously reported on proposals for responding to the problem of repetitive applications arising from systemic issues.[45] These included a range of proposals for action by various actors, both individually and in collaboration, including member States, the Committee of Ministers, the Court and others. They have not yet been the subject of specific decisions by the Committee of Ministers.

45. Given their length and detail, these proposals are not repeated here in full. Insofar as the CDDH considers that there remains scope for taking significant further action on them, however, they are recalled in the final conclusions and possible proposals at Section XII.

X. Conclusions and possible proposals

46. The CDDH proposes the following as ways and means of resolving the large numbers of applications arising from systemic issues identified by the Court:

- Member States are expected to implement fully the relevant Committee of Ministers' Recommendations to member States, especially, in the present context:
    - Rec(2004)5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, Rec(2004)6 on the improvement of domestic remedies and CM/Rec(2010)3 on effective remedies for excessive length of proceedings; and
    - CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights;
- Member States are encouraged to take full account of the Guide to Good Practice in respect of domestic remedies in fulfilling their obligation under Article 13 of the Convention;
- Member States are encouraged to co-operate fully with the Court in pursuing appropriate procedural solutions to systemic issues and so as to relieve the Court of the burden of repetitive applications, notably through recourse to friendly settlements and unilateral declarations;
- the Court is encouraged to explore with the parties possible new forms of practical co-operation, with the aim of simplifying and accelerating the administrative process leading to unilateral declarations and strike-out decisions;
- the Court could be invited to consider conferring on Single Judges, in accordance with Article 27 of the Convention, decisions to strike out applications following unilateral declarations in appropriate cases;
- Member States should co-operate fully with the Committee of Ministers in its supervision of the execution of judgments and friendly settlements, including through

[45] See the CDDH Final Report on measures that result from the Interlaken Declaration that do not require amendment of the ECHR, doc. CDDH(2010)013 Addendum I; resubmitted to the Committee of Ministers as part of a package of documents in advance of the Brighton Conference as doc. CDDH(2012)R74 Addendum II. For the purposes of this report, 'repetitive applications' were considered to be "admissible cases raising issues relating to the same underlying problem, frequently structural or systemic and often the subject of previous Court judgments" (CDDH(2010)013 Addendum I, para. 8).

the full and prompt provision of relevant information and respect for procedural deadlines;
- Member States are encouraged to indicate in their Action Plans on execution of 'leading' judgments their intention, where appropriate, to settle subsequent repetitive applications by means of unilateral declarations;
- Member States should pay particular attention to the full and prompt execution of leading judgments, including pilot judgments, relating to systemic issues;
- the Court could be invited to provide to the Committee of Ministers full information on developments before it concerning systemic issues identified in earlier judgments, including the number and content of unilateral declarations and of new applications received;
- Member States are encouraged to avail themselves fully of the various forms of technical assistance provided by the Council of Europe;
- Member States are encouraged to contribute to the Human Rights Trust Fund as a source of extra-budgetary finance for targeted technical assistance programmes;
- the Council of Europe should continue to improve the targeting of relevant technical assistance available to each State Party on a bilateral basis; the CDDH would appreciate receiving information on the impact and effectiveness of such assistance;
- given the importance of cooperation between the Council of Europe and the European Union to the provision of technical assistance, the continued funding and effective implementation of joint programmes and coherence between the two organisations' respective priorities in this field should be ensured.

47. The CDDH considers that the following principles should be respected in any procedure developed by the Court with the intention of resolving a mass of related repetitive applications:
- it should rely on co-operation between the Court and the parties and should take into account the reasonable financial capacities of the respondent State (i.e. through agreement on the number of cases to be communicated at given intervals, deadlines, etc.);
- there should first be filtering by the Court of clearly inadmissible applications;
- simplification and acceleration should not be achieved at the expense of the basic principles of fair trial and proper administration of justice, including the possibility to access the case file and where relevant make observations;
- there should be a reasonable opportunity for the Government to examine the admissibility and merits of the applications within reasonable time-limits;
- whether or not to propose a friendly settlement or unilateral declaration is entirely within the discretion of the respondent State;
- not only the Court's impartiality but also the appearance of its impartiality must be fully preserved.

48. In view of the scale of the problem, the CDDH underlines that full, prompt and effective execution of judgments of the Court, friendly settlements or unilateral declarations and full co-operation of the respondent State with the Committee of Ministers are the most urgent measures to be implemented. In particular, the introduction by the respondent State of a carefully designed, effective domestic remedy allows the 'repatriation' of applications pending before the Court.[46] Introduction of such a remedy will in many cases follow from full

[46] See, for example, *Kaplan v. Turkey*, App. no. 24240/07, judgment of 20 March 2012; *Turgut v. Turkey*, App. no. 4860/09, decision of 26 March 2013, in which the Court indicated that as of 31 December 2012, more than 3800 applications made to it arising from the same problem had not yet been communicated to the respondent State.

execution of existing Court judgments. Recent experience has shown that this response can have an extremely powerful impact on the situation. It does not, however, absolve the respondent State from resolving the underlying problem.

49. Finally, the CDDH notes that its forthcoming report containing conclusions and possible proposals for action on whether more effective measures are needed in respect of States that fail to implement judgments of the Court in a timely manner will also be relevant to the question of ways to resolve the large numbers of applications arising from systemic issues identified by the Court.