

REFORMING the European Convention on Human Rights



Interlaken, Izmir,
Brighton and beyond

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

**REFORMING
THE EUROPEAN CONVENTION
ON HUMAN RIGHTS :
INTERLAKEN, İZMIR, BRIGHTON
AND BEYOND**

**A compilation of instruments and texts relating to the
ongoing reform of the ECHR**

Directorate General
Human Rights and Rule of Law
Council of Europe, 2014

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*La réforme de la Convention européenne des droits de l'homme :
Interlaken, İzmir, Brighton et au-delà – Une compilation
d'instruments et de textes relatifs à la réforme actuelle de la CEDH*

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FOREWORD

The European Convention on Human Rights is the centre-piece of the pan-European system of human rights protection. It has been incorporated as a fundamental text in the domestic legal orders of all our member States. The Convention continues to prove itself as the greatest achievement of the Council of Europe and remains at the heart of our activities today.

In the face of ever-changing challenges, the question of how to ensure the long-term effectiveness of this system, and especially the European Court of Human Rights, is a long-standing priority of the Council of Europe and a focus of activity for its Directorate General, Human Rights and Rule of Law. Since 2010, the matter has received urgent attention at the highest political levels and has been the subject of intense scrutiny by experts. Alongside three High-level Conferences, held at Interlaken in 2010, Izmir in 2011 and Brighton in 2012, this has produced extensive results, notably Protocols no. 15 and 16 to the Convention, four non-binding Committee of Ministers' instruments and numerous reports of the Steering Committee for Human Rights.

The present compilation brings together the results of inter-governmental work on reform of the Convention and the Court from the Interlaken Conference in 2010 until the end of 2013. Building on these achievements, our work will now continue, focusing in particular on the longer-term reform of the Convention system and the Court.

Philippe BOILLAT
Director General
Human Rights and Rule of Law

PROCEEDINGS

**HIGH LEVEL CONFERENCE
ON THE FUTURE OF THE EUROPEAN
COURT OF HUMAN RIGHTS**

Conference organised by the Swiss chairmanship of the
Committee of Ministers of the Council of Europe

Interlaken, 18-19 February 2010

Proceedings (extracts)

OPENING ADDRESSES

Mrs Eveline Widmer-Schlumpf

*Federal Councillor, Head of the Federal Department of Justice and Police
(Switzerland)*

On behalf of the Committee of Ministers of the Council of Europe and on behalf of the Swiss Government, I welcome you to Interlaken.

First of all I would like to apologise for the absence of the Minister for Foreign Affairs, Micheline Calmy-Rey: she is on her way to Interlaken, but having returned late from an urgent and unforeseen foreign visit, she was unable to be with us from the start of the conference. She will therefore be joining us during the day.

Excellencies, Ladies and Gentlemen,

It was with pleasure that Switzerland responded positively to the call from Mr Costa to hold a major political conference in early 2010. The dramatic situation which has been facing the Court for some time now, the presence here of many high-ranking personalities and the intense efforts which you have put into preparing today's event are as many signs of the importance and urgency of this conference. We believe that the widest possible support for the declaration is an essential precondition for bringing about a significant and lasting improvement in the Court's situation. The Court depends on the support of all the contracting states.

On 13 May 2004 the contracting states adopted Protocol 14. I am delighted to be able to announce to you today that, together with the Secretary General, Mr Jagland, I was present just now at the presentation of Russia's instrument of ratification by my Russian counterpart, Mr Konovalov. Protocol 14 will therefore be able to come into force on 1 June 2010. I think that we can extend our congratulations to Russia, and congratulate ourselves on this outcome.

Protocol 14 will enable the Court to process more applications than in the past, but it will not be enough to provide a lasting solution to the problems facing us. Further measures will be necessary, and that is why we are gathered here in Interlaken today. The aim is to adopt a political declaration on the future of the European Court of Human Rights.

Some are perhaps disappointed at the reforms proposed in this declaration and would have preferred more ambitious goals, such as a permanent adjustment of the resources available to the Court in order to cope with the increase in the number of applications. In our view, this is not the right approach. For others, the solution lies in a substantial limitation of the right of individual application. But the proposed action plan stresses from the outset that the right of individual

application must be maintained. The time has apparently not yet come to depart radically from the current philosophy. We will perhaps have to discuss this issue one day, but that will depend on the extent to which the Court's situation is improved by the short- and long-term measures proposed in the action plan.

How can this improvement be achieved?

The congestion of the Court and the constant increase in the number of applications have varied causes, and varied measures will therefore be needed to remedy this state of affairs. Measures will be needed at the three relevant levels, namely the member states, the Court itself and the Committee of Ministers.

This is not a new finding. Most of the measures set out in the action plan have been under discussion for a long time and many of them had already been proposed in the wise persons' report in 2006. I am thinking in particular of enhanced authority of the Court's case-law in the member states, improved domestic remedies, the introduction of a new internal filtering mechanism, the use of pilot judgments and, last but not least, the possibility of a simplified procedure for amending the Convention's organisational provisions.

Some of the action plan's measures can be implemented immediately, at each of the three levels mentioned. More time will be needed for others, particularly those requiring amendments to the Convention. The action plan is based on a stepwise approach. Depending on the effectiveness of Protocol 14 and the other measures practicable in the short term to ease the Court's congestion, other actions will have to be undertaken. The last part of the declaration sets specific deadlines for the terms of reference given to the competent bodies (paragraph 5) and for evaluation of progress achieved (paragraph 6). Progress will be measured by the improvement in the Court's situation.

All the measures set out in the action plan – and I stress: all the measures – are intended to help the Court. If one were to try and find a common denominator for them, it would no doubt be the notion of *shared responsibility*, to which Mr Costa referred in his statement. A strengthening of the principle of subsidiarity is central to solving our problem. This means that the contracting states have an obligation to implement the Convention at domestic level on the basis of the clear and consistent guidelines set by the Court's case-law. Political will is essential for this. Failing that, any reform of the Court is doomed to remain incomplete. It is the implementation of the ECHR at domestic level, in the contracting states, which will enable the Court to scale down its supervisory function, secure in the knowledge that the domestic courts will have taken due account of the Convention's standards in their assessment. The fact that the majority of admissible applications today are so-called repetitive applications should alert us, as should the constant increase in the number of applications in the case of many states, without this increase being attributable to a more restrictive approach by the domestic courts in dealing with human rights cases.

I would like to set out Switzerland's views on some of the proposed reforms, which were the subject of much discussion before the Conference.

Paragraph 3 of the action plan is concerned with new procedural rules or practices in terms of access to the Court. Our view is that we should engage in immediate discussion of these options, in particular the introduction of court fees. It would of course be problematical if well-founded applications were to fail

because the applicant was unable to raise the necessary funds, but it would be a good thing to avoid manifestly inadmissible applications where nobody, not even the applicant him or herself, stands to gain from the judgment.

Paragraph 7 of the action plan deals with the filtering mechanism: it seems obvious that a court which receives tens of thousands of new applications every year must set up an internal filtering mechanism. It is above all a question of the Court's internal organisation. Quick solutions are only possible if they are based on existing arrangements. Long-term solutions should not entail a return to the old two-tier supervision system; they must not jeopardise the consistency of the Court's case-law and must remain financially viable.

The efficiency of supervision procedures includes the efficiency of the supervision by the Committee of Ministers of execution of the Court's judgments. The question arises (paragraph 12 of the action plan) of whether the current situation is still appropriate in all respects.

Paragraph 8b) states that the Court must possess the necessary administrative autonomy within the Council of Europe. In our view, adequate administrative autonomy is a fully justified and, one can even say, self-evident demand; it is equally clear, however, that this cannot mean financial autonomy.

This brings me to the last point, which is the budgetary issue. As I have already said, seeking to solve the Court's problems by constantly making new resources available does not seem to us to be a practicable approach. First of all, for financial reasons, but also because this poses a threat to the consistency of case-law. On the other hand, the backlog of cases in abeyance – before the Court and the Committee of Ministers – cannot be expected to decrease as long as the number of new applications exceeds the number of settled cases. It is hardly possible to hope for a rapid reduction in the number of outstanding cases without agreeing to the release, for a certain time, of additional financial resources.

The Interlaken Conference marks neither the end nor the beginning of the reform debate. But Interlaken must be the opportunity to pave the way for a lasting reduction of the congestion affecting the Court. This conference will be a success if we gradually achieve, through a range of measures, a balance between the number of incoming applications and the number of processed cases, ideally at a lower level than is currently the case. Just as the Swiss Chairmanship was able to base its work on the reform efforts made at the Rome Conference in 2000, we must ensure that the declaration we adopt tomorrow is followed up under future chairmanships. Switzerland will play an active part in such work.

Just a few words by way of a conclusion.

In Switzerland, compromise and consensus building are considered national virtues. I trust that the same spirit will prevail at our conference too. I wish all of us a successful and fruitful conference.

Mr Thorbjørn Jagland

Secretary General of the Council of Europe

I should like to start by thanking the Swiss Chairmanship of the Committee of Ministers for organising this extremely important Ministerial Conference. I also want to congratulate our hosts for their choice of venue. Interlaken not only provides a beautiful setting, it also symbolises the magnitude of the task ahead of us. In reforming the Court we have many mountains to climb.

But as high and as steep as these mountains may be, we must and we shall conquer them. We owe this to the people of Europe who have the right to expect that we shall succeed in safeguarding the mechanism which has looked after their human rights over the past half a century. I do not think that I am overly dramatic when I say that what is at stake is not only the effectiveness but the survival of the European Court of Human Rights.

What is the situation today?

First, there are almost 120 000 pending applications before the Court. The Court's "output" of decisions is increasing but, clearly, it is not enough. And the backlog is increasing by almost 2 000 applications each month.

Second, over 90% of these applications are inadmissible. This is a huge amount. And what does it say about human rights protection in our member States; about implementation of the Convention; about knowledge – or ignorance – of the Convention and the Court's case-law, and about public confidence in public institutions?

Third, every year the cost of the Court is increasing within the overall budget of the Council of Europe, and you know that this budget is a zero real growth budget.

The system is facing serious problems.

We have to find urgent solutions to lower the number of applications which reach the Court, and to deal in a more efficient way with applications which will continue to reach the Court.

But, first, we have to be clear. What do we want? Do we want to slowly kill the programme of activities of the Council of Europe so that the Court survives? Or do we want to have a streamlined and impact-oriented programme of activities of the Council of Europe supporting an efficient Court of Human Rights? I will come back to this point further.

I do not intend to repeat everything that I set out in my written contribution to this Conference. I stand by my proposals. For now, I will simply recall some of the most important points.

Above all, we need a better and more systematic use of the principle of subsidiarity. State Parties have the primary responsibility to respect human rights, to prevent violations and to remedy them when they occur.

All States Parties have now incorporated the Convention into their national legal systems, but not all have done so with satisfactory effect.

What we need to achieve is a genuine structural integration of the Convention into national systems, in order to secure its direct application; we need a

better implementation of its provisions, including, above all, the obligation to provide effective domestic remedies for alleged violations.

The Convention cannot be fully and effectively implemented at national level unless the authority of the Court's case-law is properly recognised in the national legal order.

Most obviously, states must promptly and fully execute judgments in cases to which they are party, including any general measures that may be required.

But that is not all. National authorities must also take sufficient account of the general principles in the Court's case-law that may have consequences for their own law and practice. There is much room for improvement here in many countries.

We must look for ways to deal with the fact that most of the applications which are submitted to the Court are eventually declared inadmissible. They are still causing a bottle-neck in the system.

I believe that better provision of objective information to potential applicants may lead to fewer inadmissible applications.

We should explore whether and how the Council of Europe and independent national human rights structures can contribute to this.

And it is not only the applicants who should have a better knowledge and understanding of the Convention system and the admissibility criteria, it is also, in many cases, their legal representatives. This should be improved through clear, consistent and accessible case-law of the Court on admissibility and just satisfaction.

In part, this is a task for the Court itself, when drafting judgments and decisions. But accessibility is also an important task for the States Parties, who have a responsibility to translate, where necessary, and to disseminate the Convention and the case-law, as well as to ensure that they are integral parts of university law teaching and professional legal training.

It is also clear that the Court must be given new procedures for dealing with inadmissible cases, in addition to those found in Protocol No. 14.

One of the most important tasks for this Conference, therefore, is to propose an avenue for future work to improve the filtering of applications.

A key short-term measure, applicable without an amendment of the Convention, is to set up a filtering mechanism made up of the judges of the existing Court, based on a system of rotation among the judges, to deal with inadmissible cases and applying strict management procedures.

The third point I attach crucial importance to is to looking at the situation of the Convention system against the background of the Council of Europe as a whole.

The Convention is a treaty of the Council of Europe and there are strong institutional links between the two. The Committee of Ministers, the Secretary General, the Parliamentary Assembly and the Commissioner for Human Rights play important roles.

The Court is not an isolated body and cannot operate in an institutional, political or social vacuum.

On the one hand, its judgments provide authoritative interpretation of Convention provisions, underpinning our standard-setting and co-operation

activities and giving important references for our other human rights mechanisms.

On the other hand, those other Council of Europe mechanisms, institutions and programmes which help member States to fulfil their obligations without the need for Court judgments in individual cases, are a reference point for the Court.

The Council of Europe's other human rights mechanisms, including the Commissioner and the various monitoring bodies as well as standard-setting and co-operation activities are therefore indispensable to the effective functioning of the Convention system.

We must not deceive ourselves that we can save the Convention system and improve the respect for human rights in Europe by feeding the Court by starving other Council of Europe activities in the field of human rights, the rule of law and democracy.

While such an approach may help the Court increase its output, it would reduce the scope and impact of our work to help states improve their implementation of the Convention. The more such help we can give, the less, in the long term, should be the need for individuals to apply to the Court.

We need to consider how best to invest in the future of the Convention system at all levels, in order to achieve the greatest long-term results. Not only financial investment, but also investment in co-operation with other actors, whether governmental or non-governmental.

As Secretary General, I am ready to take the necessary action to focus the allocation of the Council of Europe's resources on our core activities of promoting and protecting democracy, human rights and the rule of law – but let me be clear about one thing – I am unreservedly against any further transfers of funds from the Council of Europe programmes of activities to the Court.

If we want to preserve our unique mechanism for the protection of human rights, we need to safeguard the Court's capacity to deal with individual applications on violations which already occurred, as well as the Council of Europe's capacity to transform the Court's case-law in general measures preventing new violations from taking place.

The fact is that the Council of Europe needs the Court, and *vice versa*. Our organisation without the Court would risk to be seen as a toothless tiger. On the other hand, an organisation which would only deal with breaches of human rights which already occurred, without doing anything to prevent them happening in the future, could be perceived as a fig-leaf operation for the governments, providing them with a human rights reputation at the lowest possible cost – but also with the lowest possible effect.

The objective of this Conference, in my view, is to find new, creative and effective measures to save the Court and avoid the two risks. This is not going to be easy, but we will do it. We will climb this mountain because we do not have any other choice. People in Europe – and their human rights – deserve no less and will get no less.

Mr Mevlüt Çavuşoğlu

President of the Parliamentary Assembly of the Council of Europe

It is a pleasure for me to address you today – as President of the Parliamentary Assembly – at the opening of this important conference, on a subject of crucial importance for the Council of Europe, and indeed for Europe as a whole.

I thank the current Swiss Chairmanship for taking this initiative, which is in keeping with Swiss character if I may say so. I had the opportunity to reflect on this as I travelled on the road from Bern, which is an impressive system of tunnels through mountains, of roads carved on the side of mountains as these meet lakes – all testifying to the Swiss determination to find a way through difficulties. This conference will have to do the same.

Turning to the title of this conference: “The Future of the European Court of Human Rights” - are we sure it covers all that we need to do? We may have reason to doubt this. At a hearing held last December by the Parliamentary Assembly’s Committee on Legal Affairs and Human Rights, it became abundantly clear that any solution to the problems facing the Council of Europe’s system of protection of human rights must also urgently address problems outside the Court itself.

I refer especially to the lack of implementation of Convention standards within member states, and to the need to ensure prompt and full compliance with Strasbourg Court judgments in the countries concerned. Here lies our best chance to stem the flood of applications presently submerging the Court.

Of course, I have read and studied the draft Interlaken Declaration and generally share its objectives, namely:

- ▶ a renewed commitment to the system of the European Convention on Human Rights, including the right of individual application;
- ▶ support for the Strasbourg Court;
- ▶ the mapping of in-depth reform to guarantee the long-term efficiency of the system ;
- ▶ and an eight-point Action Plan.

That said, I sincerely hope our conference will have the courage to face the real human rights issues and problems confronting member states and the Council of Europe.

We should be aware of at least three facts: Firstly, the Strasbourg Court is not equipped to deal with large-scale abuses of human rights. Should the Committee of Ministers not make more robust use of its 1994 “Declaration on Compliance with Commitments”? The Assembly should also do more in this respect: it needs to refocus its monitoring priorities more on member states’ compliance with commitments.

Secondly: several of the Court’s main “clients” have not made a serious effort to put into effect the “Convention reform package”, worked out between 2000 and 2004. By so doing, have they not jeopardised the very existence of the ECHR system? And if so, can we count on the Committee of Ministers to clearly

identify the “offending” states and to help these states confront their problems - rather than repeatedly inviting all member states to protect human rights?

Thirdly: The Court is financed through the Council of Europe’s budget. Here, state contributions are clearly insufficient. Surely the financing of the Court must be reviewed as a matter of urgency - but not at the expense of the rest of the Organisation. Why is this subject not given top priority in the draft “Interlaken Declaration”?

Turning now to the authority and effectiveness of the European Court of Human Rights: as you know, the Assembly elects the judges from a list presented to it by States Parties. The quality of candidates put forward for election is of crucial importance. If national selection procedures are inadequate, the Assembly cannot do much. Often candidates are good but not necessarily outstanding. If the judgments of the Strasbourg Court are to be recognised as authoritative by the highest judicial organs in member states, the Assembly must be in a position to elect top quality judges from lists of the highest quality.

As for the volume of new applications, the statistics are depressing. The number of complaints has reached the staggering figure of almost 120,000 – some 4 kilometres in length if the files are placed side by side – with an output deficit of 1,800 applications every month...

Does the backlog represent all Council of Europe member states more or less evenly? The answer is no. Four states together represent close to 60% of the backlog. If we take the ten states where the case-count is highest, they represent over three-quarters of the backlog. In 2008, close to 90% of the Court’s judgments concerned only 12 states.

The issue of late execution – or indeed non-execution – of Strasbourg Court judgments is a matter of concern. At the end of 2000, the Committee of Ministers had 2,300 such cases pending. At the end of 2009, the number stood at over 8,600, of which over 80% concerned repetitive cases. With over 30 Ministers present at this conference, I feel duty-bound to stress that this unacceptable situation has to be dealt with immediately. Today, not tomorrow!

We must conclude that the Strasbourg Human Rights Convention system is in danger of asphyxiation. In view of this serious situation, it seems absurd for the Court and its staff to be obliged to waste time and effort in dealing with repetitive applications.

Many states do not give appropriate effect to their Convention obligations. Why do national parliaments, and indeed the Assembly, not call ministers to account at hearings, in full view of the media? When Protocol No.14 of the Convention enters into force, the Committee of Ministers should bring “infringement proceedings” against states that are “repeat offenders” in this respect.

Does the fact that the Strasbourg Court has a substantial workload and increasing backlog mean that we should take a precipitated decision to embark on yet another major internal reform for the Court itself? Do we really need to create, within the Court, an “additional judicial filtering body”, as some have suggested? Could this not be done by a rotating pool of existing judges or by a specially assigned body taken from within the Court’s Registry or from the judicial corps of member states?

It seems to me that a more effective application of the Convention within member states is essential. And here national parliaments have a special duty to ensure that draft laws, existing legislation and administrative practice are compatible with the standards of the Convention, as interpreted by the Court. It is not just a question of domestic courts remedying violations but of preventing human rights violations, which is principally the responsibility of national parliaments and governments. The Assembly has done a lot of work on this matter, as was clearly shown at the December hearing I mentioned earlier.

We should not forget that the Strasbourg supervisory mechanism is “subsidiary” in nature. National Governments and authorities are therefore primarily responsible for the effective implementation of the Convention. This means that effective human rights complaints machinery should exist at national level.

Major efforts are still needed to train lawyers, prosecutors and judges in how to interpret and apply the Convention and the Strasbourg Court’s case-law. This would surely help stem the flood of applications to the Court.

In other words, a well-functioning national human rights protection machinery could make a separate filtering body within the Court superfluous. Primary responsibility for the protection of human rights should be shifted back to national legal systems and practices, where it rightly belongs.

Excellencies, ladies and gentlemen, I hope I have not drawn too bleak a picture. As you travel through the tunnels here in Switzerland and see brightness in the distance, it could mean the end of the tunnel. The imminent entry into force of Protocol 14 will no doubt help.

Then there is the recent entry into force of the European Union’s Lisbon Treaty which will permit what I hope will be a rapid accession by the European Union to the Convention on Human Rights and thus guarantee a coherent, Europe-wide system of human rights protection. Let us do all we can to speed up accession in the months to come.

In conclusion, we must not let the current challenges to the system of the Convention on Human Rights lead us to paralysis. Fear is a bad companion. In its 60 years of existence, the Convention and the work of its Court have made an indisputable contribution to human rights and freedoms in Europe, raising the standards of protection and gradually helping to harmonise national practices.

When you travel to Interlaken from Bern, you first have a long stretch of flat land. The first 40 or 50 years of the Convention’s and the Court’s existence could be likened to road-building in such topography. Those were the “easy years” – the “easy stretch” – as it were. Then the road hits the mountains. This is where we are now. We count on the ingenuity and the daring – not only of our Swiss hosts but of all our member states – to take us through the more difficult terrain ahead.

I look forward to our proceedings and trust that we will now take the right turning to guarantee success at this critical time. You can count on the full support of the Parliamentary Assembly in moving things forward.

I thank you for your attention.

Mr Jean-Paul Costa

President of the European Court of Human Rights

The future of the European Court of Human Rights is the subject of this conference organised by the Swiss authorities, to whom I extend my warmest gratitude.

The Court, which was set up by the members of the Council of Europe, is the cornerstone of a judicial system and is what constitutes its uniqueness and its strength. It helps, at European level, to preserve and develop democracy and the rule of law. It ensures compliance with the European Convention on Human Rights, which is applicable in forty-seven countries. I consider this work to be more useful than ever.

The Court has handed down 250,000 decisions putting an end to applications and over 12,000 judgments. It has had a major impact on national legal systems. Its influence extends beyond European borders and other regional mechanisms have taken it as a model.

Nevertheless, the Court is under threat and is at the risk of no longer being able to play its role efficiently. Despite the fact that its methods have been rationalised and that it is increasingly streamlined, the Court is under considerable pressure. The number of decisions and judgments has increased almost tenfold in ten years but the number of applications continues to be even higher. The number of pending, if not overdue, cases is therefore growing even faster: 120,000 cases pending, that is nine times more than ten years ago. Admittedly, over half of the cases concern only four of the 47 member states; however that only puts the problem into perspective without denying that it exists.

We face a steeply rising curve. If action is not taken rapidly, it will soon be difficult to stock all the files and impossible to deal with applications within a reasonable time. The measures taken by the Court (simplification of procedures, selective reorientation of priorities, pilot judgments, encouraging states to reach friendly agreements and make unilateral declarations) continue to be insufficient and risk becoming illusory.

The question is what can be done to save the system?

I warmly welcome the entry into force of Protocol 14 (as we should welcome that of the Lisbon Treaty providing for the European Union's accession to the Convention). Following the introduction of the single judge procedure, the new powers given to committees and a new criterion of admissibility, simpler cases will be judged more rapidly. But Protocol 14 was signed almost six years ago. From the very outset it was considered necessary but not sufficient, which explains the Wise Persons' report in late 2006. The Protocol will effectively increase efficiency, as has been shown by its provisional application in respect of a number of countries, but it will certainly not be sufficient to deal with the influx of new applications.

The consequence is simple. Reforms are urgently needed. Interlaken has not come too late but it was high time. If we wish to maintain an international

monitoring mechanism that has proven its worth, we need to ensure its effectiveness.

Who will benefit and who should be responsible?

Who will benefit? The Court, of course. There are physical limits to its capacity to rule on cases and, if these limits are to be pushed back, serious risks that the quality, consistency and credibility of its decisions will be negatively affected. It must avoid the threat of asphyxiation.

It is important for the public that the system does not deteriorate any further but rather that it improves. These are people; human beings who are suffering or who firmly believe that their human rights have been violated. The reason why they turn to “Strasbourg”, why they make use of the remarkable remedy of the right of individual application, which was for a very long time restricted and has only become more general since 1998, is that they believe that the Court exists to protect them. The opportunity offered by the Convention will be lost if it takes too long to rule on their applications. Justice delayed is justice denied. The applicants are those who benefit most from judicial control; in the event of asphyxia, they would have the most to lose.

It is also in member states’ interest to ensure the sustainability of the system. You, the states, have built a mechanism of collective guarantee and any failure would also be collective; instead of making progress in safeguarding rights, there might be a regression in existing rights, which already have to meet a certain number of demands with regard to security that are by no means illegitimate. No-one, I am convinced, wishes to witness such a failure. The necessary measures must therefore be taken. This conference is political and it must encourage such measures. The fact that a very large number of members of European governments are gathered here today is a sign of the importance of the action that needs to be taken and a guarantee for their success.

And who would be responsible for implementing the reforms? - All stakeholders together.

The system sets out to be both complementary and subsidiary. Each State must secure to everyone within their jurisdiction the rights set out in the Convention and consequently apply the Convention. States are responsible for ensuring that applicants have access to effective remedies before national bodies, preferably courts, and for complying with the Court’s judgments. The Court must rule on applications after verifying that they are admissible – particular in terms of exhausting domestic remedies – and, where appropriate, decide whether the Convention has been violated or not.

The improvements to a system set up by a treaty depend primarily on those who drafted the treaty and the institutions responsible for enforcing the Convention, i.e. the Council of Europe and its bodies – including the Court itself. The Court relies on the institutions of the Council of Europe (the Secretary General, the Committee of Ministers, the Parliamentary Assembly, the Commissioner for Human Rights and others) to develop the Convention and its application in liaison with our Court.

In the current situation, the aim is not to make anyone responsible but rather to combine our efforts in seeking remedies.

There are three main categories of cases brought before the Strasbourg Court and remedies must be found on this basis.

First of all there are the very numerous applications which are either inadmissible or clearly ill-founded for a very wide range of reasons. Without infringing the right to individual application, it is necessary to study the practical ways in which deliberate or undeliberate abuse of this right can be avoided.

States must together with the Court – and perhaps also civil society – make an effort to provide members of the public with objective information on the admissibility criteria and application procedures. Many applicants expect too much from a system which they know little about, and finally do not obtain anything. If, despite providing more information, clearly inadmissible applications still reach the Court, it would be better to improve the way in which the Court sorts out the admissible from the inadmissible. In the long term the possibility of introducing a new filtering system, going beyond the single judge procedure, should be considered. This would entail setting up an additional judicial body within the Court.

Then there are the properly-founded but repetitive cases. These cases, which are similar to cases which are settled on the basis of well-established case-law, do not pose any new problems. The Court can do no more than repeat a finding of violation and decide that just satisfaction must be awarded. Is it normal for an international court to fulfil such a function? Would it not be better if these requests were examined at national level, on the condition that the State provides the applicant with full satisfaction in all respects? Better and faster execution of the Court's judgments, which is overseen by the Committee of Ministers, would prevent repetitive applications. This applies particularly to pilot judgments, which identify a problem that may concern hundreds of identical cases, if not more.

That leaves cases which raise questions that have not yet been resolved or which differ from cases that have already been considered. It is on these that resources should be concentrated. These three categories of applications exist in the backlog of cases and will continue to exist in the future. They therefore require different solutions. But some general measures may apply.

At national level, solutions exist in theory but not always in practice. Thus, in many countries there are no effective remedies to prevent or remedy violations of the Convention, including procedural delays or non-execution of domestic judgments. Legislation or national law should establish such remedies.

We must go even further. Without even changing the wording of Article 46 of the Convention, nothing prevents States from drawing the consequences of judgments delivered in cases where they are not defendants, and in which similar problems have been identified. Several countries are already doing this. This interpretative authority (“*res interpretata*”) would avoid a considerable number of applications.

If the Court had a more important advisory role, there would be even better dialogue with national judicial systems. In the long run, it would be necessary to amend the Convention on this point, but it is not too early to consider the desirability of such a development. This would be in addition to individual applications, but would effectively prevent unnecessary litigation.

If the combined efforts of governments, the Committee of Ministers and the Court are successful, we can expect an improvement in the functioning of the system. The time taken to rule on cases would be more reasonable, but can we absorb the backlog without additional resources? I do not think so. The financial crisis carries enormous weight. But hopefully it will not last forever and will not rule out any potential solution, for human rights have a price. Voluntary contributions can also be found. For example, the temporary secondment of national judges or lawyers, already practiced by some states, would help the Court's judges and the Registry, and at the same time allowing these people, on their return to their country, to share the benefit of their experience, thereby enhancing subsidiarity.

Tomorrow I hope the Conference will adopt a Declaration and a Plan of Action. This will set in motion a process made possible by "Interlaken" but this process will, in some respects, take several months and in others several years. A number of steps can be taken in the short term without amending the Convention. Amendments to the Convention, even if the procedures are simplified, would have to be examined rapidly while their entry into force would take some time. Follow-up meetings, under the successive chairmanships of the Committee of Ministers, should provide the opportunity to evaluate periodically the measures taken at national level and at European level in the wake of Interlaken.

The fact that this high-level conference is taking place is in itself a major event. I trust that it will give fresh impetus to the reforms required and give a fifty-year old system a boost - for the years and decades to come. I can assure you that our Court, which is proud to work impartially and independently in safeguarding human rights, is ready to contribute to this new beginning.

Ms Viviane Reding

Vice-President of the European Commission

It is a great pleasure to attend this ministerial conference just a few days after my nomination as Vice-President of the European Commission in charge of Justice, Fundamental Rights and Citizenship. My presence today confirms the determination of the European Commission to work closely with the Council of Europe to put into practice the common principles upon which both our institutions are founded.

All the components for developing an ambitious fundamental rights policy at the level of the European Union are now in place:

- ▶ First of all, with the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union is legally binding;

- ▶ Secondly, the European Union will launch as soon as possible the accession negotiations to the European Convention on Human Rights. President Barroso has entrusted me with looking after this important dossier of constitutional significance.
- ▶ Thirdly, the promotion of fundamental rights is one of the priorities of the Stockholm programme setting the strategic guidelines for developing an area of freedom, security and justice in Europe;
- ▶ Fourthly, the very creation of a new “Justice, Fundamental Rights and Citizenship” portfolio shows the importance that President Barroso attaches to strengthen even further the action of the Commission in this area.

The Charter of Fundamental Rights-policy I will develop is directly relevant for the subjects which are discussed at this ministerial conference. The more the European Commission ensures the effective full respect of fundamental rights whenever European Union law comes into play, the more efficiently the European Court of Human Rights will be in a position to do its job.

The declaration and the action plan being discussed today call for an effective implementation of the Convention at national level and for the full execution of the judgments of the European Court of Human Rights.

The Union can, and will contribute to address these calls through a rigorous policy.

- ▶ My first priority will be to ensure that the Union is beyond reproach whenever making legislation. When the European Commission proposes legislation, this must fully respect the Charter of Fundamental Rights. The Charter will be the compass for all European Union policies. It will be the base for rigorous impact assessments on fundamental rights concerning all new legislative proposals.
- ▶ My second priority will be to watch over the European Union legislative process to ensure that the final texts emerging from it are in line with the Charter. It will be a collective responsibility of all the institutions and the member states to ensure that European Union law is and remains consistent with fundamental rights throughout the legislative process.
- ▶ My third priority is at the level of the member states. The EU Charter of Fundamental Rights applies not only to EU institutions, but also to Member States when they implement EU law. I will use all the tools available under the Treaty to ensure compliance with the Charter of national legislation that transposes EU law. I will apply a “Zero Tolerance Policy” on violations of the Charter. I will certainly not shy away from starting infringement proceedings whenever necessary.

The key objective is to render as effective as possible the rights enshrined in the Charter for the benefit of all people living in the EU. This is indispensable to reach a high level of integration in the area of Justice, Freedom and Security, as well as for the credibility of the EU external policy on human rights.

The EU Charter of Fundamental Rights is a key instrument for achieving these objectives. Our EU Charter represents the most modern codification of fundamental rights in the world. We, Europeans can be proud of it. The Charter entrenches all the rights found in the European Convention on Human Rights. The meaning and scope of these rights are the same as those laid down by the

ECHR. The Charter, however, goes further and also enshrines other rights and principles, including economic and social rights resulting from the common constitutional traditions of the EU member states, the case-law of the European Court of Justice and other international instruments. In the Charter we also find the so-called “third generation” fundamental rights, such as data protection, guarantees on bioethics and on good and transparent administration. And Article 53 of the Charter makes it clear that the level of protection provided by the Charter must be at least as high as that of the Convention. Often, it will go beyond.

This legally binding Charter for 27 countries represents a major step forward in terms of political commitment for fundamental rights, of legibility and of legal certainty. The new European Commission will make this visible by adding to the solemn oath we will be taking soon before the European Court of Justice in Luxembourg an explicit reference to the Charter.

The accession of the EU to the Convention will complete the EU system of protection of fundamental rights. The constitutional significance of this accession was noted by the European Court of Justice back in 1994. Now the EU has the competence it lacked back then. What is more, the Lisbon Treaty makes it clear that accession is not only an option, it is the destination. We will reach that destination, while of course safeguarding the special characteristics of the Union legal order.

Accession to the Convention will ensure that the case-law of both Courts – the Court in Strasbourg and our Court in Luxembourg – evolves in step. It is therefore an opportunity to develop a coherent system of fundamental rights protection throughout the continent, with a strong promise for a Europe truly united by law and in values. I am proud and honoured to take part in this worthwhile endeavour, which is also of symbolic importance. In view of the strength of the EU Charter – which is in many instances more ambitious than the Convention – the European Union will not find it difficult to meet the standards required by the Convention. Accession will nevertheless show that the European Union itself, with its 27 member states, will put its weight behind the Strasbourg system of fundamental rights protection. The European Union judiciary will become part of the Strasbourg court and strengthen its efficiency. This will make Strasbourg even more so than it is today the European capital of fundamental rights protection.

In the coming months I will submit to the Council a formal recommendation for negotiation directives on the accession of the European Union to the Convention. I am happy that the Spanish Presidency of the Council of the European Union is equally determined to push for a rapid agreement on these directives in order to start the negotiations with the Council of Europe.

I welcome the fact that the accession process will coincide with the reform of the European Court of Human Rights. The European Union has a strong interest in the efficient functioning of the Court. Justice delayed is justice denied. That is why the European Union will work with you to clear the big backlog of cases and the long delays. I am confident that the Ministerial Conference will succeed in launching a process that aims to enhance the effectiveness of the Court. Of

course, the right of individual application and the principle of subsidiarity must remain essential pillars of the system.

I am convinced that the accession of the European Union to the Convention is an opportunity for both institutions. As the Secretary General of the Council of Europe rightly pointed out, “protecting human rights is not just about the Court condemning states. It is about anticipating problems and co-operating in their solution”. Protecting human rights is not about creating a culture of litigation; it is about upholding human dignity and the full enjoyment of rights. The accession of the European Union to the Convention is an incentive to develop the policies that strengthen the effectiveness of the fundamental rights that people enjoy in Europe.

We should feel proud of all our common accomplishments in the protection of human rights over the last six decades. These accomplishments should serve as guiding inspiration to continue to do what still needs to be done.

Mr Thomas Hammarberg

Council of Europe Commissioner for Human Rights

The story of the European Court of Human Rights is undoubtedly a success story. Over the past fifty years, the Court has opened new paths for the protection of human rights in Europe: the path allowing individuals to directly submit complaints about human rights violations; the path to a dynamic conceptualisation of human rights through an impressive body of case-law; last but not least, the path to positive changes in law or practice at the national level, with concrete effects on people’s lives.

It has been said that the drafters of the Convention were determined not to allow any more governments to shelter behind the argument that what a state does to its own people is within its own exclusive jurisdiction and beyond the reach of the international community.

Today, the Court has become a unique model, an inspiration, a symbol.

More importantly, for the individuals who experience or fear human rights abuses in Europe, it is even more: the Court is regarded as their *ultimum remedium*, their last source of hope to seek redress for human rights violations.

But the path has become more difficult: the story of the Court is also a story of backlog, of substantial delays, with a Court threatened with drowning under the vast numbers of applications which are being submitted to it, largely because of European states’ failure to prevent or remedy structural, systemic human rights violations.

Like some others did sixty years ago, it is now our turn to think ahead and to sow the seeds for the future.

All measures aimed at increasing the efficiency of the Court should be welcomed. Above all, the right to individual petition – the fact that all 800 million individuals in the Council of Europe area have the right to seek justice, as a last resort, at supranational level – should be preserved. This is the key characteristic of this system.

The figures which underline the need to reform the proceedings of the Court are known: the number of applications constantly on the rise, the fact that 90% of new applications before the Court are clearly inadmissible or manifestly ill-founded, and that approximately 50% of the admissible cases are “repetitive applications”, that is cases raising issues that have already been the subject of Court judgments in the past, and which normally should have been resolved by the respondent member states.

This confirms that there is a serious gap of systematic implementation by member states of the Court judgments. Behind these figures one cannot but see the necessity to improve human rights protection at national level.

Any discussion about the difficulties of the European Court must focus on the need for prevention. The main question is not why the Court has difficulties to cope, but why so many individuals feel the need to go there with their complaints.

I have underlined in my earlier memorandum the main features of a systematic and holistic strategy at national level for the prevention of violations and implementation of the standards agreed upon.

The development of a national plan for the implementation by states of their human rights obligations would be an ideal framework for such a systematic approach. In order to bridge the implementation gap, governments should for instance integrate human rights into the ordinary work of the public administration and ensure effective co-ordination and co-operation between the authorities; set up adequate systems for data collection and analysis; and foster a human rights culture through the full integration of human rights in education and training as well as through awareness.

The establishment of national systems of information on the Convention and the Court’s procedures is also part of this strategy, as well as translation of leading judgments of the Court into national languages so that domestic courts understand important Convention principles when they apply the law.

Any national work on prevention should be guided by the recommendations adopted by the Committee of Ministers in the 2000-04 reform package.

Equally important is the fact that the Court is not a solo player. Rather, it is complemented by major European monitoring bodies, such as the European Committee of Social Rights, the European Committee for the Prevention of Torture, the Advisory Committee on the Framework Convention for the Protection of National Minorities, and the European Commission against Racism and Intolerance. The reinforcement of the valuable work of these independent monitoring bodies should be seriously considered. The effective implementation of other major Council of Europe treaties should also be given priority since they are in effect complementary to the European Convention on Human Rights. They all belong to the European human rights protection system.

Other parts of the Council of Europe, such as the Venice Commission, offer advisory services to member states in order to facilitate the adoption of systematic measures for the domestic realisation of human rights. Verification of the compatibility of draft laws, existing laws and administrative practices with the standards laid down in the European Convention on Human Rights is deemed to constitute one of the main remedies of the Court's excessive workload.

The Committee of Ministers, assisted by the Department for the Execution of Judgments of the Court, plays also an important role in addressing the shortcomings identified by the Court in order to prevent recurrence of violations. A prompt, full and effective execution of the Court's judgments constitutes a key element for the effective implementation of the Convention's standards in domestic law.

The above require also the active involvement of the national human rights structures, as well as of civil society.

My own office has proven that it can play a catalytic role in the prevention of human rights violations by acting flexibly and rapidly, promoting awareness of the Council of Europe human rights standards as well as their implementation. One of our main objectives is to identify possible shortcomings in the law and practice of member states concerning the compliance with human rights as embodied in the instruments of the Council of Europe, starting with the Convention.

I remain ready to assist member states in their efforts to remedy such shortcomings, and provide guidance for a better implementation of existing standards at national level, for example by indicating legal and other reforms that may be necessary in order to give full effect to the Convention, as interpreted by the Court. This is part of the dialogue I have developed with national authorities during the numerous country visits I conduct every year.

Yet, what we have achieved up until now has created new expectations which we strive to meet. This will only be feasible on condition that the necessary resources for the fulfilment of that mission are allocated.

It is our responsibility to guarantee the continued effective functioning of the Court; and it is the member states' primary responsibility to ensure a better implementation of the Convention at the national level: prevention lies first and foremost with the states, in line with the fundamental principle of subsidiarity which is enshrined in the Convention.

The ideal is indeed that that one day each individual will be able to seek and receive justice at home.

CONCLUSIONS

Conclusions: Mrs Eveline Widmer-Schlumpf

*Federal Councillor, Head of the Federal Department of Justice and Police
(Switzerland)*

We have had some very interesting and productive discussions. They will be hard for me to summarise in a few words.

Before coming to specific points about the reform, allow me to make a few general remarks:

- ▶ The Interlaken Conference has not come too late, but rather at just the right time. In any case, action has become a matter of urgency, as unequivocally recognised by all delegations in their contributions.
- ▶ Many speakers highlighted our great debt to the European Court. For over half a century, it has been making a vitally important contribution to consolidating the rule of law and democracy. These achievements must be protected. The European Union's accession to the Convention, welcomed by various delegations, will contribute to this.
- ▶ We must also recognise that a good deal of progress has already been made in achieving long-term reform of the Court. The imminent entry into force of Protocol No. 14 has been unanimously welcomed. At the same time, it has been stressed that further urgent measures are needed.
- ▶ Fourthly, all the speeches have borne witness to a clear political determination to get to grips with these reforms. This political will provides grounds for optimism.
- ▶ In this connection, it is encouraging to note that the Action Plan which we are about to adopt has been hailed as a solid basis for further work.

I would now raise a number of concrete issues which have been central to our discussions:

- ▶ Reinforcing the principle of subsidiarity will play a central role in finding solutions to our problems. We have stressed unanimously that the States Parties to the ECHR must respect at the national level their obligations under the Convention. I say it again: better information on and dissemination of the Convention and the case-law of the Court can also help to reinforce the principle of subsidiarity. Speakers also underlined the important role played by civil society, especially NGOs and national human rights institutions.

The problem of repetitive cases was mentioned on several occasions. In this connection, I would refer to Mr Hammarberg's notable remarks, underlining the need to create a genuine national human rights culture in Europe and stating his willingness to help resolve structural problems within the member States.

On the question of the principle of subsidiarity, a number of delegations also indicated that the Court did not need to rule on everything. In particular, insofar as the principle of subsidiarity is properly applied by the States parties, the Court can reduce its supervisory function. Some delegations indicated that the Court should show a certain restraint on particular questions of major importance at national level.

- ▶ Filtering was a key issue in many contributions. Certainly, opinions differed on the characteristics of the filtering mechanism and the stage at which it should intervene. There is, however, a broad consensus on the need to instigate a filtering mechanism and to proceed urgently with discussions on its modalities.
- ▶ Several speakers also underlined the importance of clear and consistent case-law: the Court's authority depends upon it and the case-law must be a reference for the application of the Convention at national level. Mention was likewise made of the potential of the pilot judgment procedure, which the Court was encouraged to exploit more fully. The pilot judgment procedure would be even more effective if the Committee of Ministers were to prioritise the execution of judgments which reveal structural problems at national level.
- ▶ The experience of Protocol No. 14 has shown that a long time is needed before organisational provisions of the Convention can be adapted to changing needs. This is why a number of delegations have called for the drawing up of a statute for the Court.
- ▶ The importance of individual petition as the last resort for ensuring respect for the basic rights and freedoms secured by the Convention was repeatedly stressed. Maintaining the right of individual petition does not, however, preclude discussion of the modalities of application to the Court. Whatever these modalities may be, they must not lead to the rejection of well-founded applications. This is obviously of particular importance for applications alleging serious human rights violations.

To conclude.

As I emphasised at the beginning, the Interlaken Conference has shown the strong, common political will to press on with reform of the Court. Several speakers emphasised that we must make the most of this momentum to get to grips with the next steps of the process without delay. It now falls to the Committee of Ministers to see to it that the reform progresses rapidly; it must soon take the necessary decisions giving terms of reference to the competent bodies.

Adoption of the Declaration and close of the Conference : Mrs Micheline Calmy-Rey

*Federal Councillor, Head of the Federal Department of Foreign Affairs,
Chairperson in Office of the Committee of Ministers of the Council of Europe*

We now turn to the adoption of the Interlaken Declaration, which contains a formal part, an Action Plan and a third part concerning its implementation. The final draft has been distributed to you in English and French. I see it has been signed by all delegations. Does any delegation still want to raise any points concerning the text? – No. Then I propose that the Interlaken Declaration be adopted by acclamation.

[Applause]

Thank you very much for your expression of support for the Interlaken Declaration. This is a very encouraging signal for the future of the Court.

Before closing this conference, let me give you some indication of the continuing process we envisage until the end of our Chairmanship.

At Interlaken we have succeeded in giving fresh impetus to the reform of the Court system. But this work must now continue at the level of the Committee of Ministers, the body that is responsible for organising implementation.

Ideally, the Committee of Ministers is expected to endorse the Interlaken Declaration at its meeting of 11 May 2010 to mark the end of the Swiss Chairmanship. We will do everything in our power to ensure that the Ministers can adopt such a decision by giving the relevant Council of Europe bodies the first mandates for the implementation of the Action Plan. We are aware that we have little time between now and May and that the development of a procedural decision with mandates is an ambitious goal. In this context, we have noted that several delegations think that the issue of filtering applications should be considered with a certain priority and we will try to take account of this. With regard to the preparation of a decision of the Committee of Ministers and the formulation of mandates, we will get together with the Secretary General of the Council of Europe and count on the support of its various departments.

Then it will be up to future Chairmanships to take over. In this regard, we have had very encouraging signals from Turkey. We are therefore confident that the reform process will receive active support in the future.

As you can see, we still have much work to do. But now it is time to relax. It is therefore with great pleasure that I invite you to a buffet which will be served in the auditorium opposite the plenary hall. Just follow the signs labelled "lunch."

Finally, I would like to inform you that the Swiss Chairmanship will be holding a press conference at 2 p.m., with the participation of senior representatives of the Council of Europe institutions.

I would not want to end this conference without warmly thanking the members of the Council of Europe Secretariat and of the Court who helped to both prepare and run the conference. Their support was extremely valuable and greatly contributed to its success. I also extend my thanks to the interpreters who have performed their difficult task brilliantly.

To conclude, I wish you a great weekend in this beautiful region. I hope that you will take the opportunity to go skiing or hiking in the beautiful Bernese Alps. Then I wish you a safe return to your respective capitals and hope to see you all on May 11 2010 in Strasbourg for the final session of the Committee of Ministers under the Swiss Chairmanship.

Interlaken Declaration

19 February 2010

The High Level Conference meeting at Interlaken on 18 and 19 February 2010 at the initiative of the Swiss Chairmanship of the Committee of Ministers of the Council of Europe (“the Conference”):

Expressing the strong commitment of the States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the European Court of Human Rights (“the Court”);

Recognising the extraordinary contribution of the Court to the protection of human rights in Europe;

Recalling the interdependence between the supervisory mechanism of the Convention and the other activities of the Council of Europe in the field of human rights, the rule of law and democracy;

Welcoming the entry into force of Protocol No. 14 to the Convention on 1 June 2010;

Noting with satisfaction the entry into force of the Treaty of Lisbon, which provides for the accession of the European Union to the Convention;

Stressing the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, i.e. governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level;

Noting with deep concern that the number of applications brought before the Court and the deficit between applications introduced and applications disposed of continues to grow;

Considering that this situation causes damage to the effectiveness and credibility of the Convention and its supervisory mechanism and represents a threat to the quality and the consistency of the case-law and the authority of the Court;

Convinced that over and above the improvements already carried out or envisaged additional measures are indispensable and urgently required in order to:

- i. achieve a balance between the number of judgments and decisions delivered by the Court and the number of incoming applications;

- ii. enable the Court to reduce the backlog of cases and to adjudicate new cases within a reasonable time, particularly those concerning serious violations of human rights;
- iii. ensure the full and rapid execution of judgments of the Court and the effectiveness of its supervision by the Committee of Ministers;

Considering that the present Declaration seeks to establish a roadmap for the reform process towards long-term effectiveness of the Convention system.

The Conference

1. Reaffirms the commitment of the States Parties to the Convention to the right of individual petition;
2. Reiterates the obligation of the States Parties to ensure that the rights and freedoms set forth in the Convention are fully secured at the national level and calls for a strengthening of the principle of subsidiarity;
3. Stresses that this principle implies a shared responsibility between the States Parties and the Court;
4. Stresses the importance of ensuring the clarity and consistency of the Court's case-law and calls, in particular, for a uniform and rigorous application of the criteria concerning admissibility and the Court's jurisdiction;
5. Invites the Court to make maximum use of the procedural tools and the resources at its disposal;
6. Stresses the need for effective measures to reduce the number of clearly inadmissible applications, the need for effective filtering of these applications and the need to find solutions for dealing with repetitive applications;
7. Stresses that full, effective and rapid execution of the final judgments of the Court is indispensable;
8. Reaffirms the need for maintaining the independence of the judges and preserving the impartiality and quality of the Court;
9. Calls for enhancing the efficiency of the system to supervise the execution of the Court's judgments;
10. Stresses the need to simplify the procedure for amending Convention provisions of an organisational nature;
11. Adopts the following Action Plan as an instrument to provide political guidance for the process towards long-term effectiveness of the Convention system.

Action Plan

A. Right of individual petition

1. The Conference reaffirms the fundamental importance of the right of individual petition as a cornerstone of the Convention system which guarantees that alleged violations that have not been effectively dealt with by national authorities can be brought before the Court.
2. With regard to the high number of inadmissible applications, the Conference invites the Committee of Ministers to consider measures that would enable the Court to concentrate on its essential role of guarantor of human rights and to adjudicate well-founded cases with the necessary speed, in particular those alleging serious violations of human rights.

3. With regard to access to the Court, the Conference calls upon the Committee of Ministers to consider any additional measure which might contribute to a sound administration of justice and to examine in particular under what conditions new procedural rules or practices could be envisaged, without deterring well-founded applications.

B. Implementation of the Convention at national level

4. The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to:
 - a. continuing to increase, where appropriate in co-operation with national human rights institutions or other relevant bodies, the awareness of national authorities of the Convention standards and to ensure their application;
 - b. fully executing the Court's judgments, ensuring that the necessary measures are taken to prevent further similar violations;
 - c. taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system;
 - d. ensuring, if necessary by introducing new legal remedies, whether they be of a specific nature or a general domestic remedy, that any person with an arguable claim that their rights and freedoms as set forth in the Convention have been violated has available to them an effective remedy before a national authority providing adequate redress where appropriate;
 - e. considering the possibility of seconding national judges and, where appropriate, other high-level independent lawyers, to the Registry of the Court;
 - f. ensuring review of the implementation of the recommendations adopted by the Committee of Ministers to help States Parties to fulfil their obligations.
5. The Conference stresses the need to enhance and improve the targeting and co-ordination of other existing mechanisms, activities and programmes of the Council of Europe, including recourse by the Secretary General to Article 52 of the Convention.

C. Filtering

6. The Conference:
 - a. calls upon States Parties and the Court to ensure that comprehensive and objective information is provided to potential applicants on the Convention and the Court's case-law, in particular on the application procedures and admissibility criteria. To this end, the role of the Council of Europe information offices could be examined by the Committee of Ministers;
 - b. stresses the interest for a thorough analysis of the Court's practice relating to applications declared inadmissible;
 - c. recommends, with regard to filtering mechanisms,
 - i. to the Court to put in place, in the short term, a mechanism within the existing bench likely to ensure effective filtering;

- ii. to the Committee of Ministers to examine the setting up of a filtering mechanism within the Court going beyond the single judge procedure and the procedure provided for in i.

D. Repetitive applications

7. The Conference:

- a. calls upon States Parties to:
 - i. facilitate, where appropriate, within the guarantees provided for by the Court and, as necessary, with the support of the Court, the adoption of friendly settlements and unilateral declarations;
 - ii. co-operate with the Committee of Ministers, after a final pilot judgment, in order to adopt and implement general measures capable of remedying effectively the structural problems at the origin of repetitive cases;
- b. stresses the need for the Court to develop clear and predictable standards for the “pilot judgment” procedure as regards selection of applications, the procedure to be followed and the treatment of adjourned cases, and to evaluate the effects of applying such and similar procedures;
- c. calls upon the Committee of Ministers to:
 - i. consider whether repetitive cases could be handled by judges responsible for filtering (see above, section C);
 - ii. bring about a co-operative approach including all relevant parts of the Council of Europe in order to present possible options to a State Party required to remedy a structural problem revealed by a judgment.

E. The Court

8. Stressing the importance of maintaining the independence of the judges and of preserving the impartiality and quality of the Court, the Conference calls upon States Parties and the Council of Europe to:
 - a. ensure, if necessary by improving the transparency and quality of the selection procedure at both national and European levels, full satisfaction of the Convention’s criteria for office as a judge of the Court, including knowledge of public international law and of the national legal systems as well as proficiency in at least one official language. In addition, the Court’s composition should comprise the necessary practical legal experience;
 - b. grant to the Court, in the interest of its efficient functioning, the necessary level of administrative autonomy within the Council of Europe.
9. The Conference, acknowledging the responsibility shared between the States Parties and the Court, invites the Court to:
 - a. avoid reconsidering questions of fact or national law that have been considered and decided by national authorities, in line with its case-law according to which it is not a fourth instance court;
 - b. apply uniformly and rigorously the criteria concerning admissibility and jurisdiction and take fully into account its subsidiary role in the interpretation and application of the Convention;
 - c. give full effect to the new admissibility criterion provided for in Protocol No. 14 and to consider other possibilities of applying the principle *de minimis non curat praetor*.

10. With a view to increasing its efficiency, the Conference invites the Court to continue improving its internal structure and working methods and making maximum use of the procedural tools and the resources at its disposal. In this context, it encourages the Court in particular to:
 - a. make use of the possibility to request the Committee of Ministers to reduce to five members the number of judges of the Chambers, as provided by Protocol No. 14;
 - b. pursue its policy of identifying priorities for dealing with cases and continue to identify in its judgments any structural problem capable of generating a significant number of repetitive applications.

F. Supervision of the execution of judgments

11. The Conference stresses the urgent need for the Committee of Ministers to:
 - a. develop the means which will render its supervision of the execution of the Court's judgments more effective and transparent. In this regard, it invites the Committee of Ministers to strengthen this supervision by giving increased priority and visibility not only to cases requiring urgent individual measures, but also to cases disclosing major structural problems, attaching particular importance to the need to establish effective domestic remedies;
 - b. review its working methods and its rules to ensure that they are better adapted to present-day realities and more effective for dealing with the variety of questions that arise.

G. Simplified procedure for amending the Convention

12. The Conference calls upon the Committee of Ministers to examine the possibility of introducing by means of an amending Protocol a simplified procedure for any future amendment of certain provisions of the Convention relating to organisational issues. This simplified procedure may be introduced through, for example:
 - a. a Statute for the Court;
 - b. a new provision in the Convention similar to that found in Article 41.d of the Statute of the Council of Europe.

Implementation

In order to implement the Action Plan, the Conference:

1. calls upon the States Parties, the Committee of Ministers, the Court and the Secretary General to give full effect to the Action Plan;
2. calls in particular upon the Committee of Ministers and the States Parties to consult with civil society on effective means to implement the Action Plan;
3. calls upon the States Parties to inform the Committee of Ministers, before the end of 2011, of the measures taken to implement the relevant parts of this Declaration;
4. invites the Committee of Ministers to follow-up and implement by June 2011, where appropriate in co-operation with the Court and giving the necessary terms of reference to the competent bodies, the measures set out in this Declaration that do not require amendment of the Convention;

5. invites the Committee of Ministers to issue terms of reference to the competent bodies with a view to preparing, by June 2012, specific proposals for measures requiring amendment of the Convention; these terms of reference should include proposals for a filtering mechanism within the Court and the study of measures making it possible to simplify the amendment of the Convention;
6. invites the Committee of Ministers to evaluate, during the years 2012 to 2015, to what extent the implementation of Protocol No. 14 and of the Interlaken Action Plan has improved the situation of the Court. On the basis of this evaluation, the Committee of Ministers should decide, before the end of 2015, on whether there is a need for further action. Before the end of 2019, the Committee of Ministers should decide on whether the measures adopted have proven to be sufficient to assure sustainable functioning of the control mechanism of the Convention or whether more profound changes are necessary;
7. asks the Swiss Chairmanship to transmit the present Declaration and the Proceedings of the Interlaken Conference to the Committee of Ministers;
8. invites the future Chairmanships of the Committee of Ministers to follow-up on the implementation of the present Declaration.

**HIGH LEVEL CONFERENCE
ON THE FUTURE OF THE EUROPEAN
COURT OF HUMAN RIGHTS**

Conference organised by the Turkish chairmanship
of the Committee of Ministers of the Council of Europe

İzmir, 26-27 April 2011

Proceedings (extracts)

OPENING ADDRESSES

Mr Ahmet Davutoğlu

Minister of Foreign Affairs (Turkey), Chairman of the Committee of Ministers of the Council of Europe

Distinguished colleagues, distinguished participants,

First of all you are most welcome to one of the most beautiful cities of the Mediterranean, İzmir. I hope you will enjoy your stay in İzmir. I hope we will have a very fruitful session.

As one of the founding members of the organisation, Turkey is pleased to host this important conference on the future of the European Court of Human Rights. On behalf of the Chairmanship of the Committee of Ministers and the Government of Turkey, I wish to extend to you all a very warm welcome to İzmir and to Turkey.

My country has responded positively to the invitation made at Interlaken in February 2010 to the future chairmanships of the Committee of Ministers to follow up on the implementation of the Interlaken Declaration. The reform of the Court has been identified as a priority of the Turkish Chairmanship.

We believe that the İzmir Conference will provide a new impetus to the Court reform process which was launched by the Interlaken Conference last year.

Distinguished participants,

The Convention system, to which the European Court of Human Rights is central, plays a pivotal role, establishing common standards for the respect and protection of human rights. It has value both as a symbol enshrining our shared values of human rights, democracy and the rule of law, and it also serves as a practical mechanism for ensuring that rights and freedoms are protected and that our shared values are thus respected.

The mere existence of a European Court, where more than 800 million Europeans are entitled to take their complaints, which, they believe, had not been resolved through domestic remedies, is a success in itself. This success, however, brings along high expectations. At the top of the list of expectations comes a court which functions effectively and can dispose of applications within a reasonable time; a Court which ensures legal security both for individuals and for states through a consistent case-law.

Distinguished participants,

Reform of the Court has been on the agenda for more than a decade. At the meeting of the 50th anniversary of the Convention in November 2000 in Rome, which took place only after the entry into force of Protocol No. 11, many calls were heard for measures aimed at increasing the effectiveness of the Court. However, these calls have not been fully fulfilled.

To date, some steps were of course taken, Protocol No. 14 being the most prominent. However, these steps have fallen short of meeting the ever-increasing challenges faced by the Court. After ten months of entry into force of Protocol No. 14, the Court has concluded in its written opinion for the İzmir Conference that while the results so far achieved are encouraging, Protocol No. 14 will not provide a lasting and comprehensive solution to the problems facing the Convention system.

The present difficulties challenging the long-term effectiveness and future of the Convention system are our common concern. The responsibility of the ownership of this protection mechanism requires that our governments be able to display the same common political will which they had shared at the time of the creation of the Convention system.

Distinguished participants,

The İzmir Conference pursues two main goals in the context of ensuring the long-term effectiveness of the Convention mechanism. The first is to take stock, in accordance with the Interlaken Action Plan, of the proposals that do not require amendment of the Convention; and the second is, having also regard to recent developments, to take necessary measures.

The biggest problem is the Court's case-load. Over 90% of the decisions produced by the Court declare applications inadmissible. This fact clearly shows the need to take additional measures with regard to access to the Court. Filtering out these inadmissible applications is taking too much of the Court's time and resources, which are already stretched beyond its capacities. Although the provisions introduced by Protocol No. 14 and recent measures adopted by the Court are important and necessary, they will not, however, be sufficient. We must thus make absolutely clear our political will to find more radical solutions to existing problem.

With regard to access to the Court, the Interlaken Declaration called upon the Committee of Ministers to consider any additional measure which might contribute to a sound administration of justice. It also calls for examining in particular under what conditions new procedural rules or practices could be envisaged, without deterring well-founded applications. Taken together with other concrete steps, the introduction of an application fee would have a considerable impact in reducing the backlog problem. We must continue to examine the issue of charging fees to applicants together with other possible new procedural rules or practices such as compulsory representation.

Making the practice on just satisfaction more transparent and foreseeable would certainly allow more cases to be settled outside of the Court and, perhaps, discourage applicants with unrealistic expectations.

Distinguished participants,

The other great concern arising from the Court's case-load is the problem of repetitive applications. This must primarily be resolved through effective implementation of the Convention and the Court's judgments at national level. We must ensure that effective domestic remedies exist, providing for a decision on alleged violations of the Convention and, where necessary, its redress.

We need adequate national measures to contribute actively to diminish the number of applications. We also need further guidance to ensure better understanding of the Convention and the Court's case-law and avoiding repetitive applications. We believe that the procedure for advisory opinions and having reasoned decisions in the rejection of applications for referral to the Grand Chamber would clearly ensure that more cases are dealt with satisfactorily at national level.

Effective execution of judgments, of course, requires the Court's judgments to be clear and consistent in their prescriptions. On the other hand, the principle of subsidiarity requires full, consistent and foreseeable application by the Court of the admissibility criteria. At the same time it requires observance of the rules regarding the scope of its jurisdiction, namely, *ratione temporis*, *ratione loci*, *ratione personae* and *ratione materiae*.

The admissibility criteria are an essential tool in managing the Court's case-load and in giving practical effect to the principle of subsidiarity. The new admissibility criterion adopted in Protocol No. 14 remains to be evaluated with a view to its improvement. We also need to initiate work to reflect on the admissibility criteria, including about how the criteria can be made more effective and whether new criteria are required.

Distinguished participants,

Since the Interlaken Conference the number of interim measures requested in accordance with Rule 39 has greatly increased, thus further aggravating the workload of the already overburdened Court. The Turkish chairmanship has taken into account growing concerns about the application of Rule 39, and supported the view that we have to take concrete steps on this issue. We expect that the implementation of the approach set out in the İzmir Declaration, which will be adopted by this conference, will lead to a significant reduction in the number of interim measures, and to the speedy resolution of those applications.

The Convention has been integrated into the national legal systems of all Council of Europe member states. That process must now be completed by the accession of the European Union to the Convention. Bringing the institutions of the European Union within the scope of the Convention will be a huge step forwards for human rights protection in Europe. Of course difficulties, both technical and political, will emerge as we work towards accession; but I am confident that the outcome will be successful. Turkey, will sustain its support and efforts for the ongoing accession process until the ministerial session in Istanbul. For the creation of a common legal space for the European human rights protection system, it is very important not to lose the political momentum created by the entry into force of the Lisbon Treaty and thus, to realise the accession as soon as possible.

Distinguished participants,

When we decided to convene this Conference, we were aware of the difficulties of reaching a consensus in some measures expressed in the Interlaken Declaration. Nevertheless, it was our priority to take further concrete steps, as an expression of the States Parties' determination to continue the Interlaken process. Without maintaining our political will, taking stock of the progress already achieved, and without envisaging our future steps, the reform process would be abandoned to an uncertain future.

The İzmir Declaration which will be adopted by this conference is the outcome of a collective effort made in the spirit of compromise and co-operation. Our goal was to reflect a common ground acceptable, at this stage, to all 47 members. Naturally, this will not provide all the answers for the reform of the Court. However, we believe that the outcome of this conference will give fresh encouragement and further guidance to the ongoing work on finding lasting solutions to the existing problems, it will also help to pursue long-term strategic reflections about the future role of the Court.

In view of this, I wish to conclude by expressing my confidence that our conference will make an important contribution to the future of the Court and that of the Convention mechanism as a whole. I am sure that the future chairmanships will continue to give follow-up to this process.

Distinguished participants,

Welcome to İzmir. I wish you a great time here.

Mr Ahmet Kahraman

Minister of Justice (Turkey)

Honourable colleagues, esteemed participants,

I am honoured to be at this important Conference on the Future of the European Court of Human Rights that has taken on the role of encouraging the advancement of individual rights and freedoms and the source of inspiration for many judicial reforms in our country, and to host such distinguished participants in my hometown of İzmir.

We believe that through its aims which can be outlined as ensuring respect for human rights by the Contracting States to the European Convention on Human Rights, the European Court of Human Rights has played an important role in upholding the rule of law and by establishing common standards aimed at the protection of individual rights in Europe.

In this context, we, as the Ministry of Justice, attach importance to the envisaged and formulated reforms to enable the European Court of Human

Rights to perform its vital mission in an effective way, and to this extent, we consider it important to implement the Action Plan adopted last year in Switzerland (Interlaken).

We also express our appreciation of the fact that during our Chairmanship of the Committee of Ministers, the Ministry of Foreign Affairs of Turkey fulfilled its incumbent duty and did not spare any effort for the effectiveness of the Court by organising this conference.

Distinguished participants,

While we view positively the increase in the effectiveness of the Court, we are of the opinion that applications to the Court should be precluded through improvements at the domestic levels which would be able to provide alternative means of redress and solutions.

Accordingly in this way, we believe that it will not only be possible to avoid violations of rights but also by displaying improvements within member states' systems, this will greatly benefit the easing of the burden on the Court itself.

In recent years, Turkey has taken many steps in the prevention of the violation of rights. Within the last decade, many legislative reforms have been implemented in our country, from the criminal laws to the commercial laws. Through such reforms many potential situations that may have caused risk of violation of rights, have been prevented.

With the envisaged new Constitution, planned to be completed next year, these legislative amendments will be more firmly assured.

On another aspect, during this period of time, our country has made headway in a number of changes for the judicial personnel. As well as improving their personal rights, it has also supported further education for the members of the judiciary through the establishment of the Justice Academy. Above all, by reforming the structure of the Supreme Board of Judges and Prosecutors, it has enabled the Board to become more independent and democratic.

Our activities continue in many different areas. These include, for example: a legislation launching the courts of appeals to speed up the functioning of the judiciary and the realisation of the national justice information system (NJIS), which is the first integrated judicial electronic communications network.

On the other hand, in order to examine violations of rights without giving the necessity for recourse to the European Court of Human Rights and to conclude allegations of violation, where necessary, by redressing the victims within our domestic system, the right to individual petition to the Constitutional Court will enter into force at the end of 2012.

Distinguished guests,

I do not intend to bore you today by mentioning all the activities we have realised.

However, it is true that our country has taken the judgments of the European Court Human Rights as her guide and turned them into its watchword in reforming her system and transforming Turkey into a place where human rights and human honour takes precedent above all else.

We are aware that there is still a long way to go. Nevertheless, in the not too distant future, through determination and persistence, Turkey will become one of the countries which best guarantees the rights as protected under the European Convention on Human Rights.

Once more I salute all the participants, and hope that each of you has a pleasant stay in İzmir.

Mr Thorbjørn Jagland

Secretary General of the Council of Europe

Ministers, Excellencies, ladies and gentlemen,

I will start by thanking our hosts, the Turkish Chairmanship of the Committee of Ministers, for having organised this important Conference and ensuring such a warm welcome in the beautiful city of İzmir.

We are gathered here today to find solutions to the important challenges faced by the European Court of Human Rights which, over the last fifty years, has become the world's largest and most influential international court as well as its foremost human rights court.

The Court's case-law has over the years raised the protection of human rights in all our member states to a higher and uniform standard. The Court has thus become the guarantor of long lasting international stability and peace.

If the Court fails, the Convention system fails; and if the Convention fails, the Council of Europe will fail.

Let me illustrate, with facts and figures, the challenges faced by the Court:

- ▶ At the end of last month, there were 149 100 applications pending before the Court.

That is almost 30 000 more than when we met in Interlaken last February. The Court is receiving far too many applications.

- ▶ The overwhelming majority of these applications are inadmissible: in fact nine out of ten applications are declared inadmissible.

Most of these applications should never have been made.

- ▶ In 2010 the Court found violations in 1 282 judgments.

Most of these judgments should not have been necessary because they related to problems for which the Court had already indicated solutions.

In other words, they were what we call clone or repetitive applications. There were about 25 000 such applications pending before the Court at the end of 2010.

Too many applicants are obliged to bring their applications to Strasbourg, because their national authorities are failing to resolve well-known, widespread problems.

As a result of these important challenges the Court is faced with, it is spending far too much of its resources on work that falls outside its core function.

This means less time can be devoted to the original and noble purpose of the Court: to examine applications that are of principal importance for human rights protection in Europe.

How can we respond to these challenges?

Our priority must be to do something about the repetitive applications as well as the inadmissible applications.

▶ In that context, the Court needs to exploit the full potential of Protocol No. 14.

I refer in particular to the new single judge procedure for dealing with inadmissible applications; and also to the new three-judge committee procedure, for dealing with repetitive applications.

I know that the Court has made excellent progress in implementing these two innovations.

At the same time, I am sure that there is still scope for improvement.

Why not have a small number of judges working full-time on filtering for a certain, limited part of their nine-year term of office?

The new admissibility criterion contained in Protocol No. 14 – that applicants must show that they have suffered “manifest disadvantage” – has great unexploited potential.

By using it more extensively, the Court could reject a greater number of unimportant cases by simple decision, instead of issuing judgments that are far more complex and time-consuming.

Protocol No. 14 has now been fully in force for almost eleven months; growth in the backlog has however continued and shows no signs of slowing down.

Protocol No. 14, therefore, may be palliative – but it will not be the cure.

▶ The problem of repetitive applications is a fundamental issue.

When states find themselves confronted with applications involving familiar problems, they should more often propose solutions directly to the Court, without waiting for yet another judgment from the Court.

Friendly settlements and unilateral declarations can allow the Court to strike applications out of its list by a simple decision.

And if the settlement or declaration includes appropriate general measures, the underlying problem may be solved once and for all. Council of Europe relevant entities should be of assistance to member states in the adoption of general measures requiring amendments to the legislation or changes in the practice.

▶ The problem of inadmissible applications must be tackled from both sides: reduce the rate of incoming applications and increase the Court’s output of decisions to reject them.

Both the Court and I have taken, or are proposing various measures to provide better information to applicants on the role of the Court – and in particular on the limits to that role.

There are other, more radical possibilities for deterring inadmissible applications, such as introducing a system of fees for applicants or obliging them to have legal representation when applying.

These possibilities will continue to be examined.

What we cannot avoid, however, is to reach agreement on a new procedure or mechanism for filtering by the Court, one that goes beyond the single judge procedure and one that does not need any amendment to the Convention.

Once we have agreed on this, I am prepared to mobilize resources for the Court so that the filtering can be effective.

Ladies and gentlemen,

National experts have been discussing these issues – and others – since the Interlaken Conference.

I do understand that careful technical preparation is absolutely necessary, but it must be backed up by political determination: a recognition of the need for immediate action and a willingness, if necessary, to compromise in the wider interest.

The only completely unacceptable option is to do nothing, or – perhaps even worse – to tinker around the edges and imagine that this will be enough.

In the end, the big answers to the big problems can only come from the States Parties themselves.

This should come as no surprise, since the Convention system is based on the principle of “subsidiarity.”

When we talk about subsidiarity in the Convention system, what do we mean?

First and foremost, we mean that “human rights protection begins at home.”

The States parties to the Convention have all voluntarily accepted to respect and protect the rights and freedoms it contains.

For the past ten years, the need for greater action at national level has been a constant theme of work on reform of the Convention system.

Yet the need is still there.

Violations of the right to fair trial, on account of the excessive length of domestic judicial proceedings, are still by far the most frequent form of violation found by the Court in its judgments.

The Court has for years been issuing judgments against a number of States in which it has found this kind of violation.

Subsidiarity also means that states must execute the Court’s judgments swiftly and fully.

The more judgments the Court issues, the more work the Committee of Ministers has in supervising their execution – and the Court’s output has increased impressively in recent years.

I therefore welcome the Committee of Ministers’ new working methods for supervision of the execution of judgments, and encourage all member states to co-operate fully and effectively.

Subsidiarity also concerns the Court. The President of the Court will inform you about the different measures taken by the Court in that respect following Interlaken.

Ladies and gentlemen,

I shall repeat what I already stated in Interlaken.

The Court is not an isolated body and cannot operate in an institutional, political or social vacuum.

The Court judgments provide authoritative interpretation of Convention provisions, underpinning our standard-setting and co-operation activities and giving important references to our other human rights mechanisms.

This is the driving force of the Council of Europe as an intergovernmental organisation.

Other Council of Europe mechanisms, institutions and programmes which help member States to fulfil their obligations without the need for Court judgments, are a reference point for the Court.

The Council of Europe is therefore indispensable to the effective functioning of the Convention system.

That is why, with the support of the Committee of Ministers, I am proposing far-reaching reforms to revitalise and streamline our work and preserve our relevance for the future.

The aim of these reforms will be to ensure greater impact and effectiveness – including cost-effectiveness – as well as greater visibility for priority activities in our central fields of human rights, democracy and the rule of law.

I am convinced that when these reforms are fully implemented, the number of applications before the Court will decrease.

In this connection, alongside our work on reform of the Convention system, we – the member states and the European Union together – are working to extend that system through accession of the European Union to the Convention.

European Union accession to the Convention is one of our highest priorities.

I am personally committed to helping to achieve a successful outcome as soon as possible.

Ladies and gentlemen,

Our work to ensure a sustainable, effective European human rights protection system is well under way.

Interlaken, along with the last state's ratification of Protocol No. 14, marked a new starting point, and the İzmir Conference will mark an essential staging post for stock-taking, clarification and prioritisation.

I find it fitting to recall President John F. Kennedy's words that as problems are made by men, solutions to the problems will also be found by men.

So let us be clear: the States Parties to the Convention have a collective responsibility to bring this process to a sustainable, successful conclusion.

The Convention is Europe's human rights badge of honour, made exceptional by the fact that the Court issues binding judgments on individual applications.

We must therefore renew our vigour and determination for the difficult tasks that still lie ahead: to ensure that future generations may benefit from the enormous advantages that the Council of Europe has brought to us by giving birth to the Convention and the Court.

Thank you.

Mr Mevlüt Çavuşoğlu

President of the Parliamentary Assembly of the Council of Europe

Ladies and gentlemen,

It is a great pleasure and honour for me to address this conference as President of the Parliamentary Assembly, one of the statutory organs of the Council of Europe. I wholeheartedly congratulate my fellow countryman, Foreign Minister Mr Ahmet Davutoğlu, for organising this important conference in the framework of the Turkish Chairmanship of the Committee of Ministers.

The reform of the European Court of Human Rights is part of the overall reform of the Council of Europe, which aims at making our organisation more relevant and more efficient. Both reforms are not only closely related, they are dependent on one another. The Court cannot be functional if the Council of Europe as a whole does not have the political leverage to promote legal reforms and to ensure the execution of the Court's judgments in its member states. Nor can the Council of Europe be functional if the Court is not capable of fulfilling its essential mission of protection of the European Convention on Human Rights.

The future of the Court is also very closely linked to the accession of the European Union to the Convention. This will guarantee a coherent, Europe-wide system of human rights protection and we should do all we can to speed up this accession in the coming months.

The Assembly, as the Committee of Ministers, is responsible for protecting the Council of Europe's human rights values and in ensuring compliance of the Convention standards by member states. I shall therefore now focus on the "parliamentary dimension" of work carried out by the Assembly and the national parliaments it represents.

The Assembly has been following closely the Interlaken process. In Resolution 1726 – which it adopted on this subject – it insisted that the process should take into account, in particular: the need to strengthen the implementation of Convention rights at the national level; the improvement of the effectiveness of domestic remedies in states with major structural problems, and the need to rapidly and fully execute the judgments of the Court.

The Assembly has also repeatedly stated that the authority of the Strasbourg Court depends on the stature of its judges and on the quality and coherence of the Court's case-law.

Let me start with the issue of the judges to the Court who, as you know, are elected by the Assembly. The Assembly is doing its best to ensure that the judges are of the highest calibre. However, the selection procedures start in member states and we have always insisted that, in order to enhance the quality, effectiveness and authority of the Court, these procedures must be rigorous, fair and transparent.

Unfortunately, this is still not always the case and the Assembly has not hesitated, on several occasions, to send back lists which it has considered unsatisfactory. We therefore welcome the initiative of the President of the Court to

create an Advisory Panel of experts which would counsel governments before any lists of candidates are transmitted to the Assembly.

I now move on to the key role that national parliaments can play in stemming the flood of applications submerging the Court. In this connection, the dual role of the Assembly's parliamentarians – as members of their respective national parliaments and of the Assembly, is an important asset that we have at our disposal.

First of all, the Assembly is undertaking serious efforts to ensure that national parliaments rigorously and systematically verify the compatibility of draft and existing legislation with the Convention's standards, and ensure effective domestic remedies.

Secondly, the Assembly and national parliaments also have a responsibility for rapid and effective implementation of judgments by the Strasbourg Court. The Committee of Ministers, which holds the principal responsibility for the supervision of the execution of the Court's judgments, has itself acknowledged the benefit of greater parliamentary involvement. That said, and in spite of the efforts of the Assembly, the manner in which many national legislative bodies function in this regard is still not satisfactory. But I can assure you that we will persevere in this respect.

Priority must be given to solving major structural problems, which have led to numerous repeated violations of the Convention. The Assembly has identified, in particular, the following problems: the excessive length of judicial proceedings, chronic non-enforcement of domestic judicial decisions, deaths and ill-treatment by law enforcement officials, including lack of effective investigations into them, and unlawful or excessive detention on remand.

Subsequently, in its recent Resolution on the implementation of judgments of the European Court of Human Rights, the Assembly called upon the chairpersons of those national parliamentary delegations of states concerned by these problems – together, if necessary, with the relevant ministers – to present the results achieved in solving them. I personally, as President of the Assembly, have asked the chairpersons of the parliamentary delegations concerned to provide me with information – if possible within the next six months – on follow-up given by national parliaments.

I believe this is an example of how, in the context of the Interlaken follow-up, the Assembly has itself taken the initiative to give priority to the full and swift compliance with the Court's judgments which, in many instances, requires regular and rigorous parliamentary supervision.

Finally, I wish to inform you about progress made in the context of ongoing negotiations with respect to European Union accession to the European Convention on Human Rights. A joint informal body composed of representatives of the Assembly and the European Parliament met in March of this year to discuss the modalities of the participation of European Parliament representatives in the Assembly's process of electing judges to the Court subsequent to such accession. A large measure of agreement has already been reached on a number of issues in this respect and a second meeting is scheduled to take place in mid-June.

One of the issues that still needs to be thoroughly addressed is the concern of some member states that a "block" approach of the European Union in the

Committee of Ministers, in particular as regards execution of judgments, would create an insurmountable voting majority. I wish to stress that on human rights issues, states must act in conformity with the fundamental values and principles and not according to their “block” belonging and solidarity. This is the unique value of the Council of Europe, where principles take precedence over economic, political, geo-political or other considerations.

Ladies and gentlemen, I believe that today’s conference will help us to reach decisions which will not only ensure the viability of the Council of Europe and the Court, but will ensure better and more effective protection of the rights enjoyed by Europe’s 800 million citizens. The responsibility lies with all of us.

I thank you for your attention.

Mr Jean-Paul Costa

President of the European Court of Human Rights

Mr Chair of the Committee of Ministers, Mr Secretary General, Mr President of the Assembly, Ladies and Gentlemen,

The first conference on the future of the European Court of Human Rights took place last year in Interlaken.

After expressing a strong commitment to the Convention and recognising “the extraordinary contribution of the Court to the protection of human rights in Europe”, that conference adopted a Declaration and an Action Plan, constituting a roadmap for the reform process aimed at securing the system’s long-term effectiveness.

In agreement with the Court, the Turkish authorities wished to hold this conference in Izmir, in the context of their Chairmanship of the Committee of Ministers, so as to sustain the impetus given by Interlaken. I thank them for this initiative, and also for their hospitality and the warm welcome we have been given.

It is true that little time has elapsed between the two conferences. Protocol No. 14 moreover entered into force less than one year ago. However, that does not prevent us from taking initial stock, even if on a provisional basis, of what has already been achieved, before going on to identify areas in which Izmir could make a contribution.

Let us begin with the stocktaking.

The key importance of subsidiarity entails an obligation for parties to the Convention to ensure that the rights and freedoms it safeguards are fully pro-

tected at national level and a sharing of responsibility between the States and the Court.

In this context the Court has already taken steps to implement the recommendations made to it. I would cite the successful development of pilot judgments (the Court has very recently adopted a new Rule of Court governing the pilot-judgment procedure); adoption of a prioritisation policy; and the introduction of new criteria and scales for calculating just satisfaction under Article 41 of the Convention.

As regards case-law, an information effort targeting all those concerned is necessary. Mention can be made of the adoption of an Admissibility Guide - a practical guide setting out the conditions to be fulfilled for an application to have some prospect of success - and the development of thematic case-law guides. We also have plans to improve the HUDOC database, and a number of States are ready to contribute financially to this project.

All this makes it possible to enlighten national legal and judicial practitioners as to how the Convention must be applied. The Interlaken conference drew our attention to the importance of ensuring the clarity and consistency of the Court's case-law. No institution is perfect, and it is always possible to do more and better. That is what we have sought to achieve.

Another vitally important question for the future of the Court is the selection of judges. The criteria for office laid down by the Convention concern the judges' moral character and professional qualifications; these criteria guarantee that they are independent, impartial and competent. The selection procedure involves the States, each of which submits a list of three candidates, and the Parliamentary Assembly, which elects one of the three. Interlaken had recommended ensuring full satisfaction of the selection criteria. At my instigation, the Committee of Ministers set up a panel of experts responsible for advising States regarding the lists of candidates. This high-level body is now operational and is bringing results.

The Interlaken Action Plan invited the States to second national judicial officers to the Registry of the Court. A number of States have taken, or plan to take, this useful step, which benefits not just the Court but also the national judicial systems, when these officials return to their home countries. The Court is working with the governments to maintain and reinforce this form of co-operation.

We have begun applying the procedural provisions of Protocol No. 14. Twenty judges have been appointed to perform the duties of single judge; each of them gives decisions with the assistance of a non-judicial rapporteur, an experienced member of the Registry. Between 1 June 2010 and 1 April 2011, 26 500 decisions were handed down by single-judge formations. The three-judge committees have begun to exercise their new powers. Almost 300 applications have been dealt with in this way. Few decisions have involved the new admissibility criterion, concerning cases where the applicant suffered no significant disadvantage. However, until 1 June 2012 this criterion can be applied only by the Chambers or the Grand Chamber. Even in the longer term one should not expect too much from this provision, since more than nine applications out of ten are already dismissed by the Court as inadmissible. The possibility of reducing the

number of judges in a Chamber from seven to five is being carefully weighed, as efficiency gains should not be made to the detriment of consistency in the case-law.

The provisional outcome of the Court's efforts is far from insignificant, and has been achieved without additional resources. Nonetheless, we must face up to realities. For the first time in many years the gap between the number of new applications and the number of applications disposed of has narrowed, but it still exists. It will take some time to reduce it and, above all, to reverse the trend, that is to say gradually eliminate the backlog of cases. At the time of the Interlaken Conference we had 120 000 cases pending; today we have over 140 000. The prioritisation policy has made it possible to reduce the time taken to deal with the most urgent cases, but overall the processing times remain excessive. As I said last year, Protocol No. 14 was necessary, but it is not enough and further measures are needed.

I now wish to cite some key issues.

The first is the Court's independence. This is an essential element of the rule of law, and the corner-stone of the Convention system. The Court cannot compromise on this issue. Any reform must be compatible with the principle of independence, which is as precious for the States themselves as it is for the Court. What would people say if a State failed to respect its own courts' independence?

This issue is linked to simplification of the procedure for amending the Convention. The Court has always been in favour of this idea. The adoption of Protocols 11 and 14 offered an example of how cumbersome the amendment mechanism is. However, the aim must be to reinforce independence, not to curtail it, which would be the outcome if certain Rules of Court were transformed into provisions of a Statute. This objective, already pursued with the Wise Persons' report in 2006, should not have the effect of rigidifying the issues currently a matter for the Court alone. We wish to be involved in the Committee of Ministers' work on this question.

Another key question is repetitive applications. The Court co-operates with States to facilitate the adoption of friendly settlements and unilateral declarations. Upstream, States are obliged, under Article 13 of the Convention, to provide effective remedies for violations of the rights guaranteed. Downstream, they are also required to execute the Court's judgments promptly and to the full; this applies not just to cases in which they are a party, as stipulated by Article 46, but also, from a moral standpoint, to cases where other States are found to have perpetrated similar violations. Repetitive applications, which number about 27 000, should no longer exist if responsibility were genuinely shared.

A third issue is the influx of applications. Where applications are well-founded but repetitive, all of the Court's efforts will be vain without action by the States themselves.

What can be done about applications with no prospect of success?

The wrong solution would be to introduce a system of charges payable by applicants, which, apart from objections of principle, would raise considerable practical and management problems. Another solution worth exploring is oblig-

atory representation of applicants by a lawyer. This could permit those concerned to receive appropriate legal advice before filing an application. It must nonetheless be asked whether a system of obligatory legal representation should not go hand in hand with the introduction of national measures to facilitate the award of legal aid.

Another issue for the future is filtering of applications. This is linked to the prioritisation policy and ranges beyond the single judge system. The court is determined to do everything possible without changes to the existing law. However, the introduction of an even more effective mechanism, entailing changes to the Convention, is inevitable. The intergovernmental bodies are addressing this question, and the Court is willing to play an even greater part in their work. At all events, in the near and more distant future, more resources will be necessary, and I thank you, Mr Secretary General, for your commitment in this respect.

Lastly, this conference in Izmir should be an opportunity to reflect on the possibility for the Court to give advisory opinions. Over and beyond the proactive approach we pursue concerning dialogue with the member States' high-level courts, this is a possible means of reinforcing subsidiarity in a tangible way and would, in the medium term, bring about a reduction in the Court's case-load.

Ladies and Gentlemen,

If, as we all wish, Izmir is to extend and amplify the impetus given in Interlaken, we must bear in mind a few simple ideas.

Firstly, protection of rights is no less important in today's Europe than it was in 1950. The economic crisis, security constraints, fear or phobia of others and all kinds of conflicts require a consolidation, not a weakening, of the system. It is in the interests of all concerned, both governments and civil society, that there should be a strong and effective Court within a sound and solid Council of Europe. In this connection, I welcome the process geared to ensuring the European Union's accession to the Convention. The outcome will be a Europe offering stronger guarantees of rights, with two major courts that are not rivals but complement one another within a more coherent area of freedom, equality and justice.

Secondly, I perceive 2010 as the end of a phase, that of implementation of Protocol No. 11. Let us not forget that the last ratification of Protocol No. 14 took place at Interlaken. Izmir must mark the beginning of a new phase with the full application of Protocol No. 14, but also with the ground already being prepared for what comes next. I previously spoke of a second wind for the Convention system; since that was achieved in the Swiss Alps we now need to speed up the process here on the shores of the Mediterranean in Turkey.

Lastly, I wish to say that, in the face of major challenges, such as the emergence of new and sensitive cases or difficulty in handling an influx of requests – the interim measures under Rule 39 are an example – the Court has never faltered; it has never allowed its workload to affect the quality of its work, nor has it ever been lacking in impartiality. May the documents adopted at this confer-

ence recognise these achievements and thereby constitute an encouragement to the Court to sustain this track record, against all odds!

Thank you for your attention.

Mr Thomas Hammarberg

Commissioner for Human Rights, Council of Europe

Introduction

The number and nature of applications to the European Court of Human Rights (“the Court”) give an indication of the status of human rights on our continent today. The number of complaints has increased dramatically; about sixty thousand complaints reached the Court in 2010. Despite its extremely heavy case-load, the Court continued to deliver very important judgments and decisions on varied subjects during the past year: from domestic violence to the disappearance of individuals in armed conflicts; from the right to hold a demonstration to prisoners’ voting rights; from discrimination on the basis of health to the treatment of asylum seekers – to mention but a few examples.

The human rights of asylum seekers were also the subject of the third party interventions I made before the Court last year. These interventions followed an invitation by the Court and related to a group of cases concerning the return of asylum seekers to Greece pursuant to the European Union “Dublin Regulation”. On 1 September, I intervened orally – for the first time ever – during the hearing before the Grand Chamber of the Court in the case of *M.S.S. v. Belgium and Greece*. Following my visits to Greece, I was able to provide concrete observations on refugee protection in Greece, including asylum procedures and human rights safeguards, as well as asylum seekers’ reception and detention conditions. Last January, the Court delivered a landmark judgment in this case, which will have a lasting impact on the protection of human rights of asylum seekers in the European Union.

The fact that, since the entry into force of Protocol No. 14 to the European Convention on Human Rights, I have the right to intervene as a third party on my own initiative highlights this complementarity between the judicial organ of the Council of Europe – the Court – and my non-judicial functions. The Interlaken Declaration, adopted one year ago, actually stressed the need for a co-operative approach, including all relevant parts of the Council of Europe, in order to assist member states in remedying structural human rights problems.

In the context of the Interlaken follow-up process, I should like to focus on three major issues: interim measures indicated by the Court, the discussion concerning introduction of fees for applicants, and the effective implementation of the Convention at national level.

Interim measures indicated by the Court (Rule 39 of the Rules of the Court)

In a memorandum I presented to the Interlaken Conference a year ago, I argued that the main question is not why the Court has difficulties in coping, but why so many individuals feel the need to go there with their complaints.

The same goes for the rise in the number of Rule 39 requests being lodged with the Court: the first question is not the consequences of the overloading of the Court, but why in recent months so many individuals sought to halt their deportations through interim measures. This is partly because the mechanism is now well-known in some of the member states and has proved to be effective. But there are other reasons which explain this increase and should be addressed by member states.

- ▶ First of all, member states should respect the advice given by UNHCR concerning international protection to persons in need. The UN Refugee Agency is the international expert body on refugee matters with a wealth of experience and competence. It appears however that several of UNCHR's recommendations had recently been ignored by member states. Some European states have for instance decided to expel rejected asylum seekers to Iraq, despite a clear position and guidelines provided by UNHCR to governments that Iraqi asylum seekers originating from certain areas in Iraq should continue to benefit from international protection. As the safety of those forcibly returned to these areas cannot be guaranteed, it is therefore normal that these persons try by all means to stop their planned deportations, including by requesting the European Court to grant an interim measure halting them.

In some cases, applicants whose deportations were suspended on the basis of Rule 39 were eventually recognised as refugees, or given another status allowing them to stay in the country concerned. These decisions acknowledge that the applicants' fears were well-founded and that they would have been put at serious risk if they had been expelled before the Court had had the opportunity to properly examine the merits of their applications.

- ▶ Part of the problem also lies in national procedures. The asylum procedures of European countries are still flawed – they need to be improved and better harmonised. In particular, where asylum seekers submit an arguable claim that the execution of a removal decision could lead to a real risk of persecution, torture or other treatments contrary to the Convention, the remedy against that decision should have automatic suspensive effect.

On several occasions, the Strasbourg Court stressed the importance of having remedies with suspensive effect when ruling on the obligations of the state with regard to the right to an effective remedy in deportation or extradition proceedings. Such a remedy should prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible.

In this context, member states should also suspend removals to a particular country once a lead case has been identified by the Court, pending the decision of the Court. Not doing so will inevitably drive applicants in a similar

situation to seek interim measures and thus increase the number of requests being made.

- ▶ Finally, the application of European Union law is also a source of concern. In several cases, applicants have appealed against so-called “Dublin transfers”. In fact, the Dublin Regulation shortcomings have led to a heavy burden on national courts, including supreme courts and above all the European Court of Human Rights. During 2009 and 2010 the Court received no fewer than 900 requests for interim measures concerning asylum seekers asking for their transfers to be suspended. I would like to reiterate here my position that the “Dublin mechanism” should be revised and replaced by a safer and more humane system.

All these measures should contribute to a significant reduction in the number of requests for interim measures.

Rule 39 has proven vital for the lives of individual applicants.

Contrary to what is sometimes stated, the Court in fact grants these requests very cautiously. Their binding legal nature is now firmly established in the Court’s case-law and member states should abide by them rapidly, fully and effectively.

Fees for applicants

Some may argue that this might discourage inadmissible applications and that this system already exists in certain member states, where applicants to superior courts are requested to pay a fee – it thus seems natural to transpose it at the European level. I do not agree:

- ▶ Above all, the issue of fees for applicants raises a general question regarding access to the European Court of Human Rights, while the Interlaken Action Plan emphasised “the fundamental importance of the right of individual petition as a cornerstone of the Convention system”. This right should be guaranteed to all persons, irrespective of their financial situation. As a matter of principle, there should be no fees imposed on applicants to a human rights court, which should remain accessible.
- ▶ Such a system would also create one more administrative burden and run counter the intended aim to reduce the workload of the Court.

Effective implementation of the Convention at national level

Applicants turn to Strasbourg because they feel unable to find justice at home. Many complaints are not taken up, but still the Court has in its rulings identified a high number of shortcomings in national law and practice. Through my visits and continuous monitoring I am aware that problems such as police brutality, unfair or delayed trials, inhuman conditions of detention are systemic in several countries.

In accordance with the Interlaken Action Plan, I have tried to contribute to improving the awareness of the Convention standards and urged states to remedy structural problems revealed by the Court’s judgments, in order to prevent repetitive applications.

During my visits to member states I have however noted that some important judgments were not implemented, sometimes several years after they had been issued, despite clear guidance given by the Court.

The Court has for instance found that Roma children had been discriminated against with respect to their right to education in some member states. Three years after the first major judgment of the Court on that issue, little has changed on the ground. States should take resolute action as a matter of priority, in order to make tangible progress for the transfer of children from special to ordinary education and overall desegregation of the school system. This will not only improve people's life – it will also give a positive signal that the Court's judgments are taken seriously and that human rights are protected at national level.

It is essential that national authorities assume their responsibilities in the field of human rights protection: national judges should apply the European Convention, as interpreted by the Court, more systematically; national legislation or practices which are incompatible with it should be changed; governments should promptly and effectively implement judgments issued by the European Court.

It is the member states' task to ensure in the first place that the human rights enshrined in the Convention are respected. The more they do so, the less the Court will have to intervene.

Conclusion

In my opinion, there must be two clear points of reference at the outset of our discussion on the reform of the Court if we want to keep intact all its potential to address fundamental human needs in the future.

First, the Court is unique in Europe but it is not alone. Other parts of the Council of Europe, including my own Office, have also a role to play in ensuring the long term effectiveness of the Court. In addition, lawyers and NGOs who regularly represent applicants before or make interventions to the Court, as well as National Human Rights Structures, should more closely be involved in the process.

Second, this process requires political will which should be anchored on a principled approach to human rights: stressing that the standards are treaty based and universal; that they are relevant regardless of culture, religion or political systems; that they apply to everyone without discrimination; and – that they exist in order to be effectively implemented at national level.

CONCLUSIONS

Concluding remarks

presented by the Turkish Chairmanship of the Committee of Ministers of the Council of Europe

Let me begin by thanking all the participants for their most interesting presentations and the many concrete proposals that have been made, which will be very valuable for our work to come.

Our conference has been important as an opportunity for all member states to express, at high level, their positions on the different issues currently under discussion.

Your contributions will provide vital political impetus for the ongoing work in Strasbourg.

Diverse views have been expressed on certain issues, but there has been unanimity on the most important one: the need for urgent action.

Our Convention is crucial for Europe, for the Council of Europe and as a symbol to the world of Europe's commitment to the universal values of human rights.

Europe must remain visibly united in its commitment, which will be completed and reinforced by European Union accession to the Convention – many delegations underlined the need to complete the negotiation process as soon as possible.

The Court is the unique, central element of the Convention system and fundamental to its effectiveness.

Participants welcomed the Court's internal reforms, intended to give rapid effect to the entry into force of Protocol No. 14, enhance productivity and ensure provision of information to applicants on the Convention and the Court's role as a subsidiary control mechanism.

The Court's significance depends upon the right of individual application, which participants agreed to be the cornerstone of the system.

There was unanimous emphasis on the importance of the principle of subsidiarity, in all its aspects.

First and foremost, this means that effective implementation of the Convention at domestic level is essential to the proper functioning of the system.

Sustainable functioning of the system, however, also requires the Court to give full effect to the principle of subsidiarity.

The Court must apply fully and strictly the admissibility criteria set out in the Convention, in particular the requirement that applicants exhaust domestic remedies.

Similarly, the Court should respect the margin of appreciation that States enjoy when applying certain Convention rights.

The more the national system is effective in ensuring and protecting human rights, the lesser is the need for the Court's intervention, in particular to reconsider questions of fact or law that have already been duly considered by domestic authorities.

This should apply in particular to the Court's indications of interim measures under Rule 39 of the Rules of Court.

It was observed that the Court is not an immigration appeals tribunal and should only give such indications in exceptional circumstances.

In such cases, the Court should then rapidly determine the merits of the underlying application.

Some participants considered that allowing certain national courts to request advisory opinions from the Court could reinforce subsidiarity and help address the problem of repetitive applications, although others feared a possible increase in the Court's workload.

It has been suggested that such a system could provide similar benefits to the pilot judgment procedure, which was itself welcomed by participants.

The Court's authority as the Convention's control mechanism is dependent on prompt and full execution of its judgments, including the adoption of general measures, in accordance with the principle of subsidiarity.

Such execution is especially important in repetitive cases.

Delegations welcomed the Committee of Ministers' new working methods for supervising execution.

Clarity, consistency and foreseeability of the Court's case-law are essential to proper and consistent implementation of the Convention at national level.

The same principles apply to the judicial policy on awarding just satisfaction, which should be made public.

The Court's case-law, however, will only remain as good as its judges – participants underlined the importance of the judges' independence and competence; they therefore welcomed the creation of the advisory panel of experts on candidates for judge and encouraged further work to optimise national selection procedures.

Participants took note with satisfaction of the encouraging preliminary results of Protocol No. 14, in particular implementation of the new single judge formation and the new competences of three-judge committees.

They encouraged the Court to exploit the full potential of Protocol No. 14, including in the operation of the single judge procedure and when applying the new admissibility criterion.

But all participants agreed that even if the preliminary results are encouraging and more could be achieved, Protocol No. 14 will not ensure the long-term effectiveness of the Convention mechanism.

The Conference addressed the problem of the ever-increasing number of applications.

In this context, different ways of regulating access to the Court were proposed, including introducing a system of fees for applicants and requiring that they have legal representation from the outset.

At this stage, there was no consensus on these issues.

All agreed that a more productive structure for filtering inadmissible applications was necessary, although there were diverging views on its possible nature

Delegates recognised that the number of repetitive cases was also highly problematic and wished to continue reflection on how to deal with them more efficiently.

There was widespread recognition of the value of a simplified procedure for amending certain Convention provisions, which could facilitate the implementation of reforms in future.

This could be achieved by introduction of a statute for the Court, the possible final content of which is being carefully considered.

I am grateful for the support that has been expressed for the draft İzmir Declaration.

And as we adopt the Declaration, I promise our full support to future chairmanships of the Committee of Ministers in their efforts to ensure an effective and sustainable Convention system.

İzmir Declaration

27 April 2011

The High Level Conference meeting at İzmir on 26 and 27 April 2011 at the initiative of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe (« the Conference »),

1. Recalling the strong commitment of the States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (« the Convention ») and to the control mechanism it established;
2. Expressing its determination to ensure the effectiveness of this mechanism in the short, medium and long terms;
3. Recognising again the extraordinary contribution of the European Court of Human Rights (« the Court ») to the protection of human rights in Europe;
4. Reaffirming the principles set out in the Declaration and Action Plan adopted at the Interlaken High Level Conference on 19 February 2010 and expressing the resolve to maintain the momentum of the Interlaken process within the agreed timeframe;
5. Recalling that the subsidiary character of the Convention mechanism constitutes a fundamental and transversal principle which both the Court and the States Parties must take into account;
6. Recalling also the shared responsibility of both the Court and the States Parties in guaranteeing the viability of the Convention mechanism;

7. Noting with concern the continuing increase in the number of applications brought before the Court;
8. Considering that the provisions introduced by Protocol No. 14, while their potential remains to be fully exploited and the results so far achieved are encouraging, will not provide a lasting and comprehensive solution to the problems facing the Convention system;
9. Welcoming the ongoing negotiations on the modalities of European Union accession to the Convention;
10. Welcoming the concrete progress achieved following the Interlaken Conference;
11. Considering, however, that maintaining the effectiveness of the mechanism requires further measures, also in the light of the preliminary contribution by the President of the Court to the Conference and the opinion adopted by the Plenary Court for the Conference;
12. Expressing concern that since the Interlaken Conference, the number of interim measures requested in accordance with Rule 39 of the Rules of Court has greatly increased, thus further increasing the workload of the Court;
13. Taking into account that some States Parties have expressed interest in a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention;
14. Considering, in the light of the above, that it is time to take stock of the progress achieved so far to consider further steps in the pursuit of the Interlaken objectives and to respond to the new concerns and expectations that have become apparent since the Interlaken Conference;
15. Recalling the need to pursue long-term strategic reflections about the future role of the Court in order to ensure sustainable functioning of the Convention mechanism;

The Conference:

1. Proposes, firstly, to take stock, in accordance with the Interlaken Action Plan, of the proposals that do not require amendment of the Convention and, secondly, having also regard to recent developments, to take necessary measures;
2. Welcomes the measures already taken by the Court so far to implement Protocol No. 14 and follow up the Interlaken Declaration, including the adoption of a priority policy;
3. Takes note of the fact that the provisions introduced by Protocol No. 14 will not by themselves allow for a balance between incoming cases and output so as to ensure effective treatment of the constantly growing number of applications, and consequently underlines the urgency of adopting further measures;
4. Considers that the admissibility criteria are an essential tool in managing the Court's caseload and in giving practical effect to the principle of subsidiarity; stresses the importance that they are given full effect by the Court and notes, in this regard, that the new admissibility criterion adopted in Protocol No. 14, which has not yet had the effect intended, is about to be

shaped by the upcoming case-law and remains to be evaluated with a view to its improvement, and invites the Committee of Ministers to initiate work to reflect on possible ways of rendering the admissibility criteria more effective and on whether it would be advisable to introduce new criteria, with a view to furthering the effectiveness of the Convention mechanism;

5. Reaffirms the importance of a consistent application of the principles of interpretation;
6. Welcomes the recent creation of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, responsible for examining the candidatures proposed by States Parties before they are transmitted to the Parliamentary Assembly of the Council of Europe;
7. Invites the Committee of Ministers to continue its reflection on the criteria for office as judge of the Court and on the selection procedures at national and international level, in order to encourage applications by good potential candidates and to ensure a sustainable recruitment of competent judges with relevant experience and the impartiality and quality of the Court;
8. Notes with interest the adoption of a new approach in relation to the supervision of execution of Court judgments by the Committee of Ministers;
9. Adopts the Follow-up Plan below as an instrument, which builds on the Interlaken Action Plan while taking into account recent developments in the Council of Europe, the Court, and the Committee of Ministers as well as the concerns and expectations that have emerged since the Interlaken Conference.

Follow-up Plan

A. Right of individual petition

The Conference:

1. Reaffirms the attachment of the States Parties to the right of individual petition as a cornerstone of the Convention mechanism and considers in this context that appropriate measures must be taken rapidly to dissuade clearly inadmissible applications, without, however, preventing well-founded applications from being examined by the Court, and to ensure that cases are dealt with in accordance with the principle of subsidiarity;
2. Reiterates the call made for the consideration of additional measures with regard to access to the Court in the Interlaken Declaration and therefore invites the Committee of Ministers to continue to examine the issue of charging fees to applicants and other possible new procedural rules or practices concerning access to the Court;
3. Welcoming the improvements in the practice of interim measures already put in place by the Court and recalling that the Court is not an immigration Appeals Tribunal or a Court of fourth instance, emphasises that the treatment of requests for interim measures must take place in full conformity with the principle of subsidiarity and that such requests must be based on an assessment of the facts and circumstances in each individual case, fol-

lowed by a speedy examination of, and ruling on, the merits of the case or of a lead case. In this context, the Conference:

- ▶ Stresses the importance of States Parties providing national remedies, where necessary with suspensive effect, which operate effectively and fairly and provide a proper and timely examination of the issue of risk in accordance with the Convention and in light of the Court's case-law; and, while noting that they may challenge interim measures before the Court, reiterates the requirement for States Parties to comply with them;
 - ▶ Underlines that applicants and their representatives should fully respect the Practice Direction on Requests for Interim Measures for their cases to be considered, and invites the Court to draw the appropriate conclusions if this Direction is not respected;
 - ▶ Invites the Court, when examining cases related to asylum and immigration, to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, to avoid intervening except in the most exceptional circumstances;
 - ▶ Further invites the Court to consider, with the State Parties, how best to combine the practice of interim measures with the principle of subsidiarity, and to take steps, including the consideration of putting in place a system, if appropriate, to trigger expedited consideration, on the basis of a precise and limited timeframe, of the merits of cases, or of a lead case, in which interim measures have been applied;
4. Welcomes the contribution of the Secretary General, which recommends the provision to potential applicants and their legal representatives of objective and comprehensive information on the Convention and the case-law of the Court, in particular on the application procedure and the admissibility criteria, along with the detailed handbook on admissibility and the checklist prepared by the Registry of the Court, in order to avoid, insofar as possible, clearly inadmissible applications;
 5. Calls on the Secretary General to implement rapidly, where necessary in cooperation with the European Union, the proposals regarding the provision of information and training contained in the report which he has submitted to the Committee of Ministers.

B. Implementation of the Convention at national level

The Conference:

1. Reiterates calls made in this respect in the Interlaken Declaration and more particularly invites the States Parties to:
 - a. Ensure that effective domestic remedies exist, be they of a specific nature or a general domestic remedy, providing for a decision on an alleged violation of the Convention and, where necessary, its redress;
 - b. Co-operate fully with the Committee of Ministers in the framework of the new methods of supervision of execution of judgments of the Court;
 - c. Ensure that the programmes for professional training of judges, prosecutors and other law-enforcement officials as well as members of security

forces contain adequate information regarding the well-established case-law of the Court concerning their respective professional fields;

- d. Consider contributing to translation into their national language of the Practical Guide on Admissibility Criteria prepared by the Registry of the Court;
 - e. Consider contributing to the Human Rights Trust Fund.
2. Invites the States Parties to devote all the necessary attention to the preparation of the national reports that they must present by the end of 2011, describing measures taken to implement relevant parts of the Interlaken Declaration and how they intend to address possible shortcomings, in order that these reports provide a solid basis for subsequent improvements at national level.

C. Filtering

The Conference:

1. Notes with satisfaction the first encouraging results of the implementation of the new single-judge formation. It nevertheless considers that, beyond measures already taken or under examination, new provisions concerning filtering should be put in place;
2. As regards short term measures, invites the Court to consider and evaluate the system of filtering by judges, of the existing bench who dedicate their working time to single-judge work for a short period, and to continue to explore further possibilities of filtering not requiring amendment to the Convention;
3. As regards long-term measures, invites the Committee of Ministers to continue its reflection on more efficient filtering systems that would, if necessary, require amendments to the Convention. In this context, it recalls that specific proposals for such a filtering mechanism that would require amendments to the Convention have to be prepared by April 2012.

D. Advisory opinions

The Conference:

1. Bearing in mind the need for adequate national measures to contribute actively to diminishing the number of applications, invites the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court's case-law, thus providing further guidance in order to assist States Parties in avoiding future violations;
2. Invites the Court to assist the Committee of Ministers in its consideration of the issue of advisory opinions.

E. Repetitive applications

The Conference, whilst reiterating the calls made in the Interlaken Action Plan concerning repetitive applications and noting with satisfaction the first encouraging results of the new competences of committees of three judges:

1. Invites the States Parties to give priority to the resolution of repetitive cases by way of friendly settlements or unilateral declarations where appropriate;
2. Underlines the importance of the active assistance of the Court to States Parties in their efforts to reach friendly settlements and to make unilateral declarations where appropriate and encourages the Court's role in this respect as well as the need for creating awareness of friendly settlements as an integral part in the Convention for settling disputes between parties to proceedings before the Court;
3. Considers that the Court, when referring to its « well-established case-law » must take account of legislative and factual circumstances and developments in the respondent State;
4. Welcomes the ongoing work of the Committee of Ministers on the elaboration of specific proposals that would require amendment to the Convention, in order to increase the Court's case-processing capacity, and considers that the proposals made should also enable the Court to adjudicate repetitive cases within a reasonable time;
5. Welcomes the new Rule 61 of the Rules of the Court adopted by the Court on the pilot-judgment procedure.

F. The Court

The Conference:

1. Assures the Court of its full support to realise the Interlaken objectives;
2. Reiterating the calls made in the Interlaken Action Plan and considering that the authority and credibility of the Court constitute a constant focus and concern of the States Parties, invites the Court to:
 - a. Apply fully, consistently and foreseeably all admissibility criteria and the rules regarding the scope of its jurisdiction, *ratione temporis*, *ratione loci*, *ratione personae* and *ratione materiae*;
 - b. Give full effect to the new admissibility criterion in accordance with the principle, according to which the Court is not concerned by trivial matters (*de minimis non curat praetor*);
 - c. Confirm in its case-law that it is not a fourth-instance court, thus avoiding the re-examination of issues of fact and law decided by national courts;
 - d. Establish and make public rules foreseeable for all the parties concerning the application of Article 41 of the Convention, including the level of just satisfaction which might be expected in different circumstances;
 - e. Consider that decisions of the panels of five judges to reject requests for referral of cases to the Grand Chamber are clearly reasoned, thereby avoiding repetitive requests and ensuring better understanding of Chamber judgments;
 - f. Organise meetings with Government agents on a regular basis so as to further good co-operation;

- g. Present to the Committee of Ministers proposals, on a budget-neutral basis, for the creation of a training unit for lawyers and other professionals;
3. Notes with satisfaction the arrangements made within the Registry of the Court that have allowed better management of budgetary and human resources;
4. Welcomes the production by the Court's Registry of a series of thematic factsheets dealing with different case-law issues and encourages the Court to pursue this work in relation to its case-law on other substantive and procedural provisions which are frequently invoked by applicants;
5. Encourages furthermore the States Parties to second national judges and, where appropriate, other high-level independent lawyers to the Registry of the Court.

G. Simplified procedure for amendment of the Convention

The Conference, taking account of the work that has followed the Interlaken Conference at different levels within the Council of Europe, invites the Committee of Ministers to pursue preparatory work for elaboration of a simplified procedure for amending provisions relating to organisational matters, including reflection on the means of its introduction, i.e. a Statute for the Court or a new provision in the Convention.

H. Supervision of the execution of judgments

The Conference:

1. Expects that new standard and enhanced procedures for supervision of the execution of judgments will bear fruit and welcomes the decision of the Committee of Ministers to assess their effectiveness at the end of 2011;
2. Reiterates the calls made by the Interlaken Conference concerning the importance of execution of judgments and invites the Committee of Ministers to apply fully the principle of subsidiarity, by which the States Parties have in particular the choice of means to deploy in order to conform to their obligations under the Convention;
3. Recalls the special role given to the Committee of Ministers in exercising its supervisory function under the Convention and underlines the requirement to carry out its supervision only on the basis of a legal analysis of the Court's judgments.

I. Accession of the European Union to the Convention

The Conference welcomes the progress made in the framework of negotiations on accession of the European Union to the Convention and encourages all the parties to conclude this work in order to transmit to the Committee of Ministers as soon as possible a draft agreement on accession and the proposals on necessary amendments to the Convention.

Implementation

The Conference:

1. Invites the States Parties, the Committee of Ministers, the Court and the Secretary General to ensure implementation of the present Follow-up Plan, which builds on the Interlaken Action Plan;
2. Invites the Committee of Ministers to:
 - a. Continue its reflection on the issue of charging fees to applicants, including other possible new procedural rules or practices concerning access to the Court, and on more efficient filtering systems that would, if necessary, require amendments to the Convention;
 - b. Reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court;
 - c. Pursue preparatory work for elaboration of a simplified amendment procedure for provisions relating to organisational matters, including reflection on the means of its introduction, i.e. a Statute for the Court or a new provision in the Convention.
3. Invites the Court to consider and evaluate the system of filtering by judges, of the existing bench who dedicate their working time to single-judge work for a short period, and to continue to explore further possibilities of filtering not requiring amendment to the Convention;
4. As regards Rule 39, expresses its expectation that the implementation of the approach set out in paragraph A3 will lead to a significant reduction in the number of interim measures granted by the Court, and to the speedy resolution of those applications in which they are, exceptionally, applied, with progress achieved within one year. The Committee of Ministers is invited to revert to the question in one year's time;
5. Invites the States Parties, the Committee of Ministers, the Court and the Secretary General to pursue long-term strategic reflections about the future role of the Court;
6. Invites the Committee of Ministers and the States Parties to consult with civil society during the implementation of the present Follow-up Plan, where appropriate, involving it in long-term strategic reflections about the future role of the Court;
7. Reminds the States Parties of their commitment to submit, by the end of 2011, a report on the measures taken to implement the relevant parts of the Interlaken Declaration and the present Declaration;
8. Invites the Committee of Ministers to confer on the relevant committees of experts the mandates necessary in order that they pursue their work on the implementation of the Interlaken Action Plan in accordance with the calendar defined therein and in the light of the goals set out in the present Declaration;
9. Asks the Turkish Chairmanship to transmit the present Declaration and the Proceedings of the İzmir Conference to the Committee of Ministers;
10. Invites the future Chairmanships to follow-up the implementation of the present Declaration jointly with the Interlaken Declaration.

**HIGH LEVEL CONFERENCE
ON THE FUTURE OF THE EUROPEAN
COURT OF HUMAN RIGHTS**

Conference organised by the United Kingdom
chairmanship of the Committee of Ministers
of the Council of Europe

Brighton, 19-20 April 2012

Proceedings (extracts)

WELCOMING ADDRESSES

The Rt Hon Kenneth Clarke QC MP

Lord Chancellor and Secretary of State for Justice

Ministers, Your Excellencies, My Lords, Ladies and Gentlemen,

On behalf of the Chairmanship of the Committee of Ministers and the Government of the United Kingdom, I'd like to offer you a very warm welcome to the UK, and to the city of Brighton and Hove.

As one of the founder members of the Council of Europe, and as the first State to ratify the European Convention on Human Rights, the United Kingdom is delighted to be holding the Chairmanship and hosting this conference. It is a huge honour, and a responsibility that the Government is taking very seriously.

Before I say more about the subject of this conference, I would like to introduce my colleague Lord William Wallace, a minister in our Foreign and Commonwealth Office, and I think he would like to offer some words of welcome.

The Rt Hon The Lord Wallace of Saltaire

Lord-in-Waiting

Ministers, Your Excellencies, My Lords, Ladies and Gentlemen,

It is my great pleasure to represent the United Kingdom Foreign and Commonwealth Office at this important conference. The Foreign Secretary has asked me personally to pass on his sincere apologies that he cannot be here today, due to unavoidable diary commitments. He is looking forward to visiting Strasbourg in May to conclude our Chairmanship.

The Chairmanship of the Committee of Ministers is literally a once-in-a-generation opportunity. We have been proud to lead the work of this remarkable organisation for these six months – not just in the field of human rights, but also in its wider activities, including on democracy and the rule of law.

Winston Churchill was of course one of the strongest proponents in the 1940s, when the Justice Secretary and I were at primary school, of creating this organisation. In 1949, the treaty that created the Council of Europe was signed in London. In some ways, this is almost a homecoming for the Council of Europe.

And we are delighted to have on display here in Brighton the original Treaty of London.

The promotion and protection of human rights continues to be at the very heart of British foreign policy and this has formed our over-arching priority for this Chairmanship. The British Government's determination to pursue opportunities to enhance political and economic freedom around the world and to oppose tyranny and to hold repressive regimes to account remains undiminished. That is why our Chairmanship of this organisation has been so important, and has not just been about the reform of the Strasbourg Court.

We are also proud to have supported the ground-breaking Council of Europe Recommendation on Lesbian, Gay, Bisexual and Transgender rights, and we have contributed to the new Council of Europe Unit set up to promote this.

In addition, we are supporting the implementation of the rule of law across the Council of Europe with the development of practical guidelines for legislators on "the principles of good law-making".

And we have promoted freedom of expression on the Internet, along with good internet governance, by supporting the adoption of the Council of Europe's strategy on this complex subject.

But it is Court reform that is our subject today. The document that the Justice Secretary will introduce continues the work of the previous conferences in Interlaken and İzmir, hosted respectively by our colleagues from Switzerland and Turkey. I am sure they will appreciate the challenge we have faced in our turn in preparing the draft Declaration, now on the table before us today. The views of each and every member State of the Council of Europe are equally important, and equally valid. They are also richly diverse.

But this is a challenge we have thoroughly enjoyed. This is due in large part to the constructive and supportive approach you and your officials have taken in working closely with us at all levels, in Strasbourg, in London and in your own capitals.

The Declaration draws strength from the energy that we have all put into finding and agreeing the right way forward. We are very grateful for the support you have shown, and we look forward to working with you to finish the job at this Conference.

OPENING ADDRESSES

The Rt Hon Kenneth Clarke QC MP

Lord Chancellor and Secretary of State for Justice

Ministers, your Excellencies, My Lords, Ladies and Gentlemen,

In Brighton at the moment there is on display a copy of a rather historic document about which the British get very excited: the Magna Carta of 1215. This illustrates that, from almost eight centuries ago, this country has had a long-standing commitment to what we now call human rights. The Magna Carta first established, in the face of a tyrannical king, that no man should lose his property or his liberty except by due process of law. It took us a few centuries to get it right, but it is today one of the great achievements of modern Europe that more than 800 million people share a common framework of decent basic standards: extending from the furthest coasts of Iceland to the borders of Iraq, from the Atlantic to the Pacific.

I hope we all agree that these standards are not just an expression of our shared belief in freedom and justice. They also reflect our shared national interests – because it is only by advancing human rights that we secure our ability to live, travel, and trade in a more open, stable and prosperous world.

But to survive and remain relevant, all institutions of a certain age need to adapt to the modern world. As a veteran Minister, I always seek to adapt myself.

This process is building on the excellent work done at the Interlaken and İzmir Conferences. I had the privilege of attending the İzmir Conference, and since then the United Kingdom as Chair has sought to maintain the momentum of reform to ensure that the very real challenges the Convention system faces are met head-on.

We are all in no douhat matters.

The backlog of 150,000 cases facing long delays in Strasbourg is not a new issue. And the Court, working with member States, has made very good progress in tackling the huge number of inadmissible cases. We pay tribute to their work.

However, in making inroads on this veritable tidal wave of litigation, it has revealed a far tougher problem. Each year, the Court receives far more admissible cases than it can properly consider in a timely manner: very roughly, 3000 admissible cases each year with the capacity to hear only about 2000.

This will inevitably lead to a change in the nature of the backlog but it will mean there is still a backlog and unacceptable delay unless we act at this Conference. It will move from being made up mainly of inadmissible cases to being made up mainly of admissible cases. But the fact that there will still be a queue really matters. The cases stuck waiting will include serious ones – individuals who are in custody or have been subject to torture, or who have had an unfair

trial, or who have been denied free speech. Those cases should not wait years before they are determined. Reform is urgently needed to ensure these cases are heard.

The backlog of 150,000 cases facing long delays in Strasbourg is not a new issue. And the Court, working with the States Parties, has made very good progress in tackling the huge number of inadmissible cases. We pay tribute to their work.

As a matter of principle and practicality, it has always been accepted that the primary responsibility for enforcing the rights in the Convention must lie with States. States must stop breaches in the first place. And where breaches do occur, States must offer proper legal remedies in national courts.

The Court is there as the ultimate arbiter and guarantor. It may sometimes need to overrule national courts – where they have clearly failed to apply the Convention obligations, or where there are significant points of interpretation that need resolution. But as the Court itself has always recognised, these cases should be exceptional: it cannot act as just another layer of appeal. It has to focus on the most serious human rights violations which urgently require the attention of an international Court of this kind.

It is solutions to these problems that we have been collectively seeking through this reform process. We have all worked together, as 47 States Parties, to produce a package that helps sort out the delays and improve human rights on the ground. The draft Declaration we have before us seeks to speed up the momentum of this process. We believe it will help ensure more cases are resolved nationally, freeing the Strasbourg Court to focus its attention promptly on the most serious ones.

Our shared priority is to show that it is possible to bring sensible and meaningful reform to the Court without weakening human rights, giving up on the Convention, or undermining decent standards across Europe. I am therefore pleased to commend this draft Declaration to you:

- ▶ It makes clear the responsibility of national governments to implement the Convention effectively, and the judgments of the Court;
- ▶ It helps clarify the relationship between the Court and national authorities, based on the key principle of subsidiarity;
- ▶ It gives the Court tools to manage its workload back to sensible proportions;
- ▶ It helps ensure that the Court and its judgments of the highest possible quality;
- ▶ And it emphasises that we have to be constantly aware of our responsibility to ensure that the Convention system is operating effectively.

With luck and a following wind, it is my hope that that is what we will achieve in the coming days.

If we get this right, the prize is a very important one.

Not just a substantial package of measures, with common sense running through it like the letters through a local sweet delicacy known as Brighton rock, which you may procure as a souvenir .

What we need here is real progress in tackling the Court's backlog effectively, while preserving the right of individual petition.

We need a clear signal to our citizens that the ultimate goal is not for the Court to process ever more cases and deliver ever more judgments, but for the rights enshrined in the Convention to be protected and respected.

And – importantly – we hope to get an agreement that makes clear that the protection of human rights goes hand-in-hand with democracy and the role of democratically-elected national parliaments.

If we can agree them, the reforms will ensure that institutions which we have established to guard against over-bearing governments and abuse of human rights are modern, effective and focus on the most serious cases. I hope that together we can find consensus. The consequence will be stronger rights, more easily enforced, more widely respected.

I look forward to hearing your views, and to working with you during the conference and I hope we can produce the desired objective by tomorrow morning.

Mr Thorbjørn Jagland

Secretary General of the Council of Europe

Ministers, Ladies and Gentlemen,

We find ourselves together for the third time in as many years. During this period of reform, the Committee of Ministers, the Court, our expert committees and many others have been working hard. The process and the draft Declaration that we have on the table today show the following:

- ▶ all member States recognise the Court's extraordinary contribution to human rights protection in Europe;
- ▶ all accept the ultimate authority of the Court to interpret the Convention;
- ▶ all have unanimously reaffirmed their attachment to the right of individual petition;
- ▶ all accept that they must fully implement the Court's judgments.

The draft Declaration also underlines the principle of subsidiarity that has underpinned the work of the Court from the very beginning and the doctrine of the margin of appreciation set up and developed by the Court itself.

My conclusion is therefore that the process which started in Interlaken has underlined and strengthened the authority of the Court.

But we have two main challenges that still need to be met.

Firstly – to improve the national implementation of the Convention, so that fewer violations occur, effective remedies are readily available, structural and systemic problems are resolved, the Court's judgments are fully and rapidly executed – and thus fewer applications are made to Strasbourg; or at least, fewer admissible applications.

Secondly, to improve the Court's capacity to respond to applications that are made, whether admissible or not. The Court should be able to give the appropriate response to every application within reasonable time.

National implementation

When it comes to the first point, it is clear that effective human rights protection begins and ends at home. The meaning of the Court was never to take responsibility from the national courts. Therefore I am pleased to see that the Declaration emphasises the shared responsibilities of States and the Court for the effective implementation of the Convention.

I understand that changes to institutions, laws and administrative practices often need time and may sometimes need money. But where there are shortcomings, States Parties' obligations under the Convention require genuine efforts towards constant progress on implementation. These efforts are an investment, not a cost.

This is especially so where structural and systemic problems give rise to repetitive applications; and even more so, where those problems are well-known and long-standing. These cases, which are almost by definition well-founded, often affect the core institutions of democracy, and are of great importance to the respect for human rights and the rule of law.

It is very important to understand that there are strong institutional links between the European Convention on Human Rights and the Council of Europe's different bodies and activities. The Court is not an isolated body and cannot operate in an institutional, political or social vacuum.

The Council of Europe has for many years been supporting member States to implement the European Convention on Human Rights at national level. Activities include the provision of legislative expertise, training and capacity development as well as dissemination of training materials. The aim of the institutional reforms during my term of office has been to improve our delivery of these services.

A lot can be done, even within current institutional constraints and limited resources. I am personally committed to ensuring better co-ordination of all co-operation activities. We need to target our activities more closely to those areas where the European Court of Human Rights, the execution process, the Human Rights Commissioner or monitoring mechanisms have identified shortcomings.

As in many areas, co-operation with the European Union will be crucial. Joint programmes represent already the largest source of funding for Council of Europe's technical assistance and co-operation projects. Through our new Directorate General of Programmes and the strengthening of our field presence, we will ensure that joint programmes are reinforced and better targeted. Our aim is to avoid any unnecessary duplication of activities, nor should important issues identified by the Strasbourg Court or human rights monitoring mechanisms be left overlooked or unattended.

Execution of judgments

Rapid and efficient implementation of the Court's judgments is essential for the authority and credibility of the Convention mechanism.

The annual report presenting the Committee of Ministers' supervision of the execution of judgments acknowledges that, despite positive indication in last year's figures, there remain many important and complex structural problems in the domestic processes of member States. I therefore support the idea to reflect on more effective measures that could be taken in respect of States that persistently fail to implement judgments of the Court, notably those relating to repetitive cases and serious human rights violations.

The second main challenge, which I mentioned, relates to the Court's capacity to respond to applications made.

For the Convention system to remain effective, it is indispensable that the Court is allowed to continue playing its role fully, efficiently and independently.

Thanks to new working methods that give full effect to the Single Judge system introduced by Protocol No. 14, there have been encouraging signs from the Court that the long-standing problem of the backlog of clearly inadmissible applications may finally be coming under control. I can only applaud President Bratza and the Court for their efforts, welcome their results and encourage further innovations within the current legal framework. I look forward to the fulfilment of the Court's stated expectation to deal with new applications as they arrive and to progressively eliminate the backlog.

I also welcome the amendment of the existing admissibility criteria introduced by Protocol 14. It should make it easier for the Court to declare inadmissible cases in which the applicant has not suffered a significant disadvantage.

We must be honest and realistic about the possible budgetary aspects of certain proposals. I am highly sensitive to the budgetary situations of our member States, but if our words are to be backed up by action, we must recognise that some small budgetary efforts may be unavoidable. One possibility might be to set up a special fund, in particular for the backlog of the Court, to which member States could contribute on a voluntary basis.

The Statute of the Council of Europe and the European Convention on Human Rights entrust the Secretary General with tasks that relate both to the effective implementation of the Convention and to the efficient functioning of its institutions. I reiterate my absolute commitment to the fulfilment of these obligations. I will spare no effort to make sure that the Council of Europe is and remains the most efficient partner to our member States in their efforts to fulfil their obligations under the Convention.

I will return to what I said from the outset: the process from Interlaken to İzmir and now Brighton has strengthened our common recognition of the importance of the Convention system and the Court.

This is an important signal to all Europeans that peace on our continent must continue to be built on human rights and the rule of law. The effectiveness and responsiveness of this Court depend upon the right of individual application. The States Parties have themselves freely chosen to submit to an international judicial control mechanism, because they are deeply convinced that this is a vital safeguard for liberty and peace across our continent. They are, as a

result, obliged to respect the standing, independence and authority of the Court, in the same way as they show respect for their own courts at home.

As political leaders we all have an obligation to convey to our citizens that an international convention system that gives the same rights to everybody, may lead to judgments from the Court with which not everyone will agree. From time to time even a majority in our societies may disagree.

But we have to keep in mind that human rights are very often about protecting the rights of minorities.

It cannot be left to a majority within a society to protect such rights. They cannot be subject to shifting political winds.

As a consequence of the devastating nationalism and wars in the 20th century, the world moved from nationalism towards internationalism. The UN was established and the Universal Declaration of Human Rights was adopted. It was based on the belief that basic human rights do not come from any majority or any authority. They come from the fact that we are all human beings and that every nation has an obligation to uphold these rights by law.

The European Convention on Human Rights is the only real and concrete realisation of the Universal Declaration of Human Rights. Let us take new steps to strengthen this system further.

Mr Jean-Claude Mignon

President of the Parliamentary Assembly of the Council of Europe

Ladies and Gentlemen,

I thank the United Kingdom Chairmanship for giving us a further opportunity, following the conferences held in Interlaken and İzmir, to discuss the current situation and the future of the European Court of Human Rights.

At the beginnings of the European Convention on Human Rights there was no binding right to lodge individual applications, nor even a Court, since it was established in 1959. However, the Convention system gradually gathered momentum, leading to the outcome with which we are familiar today. A Court which has greatly advanced human rights in Europe and elsewhere. But also a Court inundated by the inflow of applications. It is said to be a victim of its success. Yet can we really talk of "success" in these circumstances? Is the Court not rather a victim of deficiencies at the national level? We should not overlook the fact that about half of the cases pending before the Court concern only four respondent States, that just one of these States accounts for 27% of all applications and that 80% of applications concern just ten States, out of a total of 47.

These statistics must give us pause for thought when we consider how to reinforce the effectiveness of the Convention, including the authority of the

Court. Not so as to stigmatise any particular State, but with a view to assessing the tangible consequences of given reform measures.

First there is the issue of subsidiarity. One can but be in favour if subsidiarity means that the Court is not a fourth tier of justice and that, in principle, it is for the States to apply the Court's case-law and to draw the necessary conclusions from it, possibly by changing their legislation and practice.

However, the limits to this reinforcement of subsidiarity lie in the limitations of the national legal systems themselves. Let us not invert the situation. It is true that the States Parties are in principle best able to assess the necessity and the proportionality of the specific measures they have to take. However, in a way we also asked the Court, particularly following the enlargement of the Council of Europe, to make good the weaknesses of a number of member States with regard to the rule of law.

It is therefore the Court that must have the last word in deciding how to interpret the Convention in each case brought before it.

This case-law system sometimes encounters very strong opposition at national level, as was recently the case in the United Kingdom or in France on the questions of the status of members of the prosecution service, police custody and prisoners' right to vote. A fine balance has to be struck, in so far as the Court is sometimes accused of usurping a legislative role, and it does sometimes assume that role to a certain extent. However, could things be any different? The preamble to the Convention refers not only to the maintenance but also to the further realisation of human rights, which allows the Court to interpret the Convention and its protocols as a "living instrument", "in the light of present-day conditions".

It goes without saying that, in exchange, the Court must exercise a degree of self-restraint and refrain from interfering in matters which there is no vital need to address and which closely concern national traditions. The case concerning the display of crucifixes in classrooms, in which the Grand Chamber took account of the situation's complexity, is a good example. Whenever social issues are involved, only those values that command a broad consensus should be set up as fundamental principles.

The Court must also make its case-law as clear and coherent as possible. Any improvements to its HUDOC database could but have a positive impact in terms of clarification for users. The translation and dissemination of the Court's case-law is also of extreme importance, and indeed often absolutely essential to permit national courts to take it into account.

One comment I would make in a strictly personal capacity is that the Court has no advocates general, which detracts from the emergence of a clear public doctrine. Budgetary constraints do not permit the creation of such offices. Despite that, I propose that we reflect on means of making the Court's case-law better known, better understood and hence better applied.

One input from this conference will be enhanced recognition of the role of the Parliamentary Assembly of the Council of Europe and of the national parliaments.

The election of the Court's judges by the Assembly is of vital importance, as the Court's authority naturally depends on the stature of its members and the quality of their decisions. It is important above all this year, when a very large

number of the judges will be replaced. The initiatives taken by the Parliamentary Assembly, including the interviews with all candidates now conducted by its Sub-Committee on the Election of Judges, and by the Committee of Ministers, with the recent adoption of guidelines on the qualifications required of candidates, have already improved the process and will allow further improvements in future, a fact that I welcome.

However, that is not the only parliamentary contribution to the implementation of the Convention and the functioning of the Court. It is indeed important that national parliaments systematically check that draft legislation is compatible with the Convention, that they closely monitor the action taken to execute judgments against their States and that they ensure that changes to national legislation are in line with the measures recommended by the Court.

Execution of judgments is still a major weak point. The Committee of Ministers has reformed its procedures to make them more effective. Our Assembly very closely monitors the situation regarding execution of judgments in the countries with the greatest shortcomings in this field. A number of national parliaments have also adopted a dynamic approach in these matters.

I also welcome the exemplary work done by the Parliamentary Assembly's Monitoring Committee, which verifies that States are honouring the commitments they entered into upon acceding to the Council of Europe. However, the Organisation also has a whole series of other mechanisms to monitor respect for human rights, ranging from the Venice Commission to the European Committee for the Prevention of Torture (the CPT), via ECRI (the European Commission against Racism and Intolerance), to mention but a few. Let us make the best possible use of these mechanisms.

I wish to conclude by making a general observation and a suggestion as to what the Brighton Declaration should say as a matter of priority.

First, the observation: In a recent report our Committee on Legal Affairs disclosed that the annual cost, within the Council of Europe's budget, of hiring a judge at the European Court of Human Rights is higher than the annual contribution made by 15 member States. In other words, the contribution paid by these 15 States does not even suffice to cover the cost of their own judge in Strasbourg.

Second, my suggestion: Let us focus our efforts on those areas where the needs are most strident. Let me explain. We should not focus solely on the reform of the Court. It is regrettable that the Court is obliged to waste time and effort hearing repetitive applications against "persistent defaulters". However, during a recent visit to Moldova I received confirmation that the time taken to deal with these repetitive applications has most unfortunate human consequences. Similarly, it is not acceptable that the Committee of Ministers continues to be confronted with unacceptable delays in the execution of judgments handed down by the Court. The Convention system as a whole is in difficulty. The States must ensure that the Court continues to fulfil its primary task as the guarantor of human rights standards in Europe. They must first and foremost guarantee the effective protection of human rights at national level.

Only by enabling the Council of Europe, through its political action, to ensure compliance with the values and standards States undertake to support as members of our Organisation will we make it possible for the Court to play its role to the full.

Sir Nicolas Bratza

President of the European Court of Human Rights

Mr Chairman, Ministers, Secretary General, Excellencies, Ladies and Gentlemen,

May I begin by thanking the United Kingdom Government for organising this conference following on from those held in Interlaken and İzmir and for the efforts made to consult the Court throughout the process. We appreciate too the initiatives of different governments to maintain the impetus of the reform process launched at Interlaken and to reinforce the effectiveness of the Convention system. I would also take this opportunity to express my gratitude to all those who have contributed to this process, including the non-governmental organisations which have been tireless in their support for the Court.

Let me say immediately that I welcome the fact that, as at the Interlaken and İzmir conferences, the Declaration starts by a reaffirmation of the firm commitment of member States to the Convention and to the protection of fundamental rights. At a time when human rights and the Convention are increasingly held responsible in certain quarters for much that is wrong in society, it is worth recalling the collective resolve of member States of the Council of Europe to maintain and reinforce the system which they have set up. We should not lose sight of what that system is intended to do, that is to monitor compliance with the minimum standards necessary for a democratic society operating within the rule of law; nor should we forget the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms. It is no ordinary treaty. It is not an aspirational instrument. It sets out rights and freedoms that are binding on the Contracting Parties.

The Declaration also reaffirms the attachment of the States Parties to the right of individual petition and recognises the Court's extraordinary contribution to the protection of human rights in Europe for over 50 years. In setting up a Court to guarantee their compliance with the engagements enshrined in the Convention, the member States of the Council of Europe agreed to the operation of a fully judicial mechanism functioning within the rule of law. The principal characteristic of a court in a system governed by the rule of law is its independence. In order to fulfil its role the European Court must not only be independent; it must also be seen to be independent. That is why we are, I have to say, uncomfortable with the idea that governments can in some way dictate to the Court

how its case-law should evolve or how it should carry out the judicial functions conferred on it.

I would respectfully submit that these elements must be borne in mind in any discussion of proposals for reform. Convention amendment must be consistent with the object and purpose of the treaty and must satisfy rule of law principles, notably that of judicial independence. The true test of any proposed amendment is the extent to which it will actually help the Court cope more easily with the challenges facing it.

Having said that, there is much in this Declaration with which the Court is in complete agreement. I refer in particular to the emphasis placed on steps to be taken by the States themselves, the recognition of the shared responsibility for the system requiring national authorities to take effective measures to prevent violations and to provide remedies. The text outlines the different areas for action in a comprehensive manner. It also rightly underlines the important role of the Council of Europe in providing assistance.

Let us be clear: the main issue confronting the Court has been, and continues to be, the sheer quantity of cases. Failure to implement the Convention properly at national level is a primary source of the accumulation of meritorious cases which constitute the most serious problem that the Court has to cope with. It is also a regrettable fact that over 30,000 of the pending cases relate to repetitive violations of the Convention, in other words cases where Contracting Parties have failed to take effective steps to remedy the underlying systemic problem previously identified by the Court. It is to be hoped that the Declaration will provide a stronger basis for dealing with this unacceptable situation.

Yet we also know that while more effective action by States both generally and following a judgment finding a violation is indispensable for the long-term survival of the Convention system, it will not provide a solution in the short to medium term. That is why the Court has developed a clear strategy as to how to approach its case-load. We fully accept that we have a responsibility, particularly in the current difficult economic climate, to make the most efficient use of the resources made available to us. We are pleased that in a recent report, which has not yet been made public, the Council of Europe's external auditors have expressed their clear approval of the policy and strategy choices that the Court has made in the organisation of its work. I should also say that the latest figures are likewise a source of encouragement, with a 98% increase in the number of decided applications and a significant decrease in the number of pending applications since last summer. Cases are also coming in at a lower rate than in previous years. The perspective of reducing or even eliminating backlog, and attaining the balance referred to at Interlaken, is now a real one but this will require additional resources and that is why I strongly welcome the Secretary General's proposal to set up a fund.

These promising statistics should not, however, lull us into a false sense of security, into a feeling that no further action is needed to help the Court. In particular, as the Court points out in its preliminary opinion for this Conference, efficient filtering and more effective prioritisation still leave a very large volume of cases not catered for.

Moreover these are cases which are likely to be admissible and well-founded.

So what more needs to be done? In its preliminary opinion the Court set out its own view on future action. But in the process of the preparation for the Conference there has been much discussion on whether it is right and necessary to reinforce the notion of subsidiarity and the doctrine of margin of appreciation; whether some new form of admissibility criterion should be added to the arsenal of admissibility conditions that are already available to the Court and which allow it every year to reject as inadmissible the vast majority of the applications lodged with it; or again whether dialogue with national courts should be institutionalised through advisory opinions?

As to subsidiarity, the Court has clearly recognised that the Convention system requires a shared responsibility which involves establishing a mutually respectful relationship between Strasbourg and national courts and paying due deference to democratic processes. However, the application of the principle is contingent on proper Convention implementation at domestic level and can never totally exclude review by the Court. It cannot in any circumstances confer what one might call blanket immunity.

The doctrine of margin of appreciation is a complex one about which there has been much debate. We do not dispute its importance as a valuable tool devised by the Court itself to assist it in defining the scope of its review. It is a variable notion which is not susceptible of precise definition. It is in part for this reason that we have difficulty in seeing the need for, or the wisdom of, attempting to legislate for it in the Convention, any more than for the many other tools of interpretation which have been developed by the Court in carrying out the judicial role entrusted to it.

We welcome the fact that no proposal for a new admissibility criterion is now made in the Declaration and we are grateful for the efforts to take on board the Court's concerns in this respect. In this context may I repeat that it is indeed the Court's practice to reject a case as inadmissible where it finds that the complaint has been fully and properly examined in Convention terms by the domestic courts.

The Court has discussed the idea that superior national courts should be enabled to seek an advisory opinion from Strasbourg and distributed a reflection paper on it; it is not opposed to such a procedure in principle, although there remain unanswered questions about how it would work in practice.

Mr Chairman, before concluding, I would wish to reiterate the Court's unequivocal support for the rapid accession of the European Union to the Convention. We of course fully subscribe to the call in the Declaration for a swift and successful conclusion of the work on the accession agreement.

Mr Chairman, the introduction by the Convention of the right of individual petition before an international body changed the face of international law in a way that most people would hope and believe was lasting. We do not have to look very far outside Europe today to understand the continuing relevance of the principle that States which breach the fundamental rights of those within their jurisdiction should not be able to do so with impunity.

It is nevertheless not surprising that governments and indeed public opinion in the different countries find some of the Court's judgments difficult to accept. It is in the nature of the protection of fundamental rights and the rule of law that sometimes minority interests have to be secured against the view of the majority. I would plead that this should not lead governments to overlook the very real concrete benefits which the Court's decisions have brought for their own countries on the internal plane. At the same time I am confident that they understand the value of the wider influence of the Convention system across the European continent and indeed further afield. It is surely not controversial to maintain that all European partners are best served by the consolidation of democracy and the rule of law throughout the continent. The political stability and good governance which are essential for economic growth are dependent on strong democratic institutions operating within an effective rule of law framework.

Mr Chairman, ladies and gentlemen, the Convention and its enforcement mechanism remain a unique and precious model of international justice, whose value in the Europe of the 21st century as a guarantee of democracy and the rule of law throughout the wider Europe is difficult to overstate. While much has changed in the past 50 years, the need for the Convention and for a strong and independent Court is as pressing now as at any time in its history.

Mr Nils Muižnieks

Commissioner for Human Rights of the Council of Europe

Ministers, Excellencies, Ladies and Gentlemen,

I assumed office only at the beginning of the month and this is my first official appearance as Commissioner. Thus, I cannot yet refer to insights gained from my own country visits, thematic work or third-party interventions before the Court. However, I believe all of our work is related in some way to the work of the Court – preventing human rights violations through promoting human rights awareness, addressing systemic problems in member States that lead to many complaints, pushing for implementation of human rights standards at the national level, and sharing best practices to address human rights concerns.

In my remarks today, I would like to touch upon several important issues and principles related to the nexus of our work with that of the Court.

Much has been said about the principle of subsidiarity. It has been given a number of different meanings, from the idea that domestic courts should have greater powers to interpret Convention rights to the possibility of allowing States to override decisions of the Strasbourg Court.

The principle of subsidiarity essentially means that the prime responsibility for ensuring respect for the rights enshrined in the Convention lies first and foremost with the national authorities rather than with the Court.

It is thus about effective implementation of the Convention at national level, but also about effectiveness of domestic remedies and the need to swiftly and fully execute the judgments of the Court. For this principle to function in practice, effective and independent national human rights structures and courts, as well as effective remedies must be in place – so that each individual can find justice at national level.

Whether human rights are implemented and interpreted correctly at the national level will lastly be examined by the Court, as an instance of last recourse.

The Interlaken Declaration and Action Plan have confirmed that national authorities – governments, courts and parliaments – are key to guaranteeing and protecting human rights at national level.

The main message brought by the massive inflow of cases in Strasbourg is that the European Court of Human Rights is essential to many individuals who feel that their rights have not been protected in a European State.

In a number of country reports, my predecessor, Thomas Hammarberg, has focused on the link between the administration of justice and the protection of human rights and I intend to continue this work.

Shortcomings within the judicial system are a significant source of violations of the European Convention, including for instance violations of the right to liberty, and many of the complaints to the Court relate to excessively slow procedures and to failure of member States to enforce domestic court decisions. In several European countries, these decisions are often enforced only partly, after long delays, or sometimes not at all.

My intention is to continue to assist “high case-count” States (that is States with the highest number of pending applications before the Court) to address the underlying causes of this phenomenon.

I would like my work to be useful in addressing the systematic failure to implement the Convention, particularly in countries where national courts simply do not provide sufficient protection to individual rights. More needs to be done in order to implement the Convention through the national courts.

This of course goes hand in hand with the need to improve domestic remedies. Recourse to an international court should be seen for what it is – essentially a failure to provide proper national remedies.

The desirability or even requirement of having effective national human rights structures was mentioned in early drafts of the Declaration. Bodies such as parliamentary ombudsmen, equality bodies, data protection commissioners, children’s ombudsmen, police complaints commissions and other similar mechanisms are important partners for us. When given proper mandates and adequate funding to ensure their independence, such structures have the potential to improve the human rights situation considerably.

Some good practices exist; a couple of national human rights institutions have focused on promoting compliance with the European Convention and encouraging implementation of judgments of the Court. However, as a consequence of the economic crisis, many of these structures have been weakened

through budget or staff cuts and some have been done away with altogether. This is unfortunate, as in times of crisis, they are essential sources of assistance for the most vulnerable victims of human rights violations.

Co-operation with national human rights structures should be enhanced with the aim of fostering human rights oriented policies at national level and addressing systemic shortcomings in member States. Furthermore, member States which have not yet done so should consider establishing such institutions, including at the regional or local level.

It is the member States' task to ensure a better implementation of the Convention at the national level. However, non-execution of Court's judgments remains a major problem in the current system.

Though in the majority of cases European States do comply with the Court's decisions, there are also cases of States being strikingly slow to abide by their obligation to execute the judgments. Some important judgments have remained unimplemented after several years despite clear guidance given by the Court and the Committee of Ministers.

As a consequence, many of the judgments issued by the Court concern so-called 'repetitive applications,' i.e. cases raising issues that have already been the subject of Court judgments in the past, and which normally should have been resolved by the respondent member States. These 'repetitive applications' contribute to the overloading of the Court and create a risk of delayed decisions in general.

This requires a prompt, full and effective execution by member States so that recurrence of similar violations is prevented.

During the six years of my mandate, I will continue to draw the authorities' attention to the need for the prompt implementation of judgments issued by the Court. I also intend to engage not only with governments, but also with parliaments, judiciaries, national human rights structures and civil society partners to promote more effective implementation of Convention standards by member States.

Subsidiarity should be seen together with another principle – the principle of complementarity. There should be a more intense exploration of joint efforts with other Council of Europe monitoring mechanisms, political bodies, member States, the national judiciaries, and national human rights structures. My Office is eager to work together with others in this endeavour.

My role, as I see it, complements the role of the Court. By highlighting the need for the prevention of human rights violations, identifying and sharing best practices, raising awareness on the agreed standards, and suggesting remedies for human rights violations, especially in cases of gross or systemic problems, I think my Office can play an important role in ensuring that the Convention system remains effective.

EXCHANGE OF VIEWS ON NATIONAL IMPLEMENTATION OF THE CONVENTION

Following the general remarks from heads of delegations on the draft Declaration as a whole, there was an exchange of views on one particular aspect: the implementation of the Convention at national level. Participants were invited to share their views on national implementation: what had been their experience, and what did they consider was important? And also, what could the Council of Europe do to support national implementation?

Summary: The Rt Hon Dominic Grieve QC MP

Attorney General for England and Wales

It's now my task to attempt to sum up what has been an extraordinarily varied debate with a large number of contributions. There are clearly a number of common themes which seem to me to come out of it in terms of ensuring good national implementation.

We have, and I think it's almost universal, the creation of domestic remedies.

The dissemination of information on the Convention and on the case-law of the Court – databases, translations, websites, newsletters – we've heard a great deal about that this morning and how that is helping to promote knowledge.

Implementation of judgments, which requires, of course, both coordination in government, annual reports to parliament and a dialogue between executive and parliament to ensure that this is happening properly.

Screening of draft legislation, something which I mentioned in my opening in terms of my own role.

And, of course, the training and awareness raising of judges, prosecutors and policy-makers, as well as the police.

Reform to deal with the excessive length of judicial proceedings is, I suspect, one of the key issues that we are all having to look at and with that, ensuring that our court systems are fit for purpose through audit.

I was interested to hear about the national human rights action plans and, of course, the creation of National Human Rights Institutions which, in my experience in the United Kingdom, have been immensely valuable in promoting Convention rights.

Obviously incorporation of the Convention into national law and implementation of pilot judgments.

Might I then just mention a couple of other things which I thought came out of this which I feel are of some importance? I think the Luxembourg contribution highlighted that there is often going to be a gulf between the abstract rights that we subscribe to and the practical reality of their application on the ground.

In this context, my experience is certainly that with public officials at any level, an importance of constant training to remind of the obligations in terms of protecting human rights but also perhaps reminding of how one can operate successfully within that framework, has often seemed to me to be critical.

My own experience as Attorney General in England and Wales is that often violations of human rights when they occur are not deliberate. They're often, in fact, accidental. Although it is probably noteworthy that when one has bureaucracies that succeed in violating rights, even accidentally, it can be rather difficult sometimes to persuade people afterwards to accept that they've done it.

And in that context, I also think that the educational role more widely, and particularly that of parliaments, and engaging the public, something that the Prime Minister of the United Kingdom has recognised, is absolutely key. If the public do not see the relevance of human rights themselves and see them only as relevant to people whom they might otherwise consider to be unworthy of them, then in fact we will not succeed in getting the right message across. There is always a slight tendency, in my experience, for officialdom to sometimes moan that in fact the only way in which the rights are being applied appears to be to the profit of those whom the public might regard as generally slightly undeserving.

All this I think requires an educational campaign to point out that the Convention rights in fact uniformly and universally applied, lead to an immense improvement in quality of life for everybody.

Looking ahead, it seems to me that the follow-up we might wish to consider is looking at the compilation of best practice, which I think the United Kingdom, in its last moments of Chairmanship, will see whether we can bring together to distil some of the things that have been done here today and to explore how we share that best practice in future.

And with those remarks, I would like to thank all of you who have participated in this wide-ranging and, I will have to say, from my point of view, extremely educational and interesting debate. Thank you very much.

CONCLUSIONS

Concluding remarks

presented by the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe

On behalf of the United Kingdom Chairmanship, let me thank you all for your contributions to this Conference, and to the drafting process for the Declaration.

This Conference has been an opportunity for us all to reaffirm our commitment to the European Convention on Human Rights. We have expressed our shared commitment to the right of individual petition, as well as to the primary responsibility of the States Parties for the implementation of the Convention.

We have also reaffirmed the importance of achieving meaningful and successful reform of the European Court of Human Rights. The Court is an extraordinary institution that has long been the cornerstone of the Convention system. We must ensure its independence and authority.

I am very grateful to all delegations who participated in the exchange of views on the national implementation of the Convention. National implementation is a key part of the principle of subsidiarity. The primary objective must always be to ensure the full enjoyment of the rights and freedoms set out in the Convention. It is important to prevent violations from occurring or, if they do occur, to secure the provision of effective remedies at national level. It is also important to secure the effective implementation of judgments of the Court.

The process that began with the Interlaken Conference, and continued with the İzmir Conference, set out to secure the future of the Court. It is vital that the Court is able to address the applications that it receives quickly and effectively, and to focus on applications that relate to serious violations or important points of interpretation of the Convention. The Court is already making great steps forward in addressing its backlog of inadmissible applications. The challenge now relates particularly to the backlog of admissible cases, and particularly those that disclose potentially well-founded allegations of new violations of the Convention.

The Declaration contains a range of measures to secure the future of the Court and the Convention. We must now proceed to implement these measures quickly and effectively. I call on all those involved in this process to continue to work together in a spirit of co-operation to ensure in particular that the necessary amendments to the Convention are adopted by the end of 2013; and that the further consideration of important subjects called for in the Declaration is carried out effectively.

I am again grateful to you all for your support as we adopt the Brighton Declaration, and I promise our full support to the future Chairmanships of the

Council of Europe as they continue our efforts to ensure the effectiveness of the Convention system.

I would like particularly to thank:

- ▶ all the delegations who have participated;
- ▶ the Council of Europe, and particularly its senior officials who have participated in our proceedings;
- ▶ the teams who have supported our proceedings, including the Secretariat of the Council of Europe who supported our negotiations, all the staff who have looked after us here in Brighton and the staff of the Foreign and Commonwealth Office and the Ministry of Justice who have supported the Chairmanship of the United Kingdom;
- ▶ and particularly our interpreters here in Brighton.

It has been a pleasure to welcome you to Brighton, and I wish you all a safe journey home.

Brighton Declaration

20 April 2012

The High Level Conference meeting at Brighton on 19 and 20 April 2012 at the initiative of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe (“the Conference”) declares as follows:

1. The States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) reaffirm their deep and abiding commitment to the Convention, and to the fulfilment of their obligation under the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.
2. The States Parties also reaffirm their attachment to the right of individual application to the European Court of Human Rights (“the Court”) as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention. The Court has made an extraordinary contribution to the protection of human rights in Europe for over 50 years.
3. The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, *inter alia* of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court.
4. The States Parties and the Court also share responsibility for ensuring the viability of the Convention mechanism. The States Parties are determined

to work in partnership with the Court to achieve this, drawing also on the important work of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe as well as the Commissioner for Human Rights and the other institutions and bodies of the Council of Europe, and working in a spirit of co-operation with civil society and National Human Rights Institutions.

5. The High Level Conference at Interlaken (“the Interlaken Conference”) in its Declaration of 19 February 2010 noted with deep concern that the deficit between applications introduced and applications disposed of continued to grow; it considered that this situation caused damage to the effectiveness and credibility of the Convention and its supervisory mechanism and represented a threat to the quality and the consistency of the case-law and the authority of the Court. The High Level Conference at İzmir (“the İzmir Conference”) in its Declaration of 27 April 2011 welcomed the concrete progress achieved following the Interlaken Conference. The States Parties are very grateful to the Swiss and Turkish Chairmanships of the Committee of Ministers for having convened these conferences, and to all those who have helped fulfil the action and follow-up plans.
6. The results so far achieved within the framework of Protocol No. 14 are encouraging, particularly as a result of the measures taken by the Court to increase efficiency and address the number of clearly inadmissible applications pending before it. However, the growing number of potentially well-founded applications pending before the Court is a serious problem that causes concern. In light of the current situation of the Convention and the Court, the relevant steps foreseen by the Interlaken and İzmir Conferences must continue to be fully implemented, and the full potential of Protocol No. 14 exploited. However, as noted by the İzmir Conference, Protocol No. 14 alone will not provide a lasting and comprehensive solution to the problems facing the Convention system. Further measures are therefore also needed to ensure that the Convention system remains effective and can continue to protect the rights and freedoms of over 800 million people in Europe.

A. Implementation of the Convention at national level

7. The full implementation of the Convention at national level requires States Parties to take effective measures to prevent violations. All laws and policies should be formulated, and all State officials should discharge their responsibilities, in a way that gives full effect to the Convention. States Parties must also provide means by which remedies may be sought for alleged violations of the Convention. National courts and tribunals should take into account the Convention and the case-law of the Court. Collectively, these measures should reduce the number of violations of the Convention. They would also reduce the number of well-founded applications presented to the Court, thereby helping to ease its workload.
8. The Council of Europe plays a crucial role in assisting and encouraging national implementation of the Convention, as part of its wider work in the field of human rights, democracy and the rule of law. The provision of tech-

nical assistance upon request to States Parties, whether provided by the Council of Europe or bilaterally by other States Parties, disseminates good practice and raises the standards of human rights observance in Europe. The support given by the Council of Europe should be provided in an efficient manner with reference to defined outcomes, in co-ordination with the wider work of the organisation.

9. The Conference therefore:
 - a. Affirms the strong commitment of the States Parties to fulfil their primary responsibility to implement the Convention at national level;
 - b. Strongly encourages the States Parties to continue to take full account of the recommendations of the Committee of Ministers on the implementation of the Convention at national level in their development of legislation, policies and practices to give effect to the Convention;
 - c. In particular, expresses the determination of the States Parties to ensure effective implementation of the Convention at national level by taking the following specific measures, so far as relevant:
 - i. Considering the establishment, if they have not already done so, of an independent National Human Rights Institution;
 - ii. Implementing practical measures to ensure that policies and legislation comply fully with the Convention, including by offering to national parliaments information on the compatibility with the Convention of draft primary legislation proposed by the Government;
 - iii. Considering the introduction if necessary of new domestic legal remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention;
 - iv. Enabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention, having regard to the case-law of the Court, in conducting proceedings and formulating judgments; and in particular enabling litigants, within the appropriate parameters of national judicial procedure but without unnecessary impediments, to draw to the attention of national courts and tribunals any relevant provisions of the Convention and jurisprudence of the Court;
 - v. Providing public officials with relevant information about the obligations under the Convention; and in particular training officials working in the justice system, responsible for law enforcement, or responsible for the deprivation of a person's liberty in how to fulfil obligations under the Convention;
 - vi. Providing appropriate information and training about the Convention in the study, training and professional development of judges, lawyers and prosecutors; and
 - vii. Providing information on the Convention to potential applicants, particularly about the scope and limits of its protection, the jurisdiction of the Court and the admissibility criteria;
 - d. Encourages the States Parties, if they have not already done so, to:

- i. Ensure that significant judgments of the Court are translated or summarised into national languages where this is necessary for them to be properly taken into account;
 - ii. Translate the Court's Practical Guide on Admissibility Criteria into national languages; and
 - iii. Consider making additional voluntary contributions to the human rights programmes of the Council of Europe or to the Human Rights Trust Fund;
- e. Encourages all States Parties to make full use of technical assistance, and to give and receive upon request bilateral technical assistance in a spirit of open co-operation for the full protection of human rights in Europe;
- f. Invites the Committee of Ministers:
- i. To consider how best to ensure that requested technical assistance is provided to States Parties that most require it;
 - ii. Further to sub-paragraphs c(iii) and (iv) above, to prepare a guide to good practice in respect of domestic remedies; and
 - iii. Further to sub-paragraph c(v) above, to prepare a toolkit that States Parties could use to inform their public officials about the State's obligations under the Convention;
- g. Invites the Secretary General to propose to States Parties, through the Committee of Ministers, practical ways to improve:
- i. The delivery of the Council of Europe's technical assistance and co-operation programmes;
 - ii. The co-ordination between the various Council of Europe actors in the provision of assistance; and
 - iii. The targeting of relevant technical assistance available to each State Party on a bilateral basis, taking into account particular judgments of the Court;
- h. Invites the Court to indicate those of its judgments that it would particularly recommend for possible translation into national languages; and
- i. Reiterates the importance of co-operation between the Council of Europe and the European Union, in particular to ensure the effective implementation of joint programmes and coherence between their respective priorities in this field.

B. Interaction between the Court and national authorities

10. The States Parties to the Convention are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, and to provide an effective remedy before a national authority for everyone whose rights and freedoms are violated. The Court authoritatively interprets the Convention. It also acts as a safeguard for individuals whose rights and freedoms are not secured at national level.
11. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are

in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

12. The Conference therefore:
 - a. Welcomes the development by the Court in its case-law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments;
 - b. Concludes that, for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case-law should be included in the Preamble to the Convention and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013, while recalling the States Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention;
 - c. Welcomes and encourages open dialogues between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention, including particularly dialogues between the Court and:
 - i. The highest courts of the States Parties;
 - ii. The Committee of Ministers, including on the principle of subsidiarity and on the clarity and consistency of the Court's case-law; and
 - iii. Government Agents and legal experts of the States Parties, particularly on procedural issues and through consultation on proposals to amend the Rules of Court;
 - d. Notes that the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties; invites the Committee of Ministers to draft the text of an optional protocol to the Convention with this effect by the end of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it; and
 - e. Recalls that the İzmir Conference invited the Committee of Ministers to consider further the question of interim measures under Rule 39 of the Rules of the Court; and invites the Committee of Ministers to assess both whether there has been a significant reduction in their numbers and whether applications in which interim measures are applied are now dealt with speedily, and to propose any necessary action.

C. Applications to the Court

13. The right of individual application is a cornerstone of the Convention system. The right to present an application to the Court should be practically

realisable, and States Parties must ensure that they do not hinder in any way the effective exercise of this right.

14. The admissibility criteria in Article 35 of the Convention define which applications the Court should consider further on their merits. They should provide the Court with practical tools to ensure that it can concentrate on those cases in which the principle or the significance of the violation warrants its consideration. It is for the Court to decide on the admissibility of applications. It is important in doing so that the Court continues to apply strictly and consistently the admissibility criteria, in order to reinforce confidence in the rigour of the Convention system and to ensure that unnecessary pressure is not placed on its workload.
15. The Conference therefore:
 - a. Welcomes the Court's suggestion that the time limit under Article 35(1) of the Convention within which an application must be made to the Court could be shortened; concludes that a time limit of four months is appropriate; and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013;
 - b. Welcomes the stricter application of the time limit in Article 35(1) of the Convention envisaged by the Court; and reiterates the importance of the Court applying fully, consistently and foreseeably all the admissibility criteria including the rules regarding the scope of its jurisdiction, both to ensure the efficient application of justice and to safeguard the respective roles of the Court and national authorities;
 - c. Concludes that Article 35(3)(b) of the Convention should be amended to remove the words "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal"; and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013;
 - d. Affirms that an application should be regarded as manifestly ill-founded within the meaning of Article 35(3)(a), *inter alia* to the extent that the Court considers that the application raises a complaint that has been duly considered by a domestic court applying the rights guaranteed by the Convention in light of well-established case-law of the Court including on the margin of appreciation as appropriate, unless the Court finds that the application raises a serious question affecting the interpretation or application of the Convention; and encourages the Court to have regard to the need to take a strict and consistent approach in declaring such applications inadmissible, clarifying its case-law to this effect as necessary;
 - e. Welcomes the increased provision by the Court of information to applicants on its procedures, and particularly on the admissibility criteria;
 - f. Invites the Court to make specific provision in the Rules of Court for a separate decision to be made on admissibility at the request of the respondent government when there is a particular interest in having the Court rule on the effectiveness of a domestic remedy which is at issue in the case; and
 - g. Invites the Court to develop its case-law on the exhaustion of domestic remedies so as to require an applicant, where a domestic remedy was available to them, to have argued before the national courts or tribunals the alleged

violation of the Convention rights or an equivalent provision of domestic law, thereby allowing the national courts an opportunity to apply the Convention in light of the case-law of the Court.

D. Processing of applications

16. The number of applications made each year to the Court has doubled since 2004. Very large numbers of applications are now pending before all of the Court's primary judicial formations. Many applicants, including those with a potentially well-founded application, have to wait for years for a response.
17. In light of the importance of the right of individual application, the Court must be able to dispose of inadmissible applications as efficiently as possible, with the least impact on its resources. The Court has already taken significant steps to achieve this within the framework of Protocol No. 14, which are to be applauded.
18. 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.
19. The increasing number of cases pending before the Chambers of the Court is also a matter of serious concern. The Court should be able to focus its attention on potentially well-founded new violations.
20. The Conference therefore:
 - a. Welcomes the advances already made by the Court in its processing of applications, particularly the adoption of:
 - i. Its priority policy, which has helped it focus on the most important and serious cases; and
 - ii. Working methods that streamline procedures particularly for the handling of inadmissible and repetitive cases, while maintaining appropriate judicial responsibility;
 - b. Notes with appreciation the Court's assessment that it could dispose of the outstanding clearly inadmissible applications pending before it by 2015; acknowledges the Court's request for the further secondment of national judges and high-level independent lawyers to its Registry to allow it to achieve this; and encourages the States Parties to arrange further such secondments;
 - c. Expresses continued concern about the large number of repetitive applications pending before the Court; welcomes the continued use by the Court of proactive measures, particularly pilot judgments, to dispose of repetitive violations in an efficient manner; and encourages 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;

- d. Building on the pilot judgment procedure, invites the Committee of Ministers to consider the advisability and modalities of a procedure by which the Court could register and determine a small number of representative applications from a group of applications that allege the same violation against the same respondent State Party, such determination being applicable to the whole group;
- e. Notes that, to enable the Court to decide in a reasonable time the applications pending before its Chambers, it may be necessary in the future to appoint additional judges to the Court; further notes that these judges may need to have a different term of office and/or a different range of functions from the existing judges of the Court; and invites the Committee of Ministers to decide by the end of 2013 whether or not to proceed to amend the Convention to enable the appointment of such judges following a unanimous decision of the Committee of Ministers acting on information received from the Court;
- f. Invites the Court to consult the States Parties as it considers applying a broader interpretation of the concept of well-established case-law within the meaning of Article 28(1) of the Convention, so as to adjudicate more cases under a Committee procedure, without prejudice to the appropriate examination of the individual circumstances of the case and the non-binding character of judgments against another State Party;
- g. Invites the Court to consider, in consultation with the States Parties, civil society and National Human Rights Institutions, whether:
 - i. In light of the experience of the pilot project, further measures should be put in place to facilitate applications to be made online, and the procedure for the communication of cases consequently simplified, whilst ensuring applications continue to be accepted from applicants unable to apply online;
 - ii. The form for applications to the Court could be improved to facilitate the better presentation and handling of applications;
 - iii. Decisions and judgments of the Court could be made available to the parties to the case a short period of time before their delivery in public; and
 - iv. The claim for and comments on just satisfaction, including costs, could be submitted earlier in proceedings before the Chamber and Grand Chamber;
- h. Envisages that the full implementation of these measures with appropriate resources should in principle enable the Court to decide whether to communicate a case within one year, and thereafter to make all communicated cases the subject of a decision or judgment within two years of communication;
- i. Further expresses the commitment of the States Parties to work in partnership with the Court to achieve these outcomes; and
- j. Invites the Committee of Ministers, in consultation with the Court, to set out how it will determine whether, by 2015, these measures have proven sufficient to enable the Court successfully to address its workload, or if further measures are thereafter needed.

E. Judges and jurisprudence of the Court

21. The authority and credibility of the Court depend in large part on the quality of its judges and the judgments they deliver.
22. The high calibre of judges elected to the Court depends on the quality of the candidates that are proposed to the Parliamentary Assembly for election. The States Parties' role in proposing candidates of the highest possible quality is therefore of fundamental importance to the continued success of the Court, as is a high-quality Registry, with lawyers chosen for their legal capability and their knowledge of the law and practice of States Parties, which provides invaluable support to the judges of the Court.
23. Judgments of the Court need to be clear and consistent. This promotes legal certainty. It helps national courts apply the Convention more precisely, and helps potential applicants assess whether they have a well-founded application. Clarity and consistency are particularly important when the Court addresses issues of general principle. Consistency in the application of the Convention does not require that States Parties implement the Convention uniformly. The Court has indicated that it is considering an amendment to the Rules of Court making it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case-law.
24. A stable judiciary promotes the consistency of the Court. It is therefore in principle undesirable for any judge to serve less than the full term of office provided for in the Convention.
25. The Conference therefore:
 - a. Welcomes the adoption by the Committee of Ministers of the Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, and encourages the States Parties to implement them;
 - b. Welcomes the establishment of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights; notes that the Committee of Ministers has decided to review the functioning of the Advisory Panel after an initial three-year period; and invites the Parliamentary Assembly and the Committee of Ministers to discuss how the procedures for electing judges can be further improved;
 - c. Welcomes the steps that the Court is taking to maintain and enhance the high quality of its judgments and in particular to ensure that the clarity and consistency of judgments are increased even further; welcomes the Court's long-standing recognition that it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart without cogent reason from precedents laid down in previous cases; and in particular, invites the Court to have regard to the importance of consistency where judgments relate to aspects of the same issue, so as to ensure their cumulative effect continues to afford States Parties an appropriate margin of appreciation;
 - d. In light of the central role played by the Grand Chamber in achieving consistency in the Court's jurisprudence, concludes that Article 30 of the Convention should be amended to remove the words "unless one of the parties to the case objects"; invites the Committee of Ministers to adopt the necessary amending instrument, and to consider whether any consequential

- changes are required, by the end of 2013; and encourages the States Parties to refrain from objecting to any proposal for relinquishment by a Chamber pending the entry into force of the amending instrument;
- e. Invites the Court to consider whether the composition of the Grand Chamber would be enhanced by the *ex officio* inclusion of the Vice Presidents of each Section; and
 - f. Concludes that Article 23(2) of the Convention should be amended to replace the age limit for judges by a requirement that judges must be no older than 65 years of age at the date on which their term of office commences; and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013.

F. Execution of judgments of the Court

26. Each State Party has undertaken to abide by the final judgments of the Court in any case to which they are a party. Through its supervision, the Committee of Ministers ensures that proper effect is given to the judgments of the Court, including by the implementation of general measures to resolve wider systemic issues.
27. The Committee of Ministers must therefore 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.
28. The Committee of Ministers is supervising the execution of an ever-increasing number of judgments. As the Court works through the potentially well-founded applications pending before it, the volume of work for the Committee of Ministers can be expected to increase further.
29. The Conference therefore:
 - a. Encourages the States Parties:
 - i. to develop domestic capacities and mechanisms to ensure the rapid execution of the Court's judgments, including through implementation of Recommendation 2008(2) of the Committee of Ministers, and to share good practices in this respect;
 - i. to make action plans for the execution of judgments as widely accessible as possible, including where possible through their publication in national languages; and
 - i. to facilitate the important role of national parliaments in scrutinising the effectiveness of implementation measures taken;
 - b. Reiterates the invitation made by the Interlaken and İzmir Conferences to the Committee of Ministers to apply fully the principle of subsidiarity by which the States Parties may choose how to fulfil their obligations under the Convention;

- c. Invites the Committee of Ministers to continue to consider how to refine its procedures so as to ensure effective supervision of the execution of judgments, in particular through:
 - i. more structured consideration of strategic and systemic issues at its meetings; and
 - ii. stronger publicity about its meetings;
- d. Invites the Committee of Ministers to consider whether more effective measures are needed in respect of States that fail to implement judgments of the Court in a timely manner; and
- e. Welcomes the Parliamentary Assembly's regular reports and debates on the execution of judgments.

G. Longer-term future of the Convention system and the Court

30. This Declaration addresses the immediate issues faced by the Court. It is however also vital to secure the future effectiveness of the Convention system. To achieve this, a process is needed to anticipate the challenges ahead and develop a vision for the future of the Convention, so that future decisions are taken in a timely and coherent manner.
31. As part of this process, it may be necessary to evaluate the fundamental role and nature of the Court. The longer-term vision must secure the viability of the Court's key role in the system for protecting and promoting human rights in Europe. The right of individual application remains a cornerstone of the Convention system. Future reforms must enhance the ability of the Convention system to address serious violations promptly and effectively.
32. Effective implementation of the Convention at national level will permit the Court in the longer term to take on a more focussed and targeted role. The Convention system must support States in fulfilling their primary responsibility to implement the Convention at national level.
33. In response to more effective implementation at the national level, the Court should be in a position to focus its efforts on serious or widespread violations, systemic and structural problems, and important questions of interpretation and application of the Convention, and hence would need to remedy fewer violations itself and consequently deliver fewer judgments.
34. The Interlaken Conference invited the Committee of Ministers to evaluate, during the years 2012 to 2015, to what extent the implementation of Protocol No. 14 and of the Interlaken Action Plan had improved the situation of the Court. It provided that, on the basis of this evaluation, the Committee of Ministers should decide before the end of 2015 whether there is a need for further action. It further provided that, before the end of 2019, the Committee of Ministers should decide on whether the measures adopted have proven to be sufficient to assure sustainable functioning of the control mechanism of the Convention or whether more profound changes are necessary.
35. The Conference therefore:

- a. Welcomes the process of reflection on the longer-term future of the Court begun at the Interlaken Conference and continued at the İzmir Conference; and welcomes the contribution of the informal Wilton Park conference to this reflection;
- b. Invites the Committee of Ministers to determine by the end of 2012 the process by which it will fulfil its further mandates under this Declaration and the Declarations adopted by the Interlaken and İzmir Conferences;
- c. Invites the Committee of Ministers, in the context of the fulfilment of its mandate under the Declarations adopted by the Interlaken and İzmir Conferences, to consider the future of the Convention system, this consideration encompassing future challenges to the enjoyment of the rights and freedoms guaranteed by the Convention and the way in which the Court can best fulfil its twin role of acting as a safeguard for individuals whose rights and freedoms are not secured at the national level and authoritatively interpreting the Convention;
- d. Proposes that the Committee of Ministers carry out this task within existing structures, while securing the participation and advice of external experts as appropriate in order to provide a wide range of expertise and to facilitate the fullest possible analysis of the issues and possible solutions;
- e. Envisages that the Committee of Ministers will, as part of this task, carry out a comprehensive analysis of potential options for the future role and function of the Court, including analysis of how the Convention system in essentially its current form could be preserved, and consideration of more profound changes to how applications are resolved by the Convention system with the aim of reducing the number of cases that have to be addressed by the Court.
- f. Further invites the States Parties, including through the Committee of Ministers, to initiate comprehensive examination of:
 - i. the procedure for the supervision of the execution of judgments of the Court, and the role of the Committee of Ministers in this process; and
 - ii. the affording of just satisfaction to applicants under Article 41 of the Convention; and
- g. As a first step, invites the Committee of Ministers to reach an interim view on these issues by the end of 2015.

H. General and final provisions

36. The accession of the European Union to the Convention will enhance the coherent application of human rights in Europe. The Conference therefore notes with satisfaction progress on the preparation of the draft accession agreement, and calls for a swift and successful conclusion to this work.
37. The Conference also notes with appreciation the continued consideration, as mandated by the Interlaken and İzmir Conferences, as to whether a simplified procedure for amending provisions of the Convention relating to organisational matters could be introduced, whether by means of a Statute for the Court or a new provision in the Convention, and calls for a swift and successful conclusion to this work that takes full account of the constitutional arrangements of the States Parties.

38. Where decisions to give effect to this Declaration have financial implications for the Council of Europe, the Conference invites the Court and the Committee of Ministers to quantify these costs as soon as possible, taking into account the budgetary principles of the Council of Europe and the need for budgetary caution.
39. The Conference:
 - a. Invites the United Kingdom Chairmanship to transmit the present Declaration and the Proceedings of the Conference to the Committee of Ministers;
 - b. Invites the States Parties, the Committee of Ministers, the Court and the Secretary General of the Council of Europe to give full effect to this Declaration; and
 - c. Invites the future Chairmanships of the Committee of Ministers to ensure the future impetus of the reform of the Court and the implementation of the Convention.

TEXTS ADOPTED BY
THE COMMITTEE
OF MINISTERS

PROTOCOL NO. 15 AMENDING THE CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Strasbourg, 24 June 2013

Preamble

The member States of the Council of Europe and the other High Contracting Parties 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”), signatory hereto,

Having regard to the declaration adopted at the High Level Conference on the Future of the European Court of Human Rights, held in Brighton on 19 and 20 April 2012, as well as the declarations adopted at the conferences held in Interlaken on 18 and 19 February 2010 and İzmir on 26 and 27 April 2011;

Having regard to Opinion No. 283 (2013) adopted by the Parliamentary Assembly of the Council of Europe on 26 April 2013;

Considering the need to ensure that the European Court of Human Rights (hereinafter referred to as “the Court”) can continue to play its pre-eminent role in protecting human rights in Europe,

Have agreed as follows:

Article 1

At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows:

“Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.”

Article 2

- 1 In Article 21 of the Convention, a new paragraph 2 shall be inserted, which shall read as follows:

“Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly, further to Article 22.”

- 2 Paragraphs 2 and 3 of Article 21 of the Convention shall become paragraphs 3 and 4 of Article 21 respectively.
- 3 Paragraph 2 of Article 23 of the Convention shall be deleted. Paragraphs 3 and 4 of Article 23 shall become paragraphs 2 and 3 of Article 23 respectively.

Article 3

In Article 30 of the Convention, the words “unless one of the parties to the case objects” shall be deleted.

Article 4

In Article 35, paragraph 1 of the Convention, the words “within a period of six months” shall be replaced by the words “within a period of four months”.

Article 5

In Article 35, paragraph 3, sub-paragraph b of the Convention, the words “and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal” shall be deleted.

Final and transitional provisions

Article 6

- 1 This Protocol shall be open for signature by the High Contracting Parties 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 7

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 High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 6.

Article 8

- 1 The amendments introduced by Article 2 of this Protocol shall apply only to candidates on lists submitted to the Parliamentary Assembly by the High Contracting Parties under Article 22 of the Convention after the entry into force of this Protocol.

- 2 The amendment introduced by Article 3 of this Protocol shall not apply to any pending case in which one of the parties has objected, prior to the date of entry into force of this Protocol, to a proposal by a Chamber of the Court to relinquish jurisdiction in favour of the Grand Chamber.
- 3 Article 4 of this Protocol shall enter into force following the expiration of a period of six months after the date of entry into force of this Protocol. Article 4 of this Protocol shall not apply to applications in respect of which the final decision within the meaning of Article 35, paragraph 1 of the Convention was taken prior to the date of entry into force of Article 4 of this Protocol.
- 4 All other provisions of this Protocol shall apply from its date of entry into force, in accordance with the provisions of Article 7.

Article 9

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and the other High Contracting Parties to the Convention 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 7; 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 24th day of June 2013, 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 and to the other High Contracting Parties to the Convention.

EXPLANATORY REPORT TO PROTOCOL NO. 15 AMENDING THE CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I. INTRODUCTION

1. The High-level Conference on the Future of the European Court of Human Rights, organised by the Swiss Chairmanship of the Committee of Ministers, took place in Interlaken, Switzerland, on 18-19 February 2010. The Conference adopted an Action Plan and invited the Committee of Ministers to issue terms of reference to the competent bodies with a view to preparing, by June 2012, specific proposals for measures requiring amendment of the Convention. On 26-27 April 2011, a second High-level Conference on the Future of the Court was organised by the Turkish Chairmanship of the Committee of Ministers at İzmir, Turkey. This Conference adopted a follow-up plan to review and further the reform process.

2. In the context of work on follow-up to these two Conferences, the Ministers' Deputies gave renewed terms of reference to the Steering Committee for Human Rights (CDDH) and its subordinate bodies for the biennium 2012-2013. These required the CDDH, through its Committee of experts on the reform of the Court (DH-GDR), to prepare a draft report for the Committee of Ministers containing specific proposals requiring amendment of the Convention.

3. Alongside this report, the CDDH presented a Contribution to the High-level Conference on the future of the Court, organised by the United Kingdom Chairmanship of the Committee of Ministers at Brighton, United Kingdom, on 19-20 April 2012. The Court also presented a Preliminary Opinion in preparation for the Brighton Conference containing a number of specific proposals.

4. In order to give effect to certain provisions of the Declaration adopted at the Brighton Conference, the Committee of Ministers subsequently instructed the CDDH to prepare a draft amending protocol to the Convention.¹ This work initially took place during two meetings of a Drafting Group of restricted composition, before being examined by the DH-GDR, following which the draft was further examined and adopted by the CDDH at its 76th meeting (27-30 November 2012) for submission to the Committee of Ministers.

5. The Parliamentary Assembly, at the invitation of the Committee of Ministers, adopted Opinion No. 283 (2013) on the draft protocol on 26 April 2013.

6. At its 123rd Session, the Committee of Ministers examined and decided to adopt the draft as Protocol No. 15 to the Convention. At the same time, it took note of the present Explanatory Report to Protocol No. 15.

1. Namely those set out in paragraphs 12b, 15a, 15c, 25d and 25f of the Declaration. See the decisions of the 122nd Session of the Committee of Ministers (23 May 2012), item 2 – Securing the long-term effectiveness of the supervisory mechanism of the European Convention on Human Rights.

II. Comments on the provisions of the Protocol

Article 1 of the amending Protocol

Preamble

7. A new recital has been added at the end of the Preamble of the Convention containing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case-law. In making this proposal, the Brighton Declaration also recalled the High Contracting Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention.²

8. The States Parties to the Convention are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, and to provide an effective remedy before a national authority for everyone whose rights and freedoms are violated. The Court authoritatively interprets the Convention. It also acts as a safeguard for individuals whose rights and freedoms are not secured at the national level.

9. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

Entry into force/ application

10. In accordance with Article 8, paragraph 4 of the Protocol, no transitional provision relates to this modification, which will enter into force in accordance with Article 7 of the Protocol.

Article 2 of the amending Protocol

Article 21 – Criteria for office

11. A new paragraph 2 is introduced in order to require that candidates be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly further to its role in electing judges under Article 22 of the Convention.

12. This modification aims at enabling highly qualified judges to serve the full nine-year term of office and thereby reinforce the consistency of the membership of the Court. The age limit applied under Article 23, paragraph 2 of the Convention, as drafted prior to the entry into force of this Protocol, had the effect of

2. See in particular paragraphs 12.b., 3 and 11 of the Brighton Declaration.

preventing certain experienced judges from completing their term of office. It was considered no longer essential to impose an age limit, given the fact that judges' terms of office are no longer renewable.

13. The process leading to election of a judge, from the domestic selection procedure to the vote by the Parliamentary Assembly, is long. It has therefore been considered necessary to foresee a date sufficiently certain at which the age of 65 must be determined, to avoid a candidate being prevented from taking office for having reached the age limit during the course of the procedure. For this practical reason, the text of the Protocol departs from the exact wording of the Brighton Declaration, whilst pursuing the same end. It was thus decided that the age of the candidate should be determined at the date by which the list of three candidates has been requested by the Parliamentary Assembly. In this connection, it would be useful if the State Party's call for applications were to refer to the relevant date and if the Parliamentary Assembly were to offer a means by which this date could be publicly verified, whether by publishing its letter or otherwise.

14. Paragraph 2 of Article 23 has been deleted as it has been superseded by the changes made to Article 21.

Entry into force/ application

15. In order to take account of the length of the domestic procedure for the selection of candidates for the post of judge at the Court, Article 8, paragraph 1 of the Protocol foresees that these changes will apply only to judges elected from lists of candidates submitted to the Parliamentary Assembly by High Contracting Parties under Article 22 of the Convention after the entry into force of the Protocol. Candidates appearing on previously submitted lists, by extension including judges in office and judges-elect at the date of entry into force of the Protocol, will continue to be subject to the rule applying before the entry into force of the present Protocol, namely the expiry of their term of office when they reach the age of 70.

Article 3 of the amending Protocol

Article 30 – Relinquishment of jurisdiction to the Grand Chamber

16. Article 30 of the Convention has been amended such that the parties may no longer object to relinquishment of a case by a Chamber in favour of the Grand Chamber. This measure is intended to contribute to consistency in the case-law of the Court, which had indicated that it intended to modify its Rules of Court (Rule 72) so as to make it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case-law.³ Removal of the parties' right to object to relinquishment will reinforce this development.

17. The removal of this right would also aim at accelerating proceedings before the Court in cases which raise a serious question affecting the interpretation of the Convention or the Protocols thereto or a potential departure from existing case-law.

3. See paragraph 16 of the Preliminary Opinion of the Court in preparation for the Brighton Conference.

18. In this connection, it would be expected that the Chamber will consult the parties on its intentions and it would be preferable for the Chamber to narrow down the case as far as possible, including by finding inadmissible any relevant parts of the case before relinquishing it.

19. This change is made in the expectation that the Grand Chamber will in future give more specific indication to the parties of the potential departure from existing case-law or serious question of interpretation of the Convention or the Protocols thereto.

Entry into force/ application

20. A transitional provision is foreseen in Article 8, paragraph 2 of the Protocol. Out of concern for legal certainty and procedural foreseeability, it was considered necessary to specify that removal of the parties' right to object to relinquishment would not apply to pending cases in which one of the parties had already objected, before entry into force of the Protocol, to a Chamber's proposal of relinquishment in favour of the Grand Chamber.

Article 4 of the amending Protocol

Article 35, paragraph 1 – Admissibility criteria: time limit for submitting applications

21. Both Articles 4 and 5 of the Protocol amend Article 35 of the Convention. Paragraph 1 of Article 35 has been amended to reduce from six months to four the period following the date of the final domestic decision within which an application must be made to the Court. The development of swifter communications technology, along with the time limits of similar length in force in the member States, argue for the reduction of the time limit.

Entry into force/ application

22. A transitional provision appears at Article 8, paragraph 3 of the Protocol. It was considered that the reduction in the time limit for submitting an application to the Court should apply only after a period of six months following the entry into force of the Protocol, in order to allow potential applicants to become fully aware of the new deadline. Furthermore, the new time limit will not have retroactive effect, since it is specified in the final sentence of paragraph 4 that it does not apply to applications in respect of which the final decision within the meaning of Article 35, paragraph 1 of the Convention was taken prior to the date of entry into force of the new rule.

Article 5 of the amending Protocol

Article 35, paragraph 1 – Admissibility criteria: significant disadvantage

23. Article 35, paragraph 3.b of the Convention, containing the admissibility criterion concerning "significant disadvantage", has been amended to delete the proviso that the case have been duly considered by a domestic tribunal. The requirement remains of examination of an application on the merits where required by respect for human rights. This amendment is intended to give greater effect to the maxim *de minimis non curat praetor*.⁴

4. In other words, a court is not concerned by trivial matters.

Entry into force/ application

24. As regards the change introduced concerning the admissibility criterion of “significant disadvantage”, no transitional provision is foreseen. In accordance with Article 8, paragraph 4 of the Protocol, this change will apply as of the entry into force of the Protocol, in order not to delay the impact of the expected enhancement of the effectiveness of the system. It will therefore apply also to applications on which the admissibility decision is pending at the date of entry into force of the Protocol.

Final and transitional provisions

Article 6 of the amending Protocol

25. This article is one of the standard final clauses included in treaties prepared within the Council of Europe. This Protocol does not contain any provision on reservations. By its very nature, this amending Protocol excludes the making of reservations.

Article 7 of the amending Protocol

26. This article is one of the standard final clauses included in treaties prepared within the Council of Europe.

Article 8 of the amending Protocol

27. Paragraphs 1 to 4 of Article 8 of the Protocol contain transitional provisions governing the application of certain other, substantive provisions. The explanation of these transitional provisions appears above, in connection with the relevant substantive provisions.

28. Article 8, paragraph 4 establishes that all other provisions of the Protocol shall enter into force as of the date of entry into force of the Protocol, in accordance with its Article 7.

Article 9 of the amending Protocol

29. This article is one of the standard final clauses included in treaties prepared within the Council of Europe.

PROTOCOL NO. 16 TO THE CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Strasbourg, 2 October 2013

Preamble

The member States of the Council of Europe and other High Contracting Parties 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”), signatories hereto,

Having regard to the provisions of the Convention and, in particular, Article 19 establishing the European Court of Human Rights (hereinafter referred to as “the Court”);

Considering that the extension of the Court’s competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity;

Having regard to Opinion No. 285 (2013) adopted by the Parliamentary Assembly of the Council of Europe on 28 June 2013,

Have agreed as follows:

Article 1

- 1 Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.
- 2 The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.
- 3 The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.

Article 2

- 1 A panel of five judges of the Grand Chamber shall decide whether to accept the request for an advisory opinion, having regard to Article 1. The panel shall give reasons for any refusal to accept the request.
- 2 If the panel accepts the request, the Grand Chamber shall deliver the advisory opinion.

- 3 The panel and the Grand Chamber, as referred to in the preceding paragraphs, shall include *ex officio* the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. 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.

Article 3

The Council of Europe Commissioner for Human Rights and the High Contracting Party to which the requesting court or tribunal pertains shall have the right to submit written comments and take part in any hearing. The President of the Court may, in the interest of the proper administration of justice, invite any other High Contracting Party or person also to submit written comments or take part in any hearing.

Article 4

- 1 Reasons shall be given for advisory opinions.
- 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 shall be communicated to the requesting court or tribunal and to the High Contracting Party to which that court or tribunal pertains.
- 4 Advisory opinions shall be published.

Article 5

Advisory opinions shall not be binding.

Article 6

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 7

- 1 This Protocol shall be open for signature by the High Contracting Parties 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 8

- 1 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 ten High

Contracting Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

- 2 In respect of any High Contracting Party to the Convention which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the expression of its consent to be bound by the Protocol in accordance with the provisions of Article 7.

Article 9

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 10

Each High Contracting Party to the Convention shall, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by means of a declaration addressed to the Secretary General of the Council of Europe, indicate the courts or tribunals that it designates for the purposes of Article 1, paragraph 1, of this Protocol. This declaration may be modified at any later date and in the same manner.

Article 11

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and the other High Contracting Parties to the Convention of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Protocol in accordance with Article 8;
- d any declaration made in accordance with Article 10; and
- e 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 2nd day of October 2013, in English and 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 and to the other High Contracting Parties to the Convention.

EXPLANATORY REPORT TO PROTOCOL NO. 16 TO THE CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

INTRODUCTION

1. The proposal to extend the jurisdiction of the European Court of Human Rights (“the Court”) to give advisory opinions was made in the report to the Committee of Ministers of the Group of Wise Persons, set up under the Action Plan adopted at the Third Summit of Heads of State and Government of the Member States of the Council of Europe (Warsaw, 16-17 May 2005) “to consider the issue of the long-term effectiveness of the ECHR control mechanism”. The Group of Wise Persons concluded 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”.¹ Such a new competence would be in addition to that accorded to the Court under Protocol No. 2 to the European Convention on Human Rights (the Convention),² whose provisions are now principally reflected in Articles 47-49 of the Convention. The Group of Wise Persons’ proposal was examined by the Steering Committee for Human Rights (CDDH) as part of its work on follow-up to the former’s report.³

2. The İzmir High-level Conference on the future of the Court (26-27 April 2011), in its final Declaration, subsequently “[invited] the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court’s case-law, thus providing further guidance in order to assist States Parties in avoiding future violations”. The Ministers’ Deputies decisions on follow-up to the İzmir Conference then invited the CDDH to elaborate specific proposals, with options, for introducing such a procedure.⁴ The CDDH’s Final Report to the Committee of Ministers on measures requiring amendment of the ECHR⁵ included an in-depth examination of a more detailed

1. See doc. CM(2006)203, para. 135.

2. See CETS No. 044.

3. See the CDDH Activity Report on guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights, doc. CDDH(2009)007 Addendum I, paras. 42-44 and the CDDH Opinion on the issues to be covered at the Interlaken Conference, doc. CDDH(2009)019 Addendum I, para. 19.

4. See doc. CM/Del/Dec(2011)1114/1.5. These instructions were subsequently absorbed into the terms of reference for the biennium 2012-2013 of the CDDH’s subordinate body, the Committee of experts on the Reform of the Court (DH-GDR).

5. See doc. CDDH(2012)R74 Addendum I, paras. 51-56 and Appendix V.

proposal made by the experts of The Netherlands and Norway, reflected also in its Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers.⁶

3. The question of advisory opinions was discussed at length during the preparation of the subsequent Brighton High-level Conference on the future of the Court (19-20 April 2012), to which the Court contributed a detailed “Reflection Paper on the proposal to extend the Court’s advisory jurisdiction”.⁷ The final Declaration of the Brighton Conference, “[noting] that the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties[, invited] the Committee of Ministers to draft the text of an optional protocol to the Convention with this effect by the end of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it”.

4. Following the Brighton Conference, the 122nd Session of the Committee of Ministers (23rd May 2012) instructed the CDDH to draft the required text. This work initially took place during two meetings of a Drafting Group of restricted composition, before being examined by the plenary Committee of experts on the reform of the Court (DH-GDR), following which the draft was further examined and approved by the CDDH at its 77th meeting (22 March 2013) for submission to the Committee of Ministers. The key issues addressed during this process were: the nature of the domestic authority that may request an advisory opinion of the Court; the type of questions on which the Court may give an advisory opinion; the procedure for considering requests, for deliberating upon accepted requests and for issuing advisory opinions; and the legal effect of an advisory opinion on the different categories of subsequent case. The CDDH’s position on these issues is reflected in the commentary on the Protocol’s provisions in section II below.

5. The Parliamentary Assembly, at the invitation of the Committee of Ministers, adopted Opinion No. 285 (2013) on the draft protocol on 28 June 2013.

6. At their 1176th meeting, the Ministers’ Deputies examined and decided to adopt the draft as Protocol No. 16 to the Convention (CETS No. 214). At the same time, it took note of the present Explanatory Report to Protocol No. 16.

6. See doc. CDDH(2012)R74 Addendum III, para. 17.

7. See doc. # 3853038, 20 February 2012.

COMMENTARY ON THE PROVISIONS OF THE PROTOCOL

Article 1

7. Paragraph 1 of Article 1 sets out three key parameters of the new procedure. First, by stating that relevant courts or tribunals “may” request that the Court give an advisory opinion, it makes clear that it is optional for them to do so and not in any way obligatory. In this connection, it should also be understood that the requesting court or tribunal may withdraw its request.

8. Second, it defines the domestic authority that may request an advisory opinion of the Court as being the “highest courts or tribunals... as specified by [the High Contracting Party] under Article 10”. This wording is intended to avoid potential complications by allowing a certain freedom of choice. “Highest court or tribunal” would refer to the courts and tribunals at the summit of the national judicial system. Use of the term “highest”, as opposed to “the highest”, permits the potential inclusion of those courts or tribunals that, although inferior to the constitutional or supreme court, are nevertheless of especial relevance on account of being the “highest” for a particular category of case. This, along with the requirement that a High Contracting Party specify which highest courts or tribunals may request an advisory opinion, allows the necessary flexibility to accommodate the particularities of national judicial systems. Limiting the choice to the “highest” courts or tribunals is consistent with the idea of exhaustion of domestic remedies, although a “highest” court need not be one to which recourse must have been made in order to satisfy the requirement of exhaustion of domestic remedies under Article 35, paragraph 1 of the Convention. It should avoid a proliferation of requests and would reflect the appropriate level at which the dialogue should take place. It can be noted that under Article 10 (see further below), a High Contracting Party may at any time change its specification of those of its highest courts or tribunals that may request an advisory opinion. In some cases, the constitutional arrangements of a High Contracting Party may provide for particular courts or tribunals to hear cases from more than one territory. This may include territories to which the Convention does not apply and territories to which the High Contracting Party has extended the application of the Convention under Article 56. In such cases, when specifying a court or tribunal for the purposes of this Protocol, a High Contracting Party may specify that it excludes the application of the Protocol to some or all cases arising from such territories.

9. The third parameter concerns the nature of the questions on which a domestic court or tribunal may request the Court’s advisory opinion. The definition – “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto” – is that which was used by the Group of Wise Persons and endorsed by the Court in its Reflection Paper, which was in turn inspired by Article 43, paragraph 2 of the Convention on referral to the Grand Chamber. It was felt that there were certain parallels between these two procedures, not limited to the fact that advisory opinions would themselves be delivered by the Grand Chamber (see Article 2, paragraph 2). That said, when applying the criteria, the different purposes of the procedure under this Protocol and that under Article 43, paragraph 2 of the Con-

vention will have to be taken into account. Interpretation of the definition will be a matter for the Court when deciding whether to accept a request for an advisory opinion (see Article 2, paragraph 1).

10. Paragraph 2 of Article 1 requires the request for an advisory opinion to be made in the context of a case pending before the requesting court or tribunal. The procedure is not intended, for example, to allow for abstract review of legislation which is not to be applied in that pending case.

11. Paragraph 3 of Article 1 sets out certain procedural requirements that must be met by the requesting court or tribunal. They reflect the aim of the procedure, which is not to transfer the dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when determining the case before it. These requirements serve two purposes. First, they imply that the requesting court or tribunal must have reflected upon the necessity and utility of requesting an advisory opinion of the Court, so as to be able to explain its reasons for doing so. Second, they imply that the requesting court or tribunal is in a position to set out the relevant legal and factual background, thereby allowing the Court to focus on the question(s) of principle relating to the interpretation or application of the Convention or the Protocols thereto.

12. In providing the relevant legal and factual background, the requesting court or tribunal should present the following:

- The subject matter of the domestic case and relevant findings of fact made during the domestic proceedings, or at least a summary of the relevant factual issues;
- The relevant domestic legal provisions;
- The relevant Convention issues, in particular the rights or freedoms at stake;
- If relevant, a summary of the arguments of the parties to the domestic proceedings on the question;
- If possible and appropriate, a statement of its own views on the question, including any analysis it may itself have made of the question.

13. The Court would be able to receive requests in languages other than English or French, as it does at present for individual applications. Requesting courts or tribunals may thus address the Court in the national official language used in the domestic proceedings.

Article 2

14. Paragraph 1 of Article 2 sets out the procedure for deciding whether or not a request for an advisory opinion is accepted. The Court has a discretion to accept a request or not, although it is to be expected that the Court would hesitate to refuse a request that satisfies the relevant criteria by (i) relating to a question as defined in paragraph 1 of Article 1 and (ii) the requesting court or tribunal having fulfilled the procedural requirements as set out in paragraphs 2 and 3 of Article 1. As is the case for requests for referral to the Grand Chamber under Article 43 of the Convention, the decision on acceptance is taken by a five-judge panel of the Grand Chamber.

15. Unlike the procedure under Article 43, however, the panel must give reasons for any refusal to accept a domestic court or tribunal's request for an advisory opinion. This is intended to reinforce dialogue between the Court and national judicial systems, including through clarification of the Court's interpretation of what is meant by "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto", which would provide guidance to domestic courts and tribunals when considering whether to make a request and thereby help to deter inappropriate requests. The Court should inform the High Contracting Party concerned of the acceptance of any requests made by its courts or tribunals.

16. Paragraph 2 of Article 2 states that it is the Grand Chamber of the Court (as defined in Article 26 of the Convention – see further under Article 6 below) that shall deliver advisory opinions following acceptance of a request by a five-judge panel. This is appropriate given the nature of the questions on which an advisory opinion may be requested and the fact that only the highest domestic courts or tribunals may request it, along with the recognised similarities between the present procedure and that of referral to the Grand Chamber under Article 43 of the Convention.

17. The prioritisation to be given to proceedings under this protocol would be a matter for the Court, as it is with respect to all other proceedings. That said, the nature of the question on which it would be appropriate for the Court to give its advisory opinion suggests that such proceedings would have high priority. This high priority applies at all stages of the procedure and to all concerned, namely the requesting court or tribunal, which should formulate the request in a way that is precise and complete, and those that may be submitting written comments or taking part in hearings (see Article 3 below), as well as the Court itself. Undue delay in the advisory opinion proceedings before the Court would also cause delay in proceedings in the case pending before the requesting court or tribunal and should therefore be avoided (see further under paragraph 23 below).

18. Paragraph 3 of Article 2 states that the panel and the Grand Chamber shall include *ex officio* the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. It can be noted that this is also the case for the Grand Chamber when sitting in its full composition on a case brought before it under Articles 33 or 34 of the Convention (see Article 26, paragraph 4 of the Convention). Paragraph 3 also establishes a procedure for circumstances where there is no such judge, or that judge cannot sit. This procedure is intended to be identical to that established under Article 26, paragraph 4 of the Convention and to be based upon the same list.

Article 3

19. Article 3 gives to the Council of Europe Commissioner for Human Rights and to the High Contracting Party whose domestic court or tribunal has requested the advisory opinion the right to submit written comments to and take part in any hearing before the Grand Chamber in proceedings concerning that request. The intention is that the Commissioner have an equivalent right under

the Protocol to participate in advisory opinion proceedings as s/he does under Article 36, paragraph 3) of the Convention to make a third party intervention in proceedings before a Chamber or the Grand Chamber. The wording used in the Protocol, although slightly different to that found in the Convention, is intended to have the same effect. Since advisory opinion proceedings would not be adversarial, neither would it be obligatory for the government to participate, although it would always retain the right to do so, in the same way as does a High Contracting Party in proceedings brought by one of its nationals against another High Contracting Party (see Article 36, paragraph 1 of the Convention on third party interventions).

20. The President of the Court may invite any other High Contracting Party or person to submit written comments or take part in any hearing, where to do so is in the interest of the proper administration of justice. This mirrors the situation concerning third party interventions under Article 36, paragraph 2 of the Convention. It is expected that the parties to the case in the context of which the advisory opinion had been requested would be invited to take part in the proceedings.

21. It will be for the Court to decide whether or not to hold a hearing on an accepted request for an advisory opinion.

Article 4

22. Paragraph 1 of Article 4 requires the Court to give reasons for advisory opinions delivered under this Protocol; paragraph 2 of Article 4 allows for judges of the Grand Chamber to deliver a separate (dissenting or concurring) opinion.

23. Paragraph 3 of Article 4 requires the Court to communicate advisory opinions to both the requesting court or tribunal and the High Contracting Party to which that court or tribunal pertains. It is expected that the advisory opinion would also be communicated to any other parties that have taken part in the proceedings in accordance with Article 3. It is important to bear in mind that in most cases advisory opinions will have to be admitted to proceedings that take place in an official language of the High Contracting Party concerned that is neither English nor French, the Court's official languages. Whilst respecting the fact that there are only two official languages of the Court, it was considered important to underline the sensitivity of the issue of the language of advisory opinions. It should also be taken into account that the suspended domestic proceedings can in many legal systems be resumed only after the opinion is translated into the language of the requesting court or tribunal. In the event of concerns that the time taken for translation into the language of the requesting court or tribunal of an advisory opinion may delay the resumption of suspended domestic proceedings, it may be possible for the Court to co-operate with national authorities in the timely preparation of such translations.

24. Paragraph 4 of Article 4 requires the publication of advisory opinions delivered under this Protocol. It is expected that this will be done by the Court in accordance with its practice in similar matters and with due respect to applicable confidentiality rules.

Article 5

25. Article 5 states that advisory opinions shall not be binding. They take place in the context of the judicial dialogue between the Court and domestic courts and tribunals. Accordingly, the requesting court decides on the effects of the advisory opinion in the domestic proceedings.

26. The fact that the Court has delivered an advisory opinion on a question arising in the context of a case pending before a court or tribunal of a High Contracting Party would not prevent a party to that case subsequently exercising their right of individual application under Article 34 of the Convention, i.e. they could still bring the case before the Court. However, where an application is made subsequent to proceedings in which an advisory opinion of the Court has effectively been followed, it is expected that such elements of the application that relate to the issues addressed in the advisory opinion would be declared inadmissible or struck out.

27. Advisory opinions under this Protocol would have no direct effect on other later applications. They would, however, form part of the case-law of the Court, alongside its judgments and decisions. The interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions.

Article 6

28. Article 6 reflects the fact that acceptance of the Protocol is optional for High Contracting Parties to the Convention. It thus does not have the effect of introducing new provisions into the Convention, whose text remains unchanged. Only between High Contracting Parties that choose to accept the Protocol do its provisions operate as additional articles to the Convention, in which case its application is conditioned by all other relevant provisions of the Convention. It is understood that this, in conjunction with Article 58 of the Convention, would allow a High Contracting Party to denounce the Protocol without denouncing the Convention.

Article 7

29. Article 7 is based on one of the model final clauses approved by the Committee of Ministers and contains the provisions under which a High Contracting Party to the Convention may become bound by the Protocol.

Article 8

30. The text of Article 8 is taken from Article 7 of Protocol No. 9 to the Convention and is based on the model final clauses approved by the Committee of Ministers. The number of High Contracting Parties whose expression of consent to be bound is required for the Protocol to enter into force was set at ten.

Article 9

31. Article 9 specifies, as an exception to Article 57 of the Convention, that High Contracting Parties may not make a reservation in respect of the Protocol.

Article 10

32. Article 10 is based on a standard clause used in Council of Europe treaties. It is intended explicitly to allow High Contracting Parties to make declarations on material issues arising under the Protocol, in this case to specify which of their highest courts or tribunals will be able to request advisory opinions from the Court. It also allows for further declarations to be made at any time adding to or removing from the list of specified courts or tribunals. All such declarations are addressed to the Secretary General of the Council of Europe, as depository of multilateral agreements made within the organisation.

Article 11

33. Article 11 is one of the usual final clauses included in treaties prepared within the Council of Europe. Its paragraph d. refers to the procedure established under Article 10 of the Protocol for specifying which of a High Contracting Party's highest courts or tribunals may request advisory opinions from the Court (see paragraph 32 above).

RESOLUTION CM/RES(2010)25 ON MEMBER STATES' DUTY TO RESPECT AND PROTECT THE RIGHT OF INDIVIDUAL APPLICATION TO THE EUROPEAN COURT OF HUMAN RIGHTS

Adopted by the Committee of Ministers on 10 November 2010

The Committee of Ministers,

Reiterating its commitment to the system of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, hereinafter “the Convention”) as the cornerstone of human rights protection in Europe;

Emphasising that the right of individuals to apply to the European Court of Human Rights (hereinafter referred to as “the Court”) is a central element of the convention system and must be respected and protected at all levels;

Stressing that respect for this right and its protection from any interference are essential for the effectiveness of the Convention system of human rights protection;

Recalling that all States Parties to the Convention have undertaken not to hinder in any way the effective exercise of this right, as stipulated by Article 34 of the Convention;

Recalling that positive obligations, including to investigate, form an essential characteristic of the Convention system as a whole;

Recalling also that the Court’s case-law has clearly established that Article 34 of the Convention entails an obligation for States Parties to comply with an indication of interim measures made under Rule 39 of the Rules of Court and that non-compliance may imply a violation of Article 34 of the Convention;

Noting therefore with concern that there have been isolated, but nevertheless alarming, failures to respect and protect the right of individual application (such as obstructing the applicant’s communication with the Court, refusing to allow the applicant to contact his lawyer, bringing pressure to bear on witnesses or bringing inappropriate proceedings against the applicant’s representatives), as found in recent years by the Court;

Deploring any interference with applicants or persons intending to apply to the Court, members of their families, their lawyers and other representatives and witnesses, and being determined to take action to prevent such interference;

Recalling the 1996 European Agreement relating to persons participating in proceedings of the European Court of Human Rights (ETS No. 161);

Recalling its Resolutions ResDH(2001)66 and ResDH(2006)45 on the states' obligation to co-operate with the European Court of Human Rights,

Calls upon the States Parties to:

1. refrain from putting pressure on applicants or persons who have indicated an intention to apply to the Court, members of their families, their lawyers and other representatives and witnesses aimed at deterring applications to the Court, having applications which have already been submitted withdrawn or having proceedings before the Court not pursued;
2. fulfil their positive obligations to protect applicants or persons who have indicated an intention to apply to the Court, members of their families, their lawyers and other representatives and witnesses from reprisals by individuals or groups including, where appropriate, by allowing applicants and witnesses to participate in witness protection programmes and providing appropriate forms of effective protection, including at international level;
3. in this context, take prompt and effective action with regard to any interim measures indicated by the Court so as to ensure compliance with their obligations under the relevant provisions of the Convention;
4. identify and appropriately investigate all cases of alleged interference with the right of individual application, having regard to the positive obligations already arising under the Convention in light of the Court's case-law;
5. take any appropriate further action, in accordance with domestic law, against persons suspected of being the perpetrators and instigators of such interference, including, where justified, by seeking their prosecution and the punishment of those found guilty;
6. if they have not already done so, ratify the 1996 European Agreement relating to persons participating in proceedings of the European Court of Human Rights,

Decides also to examine urgently, particularly in the context of its supervision of the execution of judgments finding a violation of Article 34, to any incident of interference with the right of individual application and encourages the Secretary General to consider exercising his powers under Article 52 of the Convention where justified by the circumstances.

RESOLUTION CM/RES(2010)26 ON THE ESTABLISHMENT OF AN ADVISORY PANEL OF EXPERTS ON CANDIDATES FOR ELECTION AS JUDGE TO THE EUROPEAN COURT OF HUMAN RIGHTS

Adopted by the Committee of Ministers on 10 November 2010

The Committee of Ministers, acting under the terms of Articles 15 and 16 of the Statute of the Council of Europe,

Referring to Article 21 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), as amended by its Protocol No. 14 (CETS No. 194);

Recalling the Interlaken Declaration whereby the High Contracting Parties to the Convention and the Council of Europe were invited to ensure the full satisfaction of the Convention's criteria for office as a judge of the Court and the importance of ensuring the impartiality and quality of the Court;

Convinced that the establishment of a Panel of Experts mandated to advise on the suitability of candidates that the member states intend to put forward for office as judges of the Court would constitute an adequate mechanism in this regard;

Recalling the responsibility of the High Contracting Parties to the Convention to ensure a fair and transparent national selection procedure;

Welcoming the support expressed by all member states for the systematic use of such a mechanism;

Hereby establishes an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (hereinafter the "Panel"), as follows:

1. Mandate

The Panel shall advise the High Contracting Parties whether candidates for election as judges of the European Court of Human Rights meet the criteria stipulated in Article 21§1 of the European Convention on Human Rights.

2. Composition

The Panel shall be composed of seven members, chosen from among members of the highest national courts, former judges of international courts, including the European Court of Human Rights and other lawyers of recognised competence, who shall serve in their personal capacity. The composition of the Panel shall be geographically and gender balanced.

3. Appointment

The members of the Panel shall be appointed by the Committee of Ministers¹ following consultations with the President of the European Court of Human Rights. Proposals for appointment may be submitted by the High Contracting Parties. Any vacancy shall be filled in the same manner. Members shall be appointed for a term of three years, renewable once. Where a member of the Panel does not complete his/her term, a successor will be appointed for a full term. Members of the Panel shall be from different member states.

4. Secretariat

The Secretary General of the Council of Europe shall provide the Panel's secretariat.

5. Functioning

Before submitting a list to the Parliamentary Assembly as provided for in Article 22 of the Convention, each High Contracting Party will forward to the Panel, via its secretariat, the names and curricula vitae of the intended candidates. On the basis of these written submissions, the Panel shall perform its function in accordance with the operating rules appended to this resolution.

Where the Panel finds that all of the persons put forward by a High Contracting Party are suitable candidates, it shall so inform the High Contracting Party without further comment.

Where it is likely that the Panel may find one or more candidates not suitable for office, the chair of the Panel shall contact the High Contracting Party concerned to inform it and/or to obtain any relevant comments. If, in the light of the written submissions and any comments obtained, the Panel considers that one or more of the persons put forward by a High Contracting Party are not suitable, it shall so inform the High Contracting Party, giving reasons for its view, which shall be confidential. The Panel shall in a similar manner consider one or more new candidates who would subsequently be presented by the High Contracting Party.

When a list of three candidates nominated by a High Contracting Party is being considered in accordance with Article 22 of the European Convention on Human Rights, the Panel shall make available to the Parliamentary Assembly in

1. The decision to appoint the members of the Panel shall be taken by the Committee of Ministers by the simple majority of votes within the meaning of Article 10.4 of the Rules of Procedure for the Meetings of the Ministers' Deputies.

writing its views as to whether the candidates meet the criteria stipulated in Article 21§1 of the Convention. Such information shall be confidential.

6. Financial provisions

The operational costs of the Panel, and any reasonable expenses incurred by its members in the exercise of their function, shall be borne by the Council of Europe.

7. Entry into force and transitional provisions

This resolution shall enter into force from the date of its adoption. It shall not apply to any list already submitted to the Parliamentary Assembly on that date. Where selection procedures are already under way, the High Contracting Parties concerned may forward the names and curricula vitae of the intended candidates to the Panel once constituted, time allowing.

Operating Rules

- (i) The Panel shall elect its own chair.
- (ii) The Panel shall adopt its opinions by consensus or, in the absence of consensus, by a qualified majority of five out of seven.
- (iii) The Panel's procedure shall be a written one. Members shall transmit their views on candidates to the chair in writing.
- (iv) The Panel may hold a meeting where it deems this necessary to the performance of its function.
- (v) It shall work in both official languages of the Council of Europe.
- (vi) It shall inform the High Contracting Parties of its views no later than four weeks after the High Contracting Parties have submitted the names and curricula vitae of the intended candidates to the Panel's secretariat.
- (vii) It shall assess the suitability of candidates on the basis of the information provided by the High Contracting Party, which shall be in one of the official languages of the Council of Europe.
- (viii) It may seek additional information or clarification from the High Contracting Party in relation to any candidate under its consideration.
- (ix) It may in exceptional circumstances decide to hold a meeting with representatives of a High Contracting Party in the exercise of its function. It shall be for the Panel to decide whether a meeting is necessary.
- (x) The Panel's proceedings shall be confidential. Any meeting with representatives of a High Contracting Party shall take place in camera.
- (xi) A Panel member who wishes to resign shall so inform the chair of the Panel, who shall inform the Chairman of the Committee of Ministers and the Secretary General.
- (xii) If a member of the Panel is nominated by a High Contracting Party for election as a Judge of the European Court of Human Rights, he/she shall withdraw from the Panel.
- (xiii) The Panel may adopt such internal working methods as it deems necessary to the exercise of its function.

GUIDELINES OF THE COMMITTEE OF MINISTERS ON THE SELECTION OF CANDIDATES FOR THE POST OF JUDGE AT THE EUROPEAN COURT OF HUMAN RIGHTS

Adopted by the Committee of Ministers on 28 March 2012

The Committee of Ministers,

Underlining the fundamental importance of the High Contracting Parties' role in proposing candidates of the highest possible quality for election as judges of the European Court of Human Rights (hereinafter "the Court"), so as to preserve the impartiality and quality of the Court, thereby reinforcing its authority and credibility;

Recalling Articles 21 and 22 of the European Convention on Human Rights (hereinafter "the Convention", ETS No. 5), which, respectively, set out the criteria for office and entrust the Parliamentary Assembly with the task of electing judges from a list of three candidates nominated by each High Contracting Party;

Recalling the Declaration adopted at the High Level Conference on the Future of the European Court of Human Rights (Interlaken, Switzerland, 18 and 19 February 2010), which stressed the importance of maintaining the independence of the judges and of preserving the impartiality and quality of the Court;

Recalling also the Declaration adopted at the High Level Conference on the Future of the European Court of Human Rights (İzmir, Turkey, 26 and 27 April 2011), which cited the need to encourage applications by good potential candidates for the post of judge at the Court, and to ensure a sustainable recruitment of competent judges, with relevant experience, and the impartiality and quality of the Court;

Recalling Committee of Ministers Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (hereinafter the "Advisory Panel"), which reiterated the responsibility of the High Contracting Parties to the Convention to ensure a fair and transparent national selection procedure;

Recalling Recommendation 1649 (2004) of the Parliamentary Assembly on candidates for the European Court of Human Rights and the Committee of Ministers' reply thereto;

Taking note of the various resolutions of the Parliamentary Assembly on the matter, including Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights,

Adopts the following guidelines and encourages High Contracting Parties to implement them and ensure that they are widely disseminated, along with their explanatory memorandum, in particular among all authorities involved in the selection of candidates for the post of judge at the Court, and, if necessary, translated into the official language(s) of the country.

I. SCOPE OF THE GUIDELINES

The present guidelines address selection procedures at national level for candidates for the post of judge at the Court, before a High Contracting Party's list of candidates is transmitted to the Advisory Panel and thereafter to the Parliamentary Assembly of the Council of Europe.

II. CRITERIA FOR THE ESTABLISHMENT OF LISTS OF CANDIDATES

1. Candidates shall be of high moral character.
2. Candidates shall possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
3. Candidates must, as an absolute minimum, be proficient in one official language of the Council of Europe (English or French) and should also possess at least a passive knowledge of the other, so as to be able to play a full part in the work of the Court.
4. Candidates need to have knowledge of the national legal system(s) and of public international law. Practical legal experience is also desirable.
5. If elected, candidates should in general be able to hold office for at least half of the nine-year term before reaching 70 years of age.
6. Candidates should undertake not to engage, if elected and for the duration of their term of office, in any activity incompatible with their independence or impartiality or with the demands of a full-time office.
7. If a candidate is elected, this should not foreseeably result in a frequent and/or long-lasting need to appoint an ad hoc judge.
8. Lists of candidates should as a general rule contain at least one candidate of each sex, unless the sex of the candidates on the list is under-represented on the Court (under 40% of judges) or if exceptional circumstances exist to derogate from this rule.

III. PROCEDURE FOR ELICITING APPLICATIONS

1. The procedure for eliciting applications should be stable and established in advance through codification or by settled administrative practice. This may be a standing procedure or a procedure established in the event of each selection process. Details of the procedure should be made public.

2. The call for applications should be made widely available to the public, in such a manner that it could reasonably be expected to come to the attention of all or most of the potentially suitable candidates.
3. States should, if necessary, consider taking additional appropriate measures in order to ensure that a sufficient number of good applicants present themselves to allow the selection body to propose a satisfactory list of candidates.
4. If the national procedure allows or requires applicants to be proposed by third parties, safeguards should be put into place to ensure that all applicants are considered fairly and impartially, and that suitable applicants are not deterred or prevented from putting themselves forward.
5. A reasonable period of time should be given for the submission of applications.

IV. PROCEDURE FOR DRAWING UP THE RECOMMENDED LIST OF CANDIDATES

1. The body responsible for recommending candidates should be of balanced composition. Its members should collectively have sufficient technical knowledge and command respect and confidence. They should come from a variety of backgrounds, be of similar professional standing and be free from undue influence, although they may seek relevant information from outside sources.
2. All serious applicants should be interviewed unless this is impracticable on account of their number, in which case the body should draw up, based on the applications, a shortlist of the best candidates. Interviews should generally be based upon a standardised format.
3. There should be an assessment of applicants' linguistic abilities, preferably during the interview.
4. All members should be able to participate equally in the body's decision, subject to the requirement that its procedures ensure that it is always able to reach a decision.

V. FINALISATION OF THE LIST OF CANDIDATES

1. Any departure by the final decision-maker from the selection body's recommendation should be justified by reference to the criteria for the establishment of lists of candidates.
2. Applicants should be able to obtain information concerning the examination of their application, where this is consistent with general principles of confidentiality in the context of the national legal system.
3. The final list of candidates to be presented to the Parliamentary Assembly should be made public by the High Contracting Party at national level.

GUIDE TO GOOD PRACTICE IN RESPECT OF DOMESTIC REMEDIES

Adopted by the Committee of Ministers on 18 September 2013

The member States of the Council of Europe have adopted the present Guide in order to promote and assist fulfilment of their obligations under the European Convention on Human Rights. The right to an effective remedy is fundamental to the respect and protection of individual rights. It gives effect to the principle of subsidiarity by establishing the domestic mechanisms that must first be exhausted before individuals may have recourse to the Strasbourg-based control mechanism, namely the European Court of Human Rights.

The implementation of effective remedies should permit a reduction in the Court's workload as a result, on the one hand, of a decrease in the number of cases reaching it and, on the other, of the fact that the detailed treatment of cases at national level would facilitate their later examination by the Court. The right to an effective remedy thus reflects the fundamental role of national judicial systems in the Convention system.

This Guide to good practice in respect of domestic remedies outlines the fundamental legal principles which apply to effective remedies in general, and the characteristics required for remedies in certain specific situations and general remedies to be effective. The specific situations dealt with by the present Guide concern remedies for deprivation of liberty, in relation to both the measure's lawfulness and the conditions of detention, and the way in which the person in detention is treated; investigations in the context of alleged violations of Articles 2 and 3 of the Convention; remedies against removal; and remedies for non-execution of domestic judicial decisions. The Guide also identifies good practices which may provide inspiration to other member States.

Furthermore, the Guide recalls that it is important that national courts and tribunals take into account the principles of the Convention and the case-law of the Court, and outlines national practices in that sense.

I. INTRODUCTION

Article 13 of the European Convention on Human Rights establishes the right to an effective remedy, stating that "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". This is one of the key provisions underly-

ing the Convention's human rights protection system, along with the requirements of Article 1 on the obligation to respect human rights and Article 46 on the execution of judgments of the European Court of Human Rights.

By contributing to the resolution of allegations of violations of the Convention at domestic level, the right to an effective remedy plays a crucial part in the practical application of the principle of subsidiarity. The implementation of effective remedies for all arguable complaints of a 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, of the fact that the detailed treatment of the cases at national level would make their later examination by the Court easier.¹ Furthermore, providing for the retroactivity of new remedies, particularly those designed to deal with systemic or structural problems, helps to reduce the Court's workload by enabling applications pending before the Court to be resolved at national level.² In fact, whereas the Court will normally assess exhaustion of domestic remedies at the date of application, it may depart from this rule when taking note of the implementation of new effective remedies.³ The right to an effective remedy also reflects the fundamental role of national judicial systems for the Convention system, where preventive measures have proved inadequate. In this respect, it should be noted that, in addition to the obligation to ascertain the existence of effective remedies in the light of the Court's case-law, States have the general obligation to solve the problems underlying violations found in the Court's judgments.⁴

Repetitive cases generally reveal a failure to implement effective domestic remedies where judgments given by the Court, particularly pilot judgments or judgments of principle, have given indications as to the general measures needed to avoid future violations. It is crucial that States execute Court judgments fully and rapidly. As the Court has noted, if States fail to provide effective remedies, "individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise ... have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened".⁵

It is also important that national courts and tribunals, when conducting proceedings and formulating judgments, take into account the principles of the Convention, with regard to the case-law of the Court. This helps ensure that the domestic remedies are as effective as possible in remedying violations of the Convention rights, and contributes to the dialogue between the Court and national courts and tribunals.⁶

1. As noted in Committee of Ministers' Recommendation Rec(2004)6 on the improvement of domestic remedies.

2. As noted in Recommendation CM/Rec(2010)3 on effective remedies for excessive length of proceedings.

3. See, for example, *Icyer v. Turkey*, App. No. 18888/02, decision of 12 January 2006, paragraph 72; *Fakhretdinov v. Russia*, App. Nos. 26716/09, 67576/09, 7698/10, 26716/09, 67576/09 and 7698/10, decision of 23 September 2010, paragraph 30; *Latak v. Poland*, App. No. 52070/08, decision of 12 October 2010.

4. As noted in Recommendation Rec(2004)6 cited above.

5. See *Kudła v. Poland*, App. No. 30210/96, judgment of 26 October 2000, paragraph 155.

6. See also paragraph 12 (c) of the Brighton Declaration; this same rationale also underpins the proposal for a system of advisory opinions by the Court (paragraph 12 (d) of the Brighton Declaration).

The implementation of effective domestic remedies for violations of the Convention has been a long-standing concern of the Council of Europe, repeatedly considered a priority at the highest political level, notably at the High-Level Conferences on the Future of the Court held in turn by the Swiss Chairmanship of the Committee of Ministers (Interlaken, Switzerland, 18-19 February 2010), the Turkish Chairmanship (İzmir, Turkey, 26-27 April 2011)⁷ and the United Kingdom Chairmanship (Brighton, United Kingdom, 19-20 April 2012). The Declaration adopted at the Brighton Conference, for example, expressed in particular “the determination of the States Parties to ensure effective implementation of the Convention” by “considering the introduction if necessary of new domestic legal remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention”, and also by “enabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention, having regard to the case-law of the Court, in conducting proceedings and formulating judgments; and in particular enabling litigants, within the appropriate parameters of national judicial procedure but without unnecessary impediments, to draw to the attention of national courts and tribunals any relevant provisions of the Convention and jurisprudence of the Court”. Further to these two provisions, the Declaration invited the Committee of Ministers “to prepare a guide to good practice in respect of domestic remedies”.⁸ Consequently, the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) to draw up this guide.⁹

The guide has two aims. The first is to identify the fundamental legal principles which apply to effective remedies, and the characteristics required for remedies in certain specific situations and general remedies to be effective. The second is to identify good practices which can provide a source of inspiration for other member States. These examples of good practices are not standard models, however. They may be suited only to certain legal systems and constitutional traditions.

Under Article 32 of the Convention, the Court has final jurisdiction to interpret and apply the Convention and its Protocols through its case-law. This case-law, particularly the Court’s pilot judgments and judgments of principle, is the main source for this guide. The interim and final resolutions adopted by the Committee of Ministers in connection with the execution of the Court’s judgments and decisions also provide guidance on the necessary general measures and on good practices, as do the Committee of Ministers’ annual reports on the supervision of the execution of Court judgments. The Committee of Ministers has also dealt with the right to an effective remedy in Recommendations

7. See the İzmir Declaration Follow-up Plan, section B.1 (a).

8. See paragraph 9. (f) ii. of the Brighton Declaration.

9. See the decisions of the Committee of Ministers at its 122nd Session, 23 May 2012, item 2 – Securing the long-term effectiveness of the supervisory mechanism of the European Convention on Human Rights. The initial work on the guide was carried out at two meetings of a select drafting group. It was then examined by the Committee of Experts on the Reform of the Court (DH-GDR) and the Steering Committee for Human Rights (CDDH) before being sent to the Committee of Ministers.

Rec(2004)6 on the improvement of domestic remedies and CM/Rec(2010)3 on effective remedies for excessive length of proceedings, which was accompanied by a guide to good practice.

The guide is also based on the national reports on measures taken to implement relevant parts of the Interlaken and İzmir Declarations, which have been the subject of analysis and recommendations forming part of the CDDH's follow-up,¹⁰ and on any other relevant information passed on by the member States in the course of the preparation work for the guide. Work carried out by other Council of Europe bodies was also taken into account. In this connection, member States are encouraged to consult the European Commission for Democracy through Law (the Venice Commission) and the European Commission for the Efficiency of Justice (CEPEJ) where necessary, for guidance and assistance in making the necessary improvements to their domestic systems.

The guide should be translated where appropriate and distributed widely, particularly to the following bodies and persons:

- ▶ national and – for those that have powers in this area – regional legislative bodies;
- ▶ bodies responsible for proposing procedural or legislative reforms such as judicial councils, depending on the organisation of various national legal systems;
- ▶ judicial bodies, particularly the higher national courts;
- ▶ officials responsible for the administration of courts, including registrars and officials dealing with the execution or implementation of decisions and judgments;
- ▶ the relevant staff of government services responsible for the administration of justice, whether at national or regional level;
- ▶ the staff of other public services responsible for the non-judicial stages of the relevant procedures, particularly the police, the prosecuting authorities, the prison authorities or those in charge of any other place of detention, while taking account of specific national features.

II. GENERAL CHARACTERISTICS OF AN EFFECTIVE REMEDY

Article 13 of the Convention, which sets out the right to an effective remedy, imposes the following obligation on States Parties:

“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.”

According to the Court's case-law, this provision has “close affinity” with Article 35 paragraph 1 of the Convention, whereby the Court may only deal with the matter after all domestic remedies have been exhausted insofar as “that rule

10. See the CDDH's report on the measures taken by the member States to implement relevant parts of the Interlaken and İzmir Declarations, document CDDH(2012)R76 Addendum I, of which the Committee of Ministers took note at its 1159th meeting (16 January 2013).

is based on the assumption, reflected in Article 13 of the Convention [...] that there is an effective remedy available in the domestic system in respect of the alleged breach”.¹¹ However, “the only remedies which Article 35 paragraph 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient. The existence of such remedies must be sufficiently certain, not only in theory but also in practice”.¹²

It should be further noted that Article 5, paragraph 4, which stipulates that everyone who is deprived of his or her liberty shall be entitled to institute proceedings before a court to verify compliance with the procedural and substantive requirements that are essential for the lawfulness of his or her deprivation of liberty, is a specific requirement in addition to the general requirements of Article 13.¹³ The scope of the obligations under this provision is set out in item ii. page 142 below. This is why the case-law cited concerns also Articles 5(3)-(5) and 35. In addition, the Court has found specific procedural obligations under Articles 2 and 3 of the Convention to investigate in certain circumstances allegations of violations suffered.¹⁴

i. The meaning of “remedy” within Article 13

The Convention requires that a “remedy” be such as to allow the competent domestic authorities both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.¹⁵ A remedy is only effective if it is available and sufficient. It must be sufficiently certain not only in theory but also in practice,¹⁶ and must be effective in practice as well as in law,¹⁷ having regard to the individual circumstances of the case. Its effectiveness does not, however, depend on the certainty of a favourable outcome for the applicant.¹⁸

Article 13 does not require any particular form of remedy, States having a margin of discretion in how to comply with their obligation, but the nature of the right at stake has implications for the type of remedy the State is required to provide.¹⁹ Even if a single remedy does not by itself entirely satisfy the requirements

11. See, for example, *McFarlane v. Ireland*, App. No. 31333/06, judgment of the Grand Chamber of 10 September 2010, paragraph 107.

12. *Ibidem*.

13. See *Claes v. Belgium*, App. No. 43418/09, judgment of 10 January 2013, paragraph 123; *A and Others v. the United Kingdom*, App. No. 3455/05, judgment of the Grand Chamber of 19 February 2009, paragraph 202.

14. The Court has also found procedural obligations under Articles 4 and 8 of the Convention, although these are not addressed in the present Guide: see respectively *Rantsev v. Cyprus and Russia*, App. No. 25965/04, judgment of 7 January 2010 and *M.C. v. Bulgaria*, App. No. 39272/98, judgment of 4 December 2003.

15. See *M.S.S. v. Belgium and Greece*, App. No. 30696/09, judgment of 21 January 2011, paragraph 288; *Halford v. the United Kingdom*, App. No. 20605/92, judgment of 25 June 1997, paragraph 64.

16. See *McFarlane v. Ireland*, App. No. 31333/06, 10 September 2010, paragraph 114; *Riccardi Pizzati v. Italy*, App. No. 62361/00, Grand Chamber judgment of 29 March 2006, paragraph 38.

17. See *El-Masri v. “the former Yugoslav Republic of Macedonia”*, App. No. 39630/09, 13 December 2012, paragraph 255; *Kudła v. Poland*, App. No. 30210/96, judgment of 26 October 2000, paragraph 152.

18. See *Kudła v. Poland*, op. cit., paragraph 157.

19. See *Budayeva and Others v. Russia*, App. No. 15339/02 etc., judgment of 20 March 2008, paragraphs 190-191.

of Article 13, the aggregate of remedies provided for under domestic law may do so.²⁰ In assessing effectiveness, account must be taken not only of formal remedies available, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant.²¹

ii. The meaning of “national authority” within Article 13

The “national 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 before it is effective.²²

iii. The meaning of “violation” within Article 13

Article 13 does not require a domestic remedy in respect of any supposed grievance, no matter how unmeritorious; the claim of a violation must be an arguable one. The Court has not given a general definition of arguability. It has, however, indicated that “where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, [he/she] should have a remedy before a national authority in order both to have [his/her] claim decided and, if appropriate, to obtain redress.”²³ The question of whether the claim is arguable should be determined in the light of the particular facts and the nature of the legal issue or issues raised. The Court follows various approaches to conclude that the grievances raised before it are not arguable under Article 13. It can note that the evidence presented by the applicants does not identify “any indication of a violation”²⁴ or refer to the considerations which led it to conclude that there had been no violation of the provision concerned, to consider that the grievance raised by the applicant was not “arguable.”²⁵

III. SPECIFIC CHARACTERISTICS OF REMEDIES IN RESPONSE TO CERTAIN PARTICULAR SITUATIONS

It is always the case that the scope of the obligation arising under Article 13 varies according to the nature of the complaint based on the Convention that is made by the applicant. This section thus deals with the characteristics that must be shown by a domestic remedy responding to certain specific situations, namely remedies for deprivation of liberty, investigations in the context of alleged violations of Articles 2 and 3 of the Convention, remedies against removal and remedies for non-execution of domestic court decisions. As regards effective remedies for excessive length of proceedings, one should refer to the relevant Recommendation CM/Rec(2010)3, accompanied by a guide to good practice.

20. See *De Souza Ribeiro v. France*, App. No. 22689/07, 13 December 2012, paragraph 79; *Kudła v. Poland*, op. cit., paragraph 157.

21. See *Đorđević v. Croatia*, App. No. 41526/10, 24 July 2012, paragraph 101; *Van Oosterwijk v. Belgium*, App. No. 7654/76, judgment of 6 November 1980, paragraphs 36–40.

22. See *Kudła v. Poland*, op. cit., paragraph 157.

23. See *Leander v. Sweden*, App. No. 9248/81, judgment of 26 March 1987, paragraph 77.

24. See, for example, *Hüsnüye Tekin v. Turkey*, App. No. 50971/99, judgment of 25 October 2005.

25. See, for example, *Sevgin and Ince v. Turkey*, App. No. 46262/99, judgment of 20 September 2005.

A. Domestic remedies in respect of deprivation of liberty

The main purpose of Article 5 of the Convention is to protect persons from arbitrary or unjustified detention.²⁶ In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, “the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.”²⁷ The notion of deprivation of liberty contains both an objective element of a person’s confinement in a particular restricted space for a non-negligible length of time, and a subjective element in that the person has not validly consented to the confinement in question.²⁸ Article 5 is therefore applicable in numerous situations, for example placement in a psychiatric or social care institution,²⁹ confinement in airport transit zones,³⁰ questioning in a police station³¹ or stops and searches by the police,³² or house arrest.³³

Domestic remedies in respect of deprivation of liberty must concern both the measure’s lawfulness and the conditions of detention, including the way in which the person in detention is treated.

1. The lawfulness of deprivation of liberty

The procedural safeguards to which persons deprived of liberty must be entitled include the right, for persons arrested or detained on the grounds that they are suspected of having committed a criminal offence, to be brought before a judge promptly and to have their case heard within a reasonable time or to be released pending trial, as stipulated in Article 5, paragraph 3 of the Convention; the right for everyone who is held in detention to have lawfulness of detention speedily examined by a Court, as stipulated in Article 5, paragraph 4; and the right to compensation for unlawful detention, as stipulated in Article 5, paragraph 5.

i. **The right for persons arrested or detained on the grounds that they are suspected of having committed a criminal offence to be brought before a judge promptly and to have their case heard within a reasonable time or to be released pending trial (Article 5, paragraph 3)**

Article 5, paragraph 3, does not provide for any possible exceptions to the obligation to bring a person before a judge promptly after his or her arrest or detention.³⁴ Review must be automatic and cannot depend on an application

26. See *McKay v. the United Kingdom*, App. No. 543/03, Grand Chamber judgment of 3 October 2006, paragraph 30. For an extended analysis of the case-law related to Article 5 of the Convention, see the Guide on Article 5 published by the Research Division of the Court.

27. See *Guzzardi v. Italy*, App. No. 7367/76, judgment of 6 November 1980, paragraph 92.

28. See *Stanev v. Bulgaria*, App. No. 36760/06, Grand Chamber judgment of 17 January 2012, paragraph 117.

29. See, for example, *Stanev v. Bulgaria*; *Storck v. Germany*, App. No. 61603/00, judgment of 16 June 2005.

30. See, for example, *Amuur v. France*, App. No. 19776/92, judgment of 25 June 1996.

31. See, for example, *Creanga v. Romania*, App. No. 29226/03, Grand Chamber judgment of 23 February 2012.

32. See, for example, *Foka v. Turkey*, App. No. 28940/95, judgment of 24 June 2008.

33. See, for example, *Lavents v. Latvia*, App. No. 58442/00, judgment of 28 November 2002.

34. See *Bergmann v. Estonia*, App. No. 38241/04, judgment of 29 May 2008, paragraph 45.

being made by the detained person,³⁵ so as to avoid situations in which persons subjected to ill-treatment might be incapable of lodging an application asking for a review of their detention; the same might also be true of other vulnerable categories of arrested persons, such as the mentally frail³⁶ or those who do not speak the language of the judge.³⁷ Judges must be impartial and independent.³⁸ They must hear the person brought before them before handing down their decision³⁹ and examine the merits of the application for review of detention.⁴⁰ If there are no reasons justifying the person's detention, the judge must be empowered to order his or her release.⁴¹

The second part of Article 5, paragraph 3, requires national courts to review the need to keep persons in detention with a view to guaranteeing their release if the circumstances no longer justify their deprivation of liberty. It is contrary to the safeguards set out in this provision more or less automatically to continue to hold a person in detention. The burden of proof cannot be reversed, and detainees cannot be obliged to prove that there are reasons for releasing them.⁴²

Example of good practice

Armenian criminal law makes a distinction between detention during the investigation and detention during the trial. Unlike detention during the investigation, which is ordered and extended by a court decision each time for no more than two months and cannot exceed a certain period of time, no maximum detention period is prescribed during the trial. Once the trial court decides on the accused person's detention during the trial, it is not obliged to refer to that issue of its own motion thereafter. However, in accordance with Articles 65 and 312 of the Criminal Code of Procedure, upon a motion of the defence the trial court can replace the detention with another measure of restraint. The Strasbourg Court has indicated that the possibility of lodging such motion may be considered as an effective remedy as far as an alleged violation of Article 5 paragraph 3 is concerned.⁴³

ii. The right to have lawfulness of detention speedily examined by a court (Article 5, paragraph 4)

According to Article 5, paragraph 4, of the Convention, "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". Arrested or detained persons are entitled to request that a court review the procedural and substantive conditions necessary for their deprivation of liberty to be "lawful" within the meaning of Article 5, paragraph 1, of the Convention.⁴⁴ The possibility of applying for review

35. See *McKay v. the United Kingdom*, paragraph 34.

36. *Ibid.*

37. See *Ladent v. Poland*, paragraph 74.

38. See, for example, *Brincat v. Italy*, paragraph 21.

39. See, for example, *Schiesser v. Switzerland*, paragraph 31.

40. See *Krejčíř v. the Czech Republic*, paragraph 89.

41. See *Assenov v. Bulgaria*, paragraph 146.

42. See *Bykov v. Russia*, App. No. 4378/02, Grand Chamber judgment of 10 March 2009, paragraph 66.

43. See *Martirosyan v. Armenia*, App. No. 23341/06, judgment of 5 February 2013.

44. See, for example, *Idalov v. Russia*, App. No. 5826/03, Grand Chamber judgment of 22 May 2012.

must be offered as soon as the person concerned has been taken into custody and, if necessary, the offer must subsequently be repeated at reasonable intervals.⁴⁵ The court to which the person deprived of liberty must have access must be an independent judicial body.⁴⁶ If there is a second level of jurisdiction, it must in principle accord detainees the same guarantees on appeal as at first instance, *inter alia* by ensuring that proceedings are conducted “speedily”.⁴⁷

Article 5, paragraph 4, contains special procedural safeguards that are distinct from those set out in Article 6, paragraph 1, of the Convention concerning the right to a fair trial. It constitutes a *lex specialis* to this latest provision,⁴⁸ as well as to the more general requirements of Article 13 concerning the right to an effective remedy.⁴⁹ The proceedings referred to in Article 5, paragraph 4, must be of a judicial nature and offer certain procedural safeguards appropriate to the nature of the deprivation of liberty in question.⁵⁰ A hearing is required in the case of a person whose detention falls within the ambit of Article 5, paragraph 1(c), covering pre-trial detention. The possibility for a detainee to be heard either in person or, where necessary, through some form of representation is a fundamental safeguard.⁵¹ Article 5, paragraph 4, does not, however, require that a detained person be heard every time he or she appeals against a decision extending detention,⁵² although there is a right to be heard at reasonable intervals.⁵³

The proceedings must be adversarial and must always ensure “equality of arms” between the parties.⁵⁴ Persons who are entitled to initiate proceedings to have the lawfulness of their detention decided cannot make effective use of that right unless they are promptly and adequately informed of the reasons why they have been deprived of their liberty.⁵⁵ In the event of pre-trial detention, persons deprived of liberty must be given a genuine opportunity to challenge the elements underlying the accusations against them. This requirement means that the court has to hear witnesses.⁵⁶ It may also order that the detainee or their representative be able to access those documents in the investigation file on which the prosecution is based.⁵⁷

45. See *Molotchko v. Ukraine*, App. No. 12275/10, judgment of 26 April 2012, paragraph 148; *Kurt v. Turkey*, judgment of 25 May 1998, paragraph 123.

46. See *Stephens v. Malta (No. 1)*, App. No. 11956/07, judgment of 21 April 2009.

47. See *Kucera v. Slovakia*, App. No. 48666/99, judgment of 17 July 2007, paragraph 107; *Smatana v. the Czech Republic*, App. No. 18642/04, 27 September 2007, paragraph 128, case wherein the Court applied the principle to a third level of jurisdiction, when examining the application for release pursuant to Article 5, paragraph 4.

48. See *Claes v. Belgium*, paragraph 123.

49. See *A. and Others v. the United Kingdom*, paragraph 202; *Claes v. Belgium*, paragraph 123.

50. See *Idalov v. Russia*, paragraph 161.

51. *Ibid.*

52. See *Saghinadze and Others v. Georgia*, App. No. 18768/05, 27 May 2010, paragraph 150.

53. See *Altinok v. Turkey*, App. No. 31610/08, judgment of 29 November 2011, paragraph 53; *Catal v. Turkey*, App. No. 26808/08, judgment of 17 July 2012, paragraph 33.

54. See *A. and Others v. the United Kingdom*, paragraph 204.

55. See *Van der Leer v. the Netherlands*, App. No. 11509/85, judgment of 21 February 1990, paragraph 28.

56. See *Turcan and Turcan v. Moldova*, App. No. 39835/05, judgment of 23 October 2007, paragraphs 67-70.

57. See *Korneykova v. Ukraine*, App. No. 39884/05, judgment of 19 January 2012, paragraph 68.

The Court has set out principles governing the oversight of the deprivation of liberty of a person of unsound mind.⁵⁸ In addition to the safeguards applicable to everyone deprived of his or her liberty, special procedural safeguards may in fact be necessary to protect those who, on account of their mental disorders, are not fully capable of acting for themselves.⁵⁹ An individual who has not been associated, either personally or through a representative, in the proceedings leading to the confinement, has grounds to argue that the proceedings were in breach of Article 5, paragraph 4.⁶⁰ Confinement is also considered of inappropriate nature where the individual declared deprived of his or her legal capacity, has not been informed that a lawyer was appointed to represent him or her, and has never met with the lawyer.⁶¹ For persons who are declared deprived of their legal capacity and can therefore not oversee their detention personally, an automatic judicial review must be required.⁶² It is in fact crucial that the individual have access to a court and the possibility to be heard before a court personally or through a representative. The Court has stipulated that these principles are applicable both where detention has been authorised by a judicial authority and where the placement in a detention centre has been initiated by a private individual, namely the guardian of the person of unsound mind, and authorised by non-judicial authorities.⁶³ With regard to detention in the psychiatric ward of a prison, although the remedy may meet the requirements of Article 5, paragraph 4, the proceedings will be rendered ineffective if the review body refuses to visit the place of detention to ascertain whether it is of inappropriate nature, this being an essential condition for the detention to be lawful.⁶⁴

Persons deprived of liberty must obtain a speedy judicial decision concerning the lawfulness of their detention and ordering its termination if it proves to be unlawful.⁶⁵ The promptness with which the court rules on the lawfulness of the detention can be assessed by reference to the period starting from the moment that the application for release was made and ending with the final determination of the legality of the applicant's detention.⁶⁶ In verifying whether the requirement of a speedy judicial decision has been met, factors comparable to those which play a role with respect to the requirement of trial within a reasonable time under Article 5, paragraph 3, and Article 6, paragraph 1, of the Convention may be taken into consideration, including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter.⁶⁷

58. See *Mihailovs v. Latvia*, App. No. 35939/10, 22 January 2013, paragraph 154; *Megyeri v. Germany*, App. No. 133770/88, judgment of 12 May 1992, paragraph 22.

59. See *Claes v. Belgium*, paragraph 128.

60. See *Winterwerp v. the Netherlands*, App. No. 6301/73, judgment of 24 October 1979, paragraph 61.

61. See *Beiere v. Latvia*, App. No. 30954/05, 29 November 2011, paragraph 52.

62. See *Shtukaturov v. Russia*, App. No. 44009/05, judgment of 27 March 2008, paragraph 123.

63. See *Mihailovs v. Latvia*, paragraph 155.

64. See *Claes v. Belgium*, paragraphs 131-134.

65. See *Idalov v. Russia*, paragraph 154.

66. See *Sanchez-Reisse v. Switzerland*, App. No. 9862/82, judgment of 21 October 1986, paragraph 54.

67. See *Mooren v. Germany*, App. No. 11364/03, Grand Chamber judgment of 9 July 2009, paragraph 106.

Examples of good practice

Concerning placement and prolongation of detention in a deportation centre, the Court considered that the fact that the Estonian domestic courts prolong the person's detention every two months, assessing the feasibility of expulsion and the steps taken by the authorities to achieve it, provided an important procedural guarantee for the applicant. Indeed, the Obligation to Leave and Prohibition of Entry Act stipulates that if it is not possible to complete expulsion within 48 hours of the alien's arrest, the person could be placed in a deportation centre, subject to judicial authorisation, until their expulsion, but for no longer than two months. If it is impossible to enforce expulsion within that period, an administrative court shall extend the term of detention by up to two months at a time until expulsion is enforced or the alien is released. Furthermore, according to the Code of Administrative Court Procedure, an administrative judge shall grant and extend a permission to take an administrative measure, declare an administrative measure justified, or revoke a permission to take an administrative measure. These decisions can be appealed. It means that a remedy exists guaranteeing regular judicial review of the grounds of detention.⁶⁸

In the context of the provisional arrest in Estonia of a person to be extradited, the Court considered that the review of the lawfulness of detention was incorporated in the decision by which the remand in custody for two months was ordered. The review of the lawfulness of the detention can further be seen as having been incorporated in the decision on the lawfulness of extradition on the basis of which the detention was extended. Despite the lack of a fixed time-limit in the latter judicial decision, the Court was satisfied that paragraph 447(7) of the Estonian Code of Criminal Procedure set one year as the maximum length of detention pending extradition. Had the domestic courts found that the extradition had become legally impossible or had the authorities been unable to conclude the extraction within one year from his arrest, the person would have been released. Thus the Court considered that the review of the lawfulness of the detention was in conformity with the requirements of Article 5, paragraph 4, of the Convention.⁶⁹

In Romania, during trial, the competent judicial authority verifies *ex officio* every 60 days if the circumstances still justify the deprivation of liberty. If the competent judicial authority finds the detention to be unlawful or no longer necessary, it revokes the measure and orders immediate release. This judgment is subject to appeal on points of law, to be examined within three days of introduction. The Court has ruled that the review of the lawfulness of detention, as required by Article 5 § 4 of the Convention, is incorporated in the first instance judgment and the subsequent declaration of guilt, the legal establishment of the offense being sufficient to justify the continued detention of the applicant.⁷⁰ The verification of the legality of detention is considered effective if the court of first

68. See *Dolinskiy v. Estonia*, App. No. 14160/08, decision of 2 February 2010.

69. See *Taylor v. Estonia*, App. No. 37038/09, decision of 26 June 2012.

70. See *Negoescu v. Romania*, App. No. 55450/00, decision of 17 March 2005.

instance analyses it thoroughly and the appeal on points of law is an additional guarantee for this verification, its effectiveness not being affected by the duration of the examination of the appeal.⁷¹

iii. The right to compensation for unlawful detention (Article 5, paragraph 5)

According to Article 5, paragraph 5, of the Convention, “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”. The right to compensation presupposes that a violation of one of the other paragraphs of Article 5 has been established by either a domestic authority or the Court itself.⁷² It creates a direct and enforceable right to compensation before the national courts.⁷³ The right to redress must be ensured with a sufficient degree of certainty⁷⁴ and redress must be possible both in theory⁷⁵ and in practice.⁷⁶ In order to amount to an effective remedy, an award of compensation for unlawful detention must not depend on the ultimate acquittal or exoneration of the detainee.⁷⁷ The national authorities must interpret and apply their national law without excessive formalism.⁷⁸ For example, although Article 5, paragraph 5, does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach, excessive formalism in requiring proof of non-pecuniary damage resulting from unlawful detention is incompatible with the right to redress.⁷⁹ The amount of compensation awarded cannot be considerably lower than that awarded by the Court in similar cases.⁸⁰ Finally, crediting a period of pre-trial detention towards a penalty does not amount to compensation as required by Article 5, paragraph 5.⁸¹

Examples of good practice

In Romania, Article 504 of the Code of Criminal Procedure provides for the right to compensation for illegal detention. According to this provision, the following persons are entitled to compensation: a person who has been convicted, in case of an acquittal; a person who was illegally deprived of liberty or whose liberty was unlawfully restricted; or a person who was deprived of liberty after expiration of the statutory limitation, amnesty or decriminalisation of the offence. Deprivation or unlawful restriction of liberty should be established,

71. See *Lapusan v. Romania*, App. No. 29723/03, 3 June 2008, paragraphs 45–46, *Ceuta v. Romania*, App. No. 1136/05, decision of 6 November 2012, paragraph 25.

72. See *N.C. v. Italy*, App. No. 24952/94, Grand Chamber judgment of 18 December 2002, paragraph 49.

73. See *A. and Others v. the United Kingdom*, paragraph 229.

74. See *Ciulla v. Italy*, App. No. 11152/84, judgment of 22 February 1989, paragraph 44.

75. See *Dubovik v. Ukraine*, App. No. 33210/07, judgment of 15 October 2009, paragraph 74.

76. See *Chitayev and Chitayev v. Russia*, App. No. 59334/00, judgment of 18 January 2007.

77. See *Nechiporuk and Yonkalo v. Ukraine*, App. No. 42310/04, judgment of 21 April 2011, paragraph 231.

78. See *Houtman and Meeus v. Belgium*, App. No. 22945/07, judgment of 17 March 2009, paragraph 44.

79. See *Danev v. Bulgaria*, App. No. 9411/05, judgment of 2 September 2010, paragraphs 34–35.

80. See *Ganea v. Moldova*, App. No. 2474/06, judgment of 17 May 2011.

81. See *Wloch v. Poland (2)*, App. No. 33475/08, judgment of 10 May 2011, paragraph 32.

where appropriate, by order of the prosecutor revoking the measure of deprivation or restriction of liberty, by order of the prosecutor terminating the criminal prosecution or by decision of the court revoking the measure of deprivation or restriction of liberty or by final judgment of acquittal or termination of the criminal proceedings. The Court has considered that this remedy is effective when there is an initial finding of unlawfulness of the detention, underlining that the Constitutional Court had considered that the provisions of the Code of Criminal Procedure should be interpreted as covering all forms of judicial error and that there was a tendency on the part of the courts to apply Articles 998 and 999 of the Civil Code on criminal responsibility and, directly, Article 5(5) of the Convention to fill the gaps in the Code of Criminal Procedure.⁸² The Court did however note that it was not putting into question its previous observations on the ineffectiveness of this remedy where there had been no prior findings on the unlawfulness of detention.⁸³

In Slovakia, the State Liability Act deals with claims for compensation for pecuniary and non-pecuniary damage caused by public authorities, including in the context of remand in custody. Claims for damages fall within the jurisdiction of the ordinary courts. Moreover, there is another procedure under Article 127 of the Constitution which may also result notably in an award of compensation in respect of damage due to a violation of the rights under Article 5, paragraphs 1 to 4, to the Convention. The Court has found that in certain circumstances, the combination of these two domestic legal provisions was compatible with the requirements of Article 5(5) of the Convention.⁸⁴

iv. Unacknowledged detention

Unacknowledged detention of a person constitutes a particularly grave violation of Article 5 of the Convention.⁸⁵ It is incumbent on the authorities that detain an individual to account for his or her whereabouts. The Court considers that Article 5 must be seen as requiring the authorities “to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since”.⁸⁶ Moreover, “where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure”. The Court considers that “seen in these terms, the requirements of Article 13 are broader than a Contracting State’s obligation under

82. See *Tomuleț v. Romania*, App. No.1558/05, decision of 16 November 2010.

83. See *Tomuleț v. Romania*, *Ogiță v. Romania*, App. No. 24708/03, 27 May 2010, paragraph 56; *Degeratu v. Romania*, App. No. 35104/02, 6 July 2010, paragraph 59.

84. See *Loyka v. Slovakia*, App. No. 16502/09, decision of 9 October 2012.

85. See, for example, *Aslakhanova and Others v. Russia*, App. Nos. 2944/06, 50184/07, 332/08 and 42509/10, judgment of 18 December 2012, paragraph 132.

86. See *Kurt v. Turkey*, judgment of 25 May 1998, paragraph 124.

Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible.”⁸⁷

2. Remedies relating to alleged violations of Article 3 of the Convention in the context of deprivation of liberty

In order to appraise the effectiveness of remedies concerning allegations of violation of Article 3 of the Convention in the context of deprivation of liberty, which can relate to either unsatisfactory conditions of detention or the treatment of the person deprived of liberty, the Court has indicated that the question is whether the person can obtain direct and appropriate redress;⁸⁸ such redress must not consist merely of indirect protection of rights, which means that the remedy must be directly accessible to the detained person.⁸⁹ “The preventive and compensatory remedies must coexist and complement each other”,⁹⁰ an exclusively compensatory remedy cannot be considered sufficient. Concerning persons detained by the authorities, strong presumptions of fact will arise in respect of injuries and death occurring during such detention and the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.⁹¹

i. Preventive remedies

The Court considers that the optimum type of redress is rapid cessation of the violation of the right not to be subjected to inhuman or degrading treatment.⁹² The remedy must be effective in practice, i.e. it must be capable of preventing the continuation of the alleged violation and of ensuring that the applicant’s material conditions of detention will improve.⁹³ This principle is also applicable to conditions of confinement in a psychiatric ward.⁹⁴ More particularly, as regards the alleged violations of Article 3 of the Convention concerning lack of adequate care for a detainee suffering from a serious illness, the preven-

87. See *Kurt*, paragraph 140, *Er and Others v. Turkey*, App. No. 23016/04, judgment of 31 July 2012, paragraph 111 and *Timurtas v. Turkey*, App. No. 23531/94, judgment of 13 June 2000, paragraph 111.

88. See *Torreggiani and Others v. Italy*, App. No. 43517/09, pilot judgment of 8 January 2013, paragraph 50.

89. See *Mandić and Jović v. Slovenia*, App. Nos. 5774/10 and 5985/10, judgment of 20 October 2011, paragraph 107. In this case, the Court noted that where a prisoner transfer request, on whatever grounds, particularly for reasons of prison overcrowding, can only be granted by the prison authorities, such a remedy is not directly accessible to the applicant, and consequently cannot be considered effective.

90. See *Ananyev and Others v. Russia*, App. Nos. 42525/07 and 60800/08, 10 October 2012, paragraph 98.

91. See e.g. *Salman v. Turkey*, App. No. 21986/93, Grand Chamber judgment of 27 June 2000, paragraph 100.

92. See *Torreggiani and Others v. Italy*, paragraph 96.

93. See the cases of *Torreggiani and Others v. Italy*, paragraph 55; *Cenbauer v. Croatia* (decision), App. No. 73786/01, 5 February 2004; *Norbert Sikorski v. Poland*, App. No. 17599/05, paragraph 116, 22 October 2009; *Mandić and Jović v. Slovenia*, paragraph 116.

94. See *Parascineti v. Romania*, App. No. 32060/05, 13 March 2012, paragraph 38.

tive remedy must ensure access to direct and timely relief.⁹⁵ The required speediness of such assistance depends on the nature of the health problem. It is much more stringent where there is a risk of death or irreparable damage to health.⁹⁶

The question of the judicial nature of the remedy is not decisive. For instance, it has been noted that, under certain circumstances, administrative remedies may prove effective.⁹⁷ The authority responsible for processing the complaint should be competent to verify the alleged violations. The authority must be independent, such as the *Independent Monitoring Boards* in the United Kingdom or the Complaints Commission (*beklagcommissie*) in the Netherlands. The supervisory authority must also have the authority to investigate complaints, with the participation of the complainant, and to issue binding and enforceable decisions.⁹⁸

Furthermore, in connection with disciplinary measures imposed on a prisoner, a remedy which cannot have timely effect is neither adequate nor effective and, in view of the major repercussions of detention in a disciplinary cell, an effective remedy must enable the prisoner to challenge both the form and the substance of, and therefore the reasons for, such a measure in court.⁹⁹ The appellant is entitled to a remedy against such a sanction before it has either been executed or come to an end,¹⁰⁰ and consequently the remedy must have minimum guarantees as to promptness.¹⁰¹

Examples of good practice

In Greece, the Penitentiary Code and the Code of Criminal Procedure provide various remedies allowing the detainee to lodge a complaint regarding his/her personal situation,¹⁰² notably the alleged deterioration of his/her health due to a lack of medical care.¹⁰³ Article 572 of the Code of Criminal Procedure provides for referral to a prosecutor in charge of executing sentences and implementing security measures, who is required to visit the prison once a week. Furthermore, Articles 6 and 86 of the Penitentiary Code recognise the right of a detainee to seize the prison Council and lodge an appeal, where necessary, before the court in charge of executing sentences. The Court noted, however, that these remedies cannot address applicants' complaints in cases where the applicant is

95. See *Čuprakovs v. Latvia*, App. No. 8543/04, judgment of 18 December 2012, paragraph 50; *Kadikis v. Latvia*, App. No. 62393/00, judgment of 4 May 2006, paragraph 62; *Goginashvili v. Georgia*, App. No. 47729/08, judgment of 4 October 2011, paragraph 49.

96. See *Čuprakovs v. Latvia*, paragraphs 53-55.

97. See the cases of *Torreggiani and Others v. Italy*, op. cit., paragraph 51, and *Norbert Sikorski v. Poland*, App. No. 17599/05, 22 October 2009, paragraph 111.

98. See the aforementioned case of *Ananyev and Others v. Russia*, paragraphs 215-216.

99. See the case of *Payet v. France*, App. No. 19606/08, 20 January 2011, paragraph 133.

100. See *Keenan v. the United Kingdom*, App. No. 27229/95, 3 April 2001, paragraph 127.

101. See, for example, *Plathey v. France*, App. Nos. 48337/09 and 48337/09, 10 November 2011, paragraphs 75-76, case in which the Court found that existing remedies did not allow the intervention of a judge before the sanction began to take effect.

102. See *Mathloom v. Greece*, App. No. 48883/07, 24 April 2012, paragraphs 48-50; *Tsivis v. Greece*, App. No. 11553/05, 6 December 2007, paragraph 19.

103. See *Nieciecki v. Greece*, App. No. 11677/11, 4 December 2012, paragraphs 37-40.

not complaining solely about his/her personal situation, but also claiming to have been personally affected by the prison's conditions, which concern general issues and affect all the detainees.¹⁰⁴

In France, the effectiveness of remedies allowing decisions affecting detainees' Convention rights to be challenged depends on the possibility of submitting such decisions (such as solitary confinement, multiple transfers, repeated searches of detainees) to supervision by the administrative courts via an urgent procedure, followed, where appropriate, by reversal of the decision.¹⁰⁵

In Romania, from June 2003, Government Emergency Ordinance No. 56/2003 introduced an appeal before the courts against any act of the prison authorities. The Ordinance was subsequently replaced by Law No. 275/2006. To the extent that a prisoner's claim concerned deficiencies in providing adequate care or adequate food, medical treatment, right to correspondence or other rights of detainees, the Court held that the complaint represents an effective domestic remedy.¹⁰⁶ This remedy was deemed effective even in a situation in which, at the date of the entry into force of the Ordinance, an application had already been pending with the Court. However, in the circumstances of the case, the gravity of the allegations made (lack of medical treatment and interference with the right to correspondence) were of such nature that they would require immediate action by the authorities. Moreover, the Court noted that this remedy was specifically designed to provide direct redress for such complaints, thus putting an end to a structural problem that existed in the national legal system before its adoption. The Court considered that it was in the applicant's interest to lodge a complaint with the courts under the newly introduced procedure when it became available, in order to allow the domestic authorities to put the situation right as swiftly as possible.¹⁰⁷ The Court reiterated, however, that for the general conditions of detention, in particular the alleged overcrowding, the detainees could not be required to have recourse to any remedy.¹⁰⁸

In Serbia, concerning a complaint about the health care provided in detention, the Court considered that the applicant should have fully pursued the administrative mechanism, and thereafter made use of the judicial review procedure, as provided by the Enforcement of Criminal Sanctions Act 2005 and the Administrative Disputes Act 2009, highlighting the existence of relevant case-law of the competent domestic courts. In addition, the Court also recalled that a constitutional appeal should, in principle, also be considered as an effective

104. See *Nisiotis v. Greece*, App. No. 34704/08, 10 February 2011, paragraph 29; *Samaras and Others v. Greece*, App. No. 11463/09, 28 February 2012, paragraph 48; *Mathloom v. Greece*, paragraph 49; *Nieciecki v. Greece*, paragraph 41.

105. See *Khider v. France*, App. No. 39364/05, 9 July 2009, paragraph 140; *Alboreo v. France*, App. No. 51019/08, 20 January 2011, paragraph 185; *Payet v. France*, App. No. 19606/08, paragraph 122; *El Shennawy v. France*, App. No. 51246/08, 20 January 2011, paragraph 57.

106. See *Dobri v. Romania*, App. No. 25153/04, 14 December 2012.

107. See *Petrea v. Romania*, App. No. 4792/03, 29 April 2008, paragraph 35, *Zarafim v. Romania*, App. No. 24082/03, decision of 13 March 2012, paragraph 35.

108. See *Petrea v. Romania*, paragraph 37, *Măciucă v. Romania*, App. No. 25763/03, 26 May 2009, paragraph 19, *Brândușe v. Romania*, App. No. 6586/03, 7 April 2009, paragraph 40, *Marian Stoicescu v. Romania*, App. No. 12934/02, 16 July 2009, paragraph 19, *Leontiu v. Romania*, App. No. 44302/10, 4 December 2012, paragraph 47.

domestic remedy in respect of all applications introduced against Serbia as of 7 August 2008, including also the instant complaint about health care in detention.¹⁰⁹

ii. Compensatory remedies

Anyone who has undergone detention in violation of his or her dignity must be able to obtain compensation.¹¹⁰ As indicated above, mere damages do not, however, provide an effective remedy in cases where the appellant is still in prison, to the extent that compensation makes no difference to his or her conditions of detention.¹¹¹

If a compensatory appeal is to be considered effective under Article 13 of the Convention, it must both have a reasonable prospect of success and provide adequate redress.¹¹²

Case-law empowering the court to order the administration to pay pecuniary compensation must be an established, constant practice in order to be deemed to provide an effective remedy.¹¹³ Excessive formalism on the part of the court can have the effect of depriving an action for damages against the State of its effectiveness. The fact that the courts require formal evidence of non-material damage can render a remedy ineffective.¹¹⁴

Applicants must not bear an excessive burden of proof in compensation proceedings. They may be asked to produce readily accessible items of evidence, such as a detailed description of the conditions of detention, witness statements and replies from supervisory bodies. The authorities will then examine the allegations of ill-treatment. The procedural rules on examination of such a complaint must comply with the principle of fairness within the meaning of Article 6 of the Convention, and the cost of such proceedings must not place an excessive burden on the applicant where the claim is justified.¹¹⁵ Even where a remedy does facilitate the award of compensation, it might not present reasonable chances of success, particularly where such award is conditional on the establishment of fault on the part of the authorities.¹¹⁶ In the same way, a remedy might not be effective in cases where, even though the appellant can prove that the conditions of detention were not in conformity with applicable standards, the courts exonerate the State of all responsibility by declaring that the conditions of detention were caused not by shortcomings on the part of the authorities but rather by a structural problem, such as prison overcrowding or insufficient resources

109. See *Nasković v. Serbia*, App. No. 15914/11, decision of 14 June 2011, paragraph 61.

110. See the aforementioned case of *Torreggiani and Others v. Italy*, paragraph 96.

111. See paragraph 36, and in particular *Iliev and Others v. Bulgaria*, App. Nos. 4473/02 and 34138/04, 10 February 2011, paragraphs 55-56.

112. See the aforementioned case of *Ananyev and Others v. Russia*, paragraph 118.

113. See the aforementioned case of *Torreggiani and Others v. Italy*, paragraph 97.

114. See the cases of *Radkov v. Bulgaria*, App. No. 18382/05, 10 February 2011 and *Iovchev v. Bulgaria*, App. No. 41211/98, 2 February 2006; also *Georgiev v. Bulgaria*, App. No. 27241/02, decision of 18 May 2010, in which the Court recognised that the law provided compensation for damage suffered, which could therefore be considered as an effective remedy.

115. See the aforementioned case of *Ananyev and Others v. Russia*, paragraph 228.

116. See the aforementioned case of *Ananyev and Others v. Russia*, paragraph 113; *Roman Karasev v. Russia*, App. No. 30251/03, paragraphs 81-85; *Shilbergs v. Russia*, App. No. 20075/03, 17 December 2009, paragraphs 71-79.

for the prison system.¹¹⁷ Nor can the authorities rely upon the absence of a positive intention to humiliate or debase the prisoner as circumstances relieving them of their obligations.¹¹⁸

Compensation for the non-material damage must, in principle, be one of the available remedies.¹¹⁹ The amount of compensation must be comparable to the amounts awarded by the Court in similar cases as a low level of compensation has the effect of rendering the remedy ineffective.¹²⁰

The Court has held that if a reduction of sentence were to be applied as compensation for a breach of Article 3 of the Convention, the courts should recognise the violation in a sufficiently clear way and afford redress by reducing the sentence in an express and measurable manner.¹²¹ Failing this, the reduction of sentence would not have the effect of depriving the person of his status as victim of the violation.¹²² The Court has also pointed out that while an automatic mitigation of sentence on account of inhuman conditions of detention may be considered as a part of a wide array of general measures to be taken, it will not provide on its own a definitive solution to the existing problem of deficient remedies nor contribute, to a decisive extent, to eradication of genuine causes of overcrowding.¹²³

Examples of good practice

The issue of the prison overcrowding in Poland has given rise to a series of rulings of principle.¹²⁴ In 2007, the Polish Supreme Court for the first time recognised a prisoner's right to bring proceedings against the State based on the Civil Code with a view to securing compensation for infringement of his fundamental rights caused by prison overcrowding and general conditions of detention. The Supreme Court reaffirmed this principle in 2010 and laid down additional guidelines on the manner in which civil courts should verify and assess the justification of restrictions of the legal minimum space in a cell. The Strasbourg Court consequently considered that the remedy allowing awards of compensation was effective.¹²⁵

117. See *Skorobogatykh v. Russia*, App. No. 4871/03, 22 December 2009, paragraphs 17-18 and 31-32; *Artyomov v. Russia*, App. No. 14146/02, 27 May 2010, paragraphs 16-18 and 111-112.

118. See the cases of *Ananyev and Others v. Russia*, paragraph 117; *Mamedova v. Russia*, paragraph 63.

119. See *McGlinchey and Others v. the United Kingdom*, App. No. 50390/99, 29 April 2003, paragraph 62; *Poghosyan and Baghdasaryan v. Armenia*, App. No. 22999/06, 12 June 2012, paragraph 47; *Stanev v. Bulgaria*, paragraph 218.

120. See the aforementioned case of *Shilbergs v. Russia*, in which the courts calculated the amount of compensation with reference to the degree of responsibility on the part of the authorities and their lack of financial resources.

121. See *Ananyev and Others v. Russia*, paragraph 225.

122. See *Dzelili v. Germany*, App. No. 65745/01, judgment of 10 November 2005, paragraph 85.

123. See *Ananyev and Others v. Russia*, paragraph 226.

124. See the cases of *Latak v. Poland* and *Lominski v. Poland*, App. Nos. 52070/08 and 33502/09, decisions of 12 October 2010, subsequently to the pilot judgments given by the Court in the cases *Orchowski v. Poland* and *Norbert Sikorski v. Poland*, Nos. 17885/04 and 17559/05, judgments of 22 October 2009.

125. See *Latak v. Poland*, paragraph 80.

The Court has also held that the French compensatory remedy was accessible and adequate, since case-law developments had induced the domestic administrative courts to acknowledge that imprisonment in inappropriate conditions in a cell which did not respect the guaranteed standards was liable to give rise to an application for compensation.¹²⁶

B. Investigations in the context of alleged violations of Articles 2 and 3 of the Convention

The Convention is intended to guarantee rights that are practical and effective, as opposed to theoretical or illusory.¹²⁷ From this perspective, combined with the general duty on the State under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, Articles 2 and 3 include procedural requirements. It is not enough that the authorities abstain from violating the provisions of the Convention, they must, when there is an arguable allegation of a violation of Articles 2 or 3, conduct an effective investigation capable of leading to the identification and punishment of those responsible.¹²⁸ The aim of such an investigation is to ensure the effective application of domestic laws protecting the right to life and, in cases where the officials or organs of the State are involved, to ensure their accountability for deaths or treatment contrary to Article 3 occurring under their responsibility.¹²⁹

The procedural obligation arising from Article 2 requires the authorities to act of their own motion, as soon as the matter has come to their attention; they cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.¹³⁰ As to Article 3, the procedural obligation arises when the allegations of the existence of prohibited treatment are “arguable”.¹³¹

This obligation applies when the impugned facts are attributable to States, whether that be, for example, in the context of recourse to force by agents of the State, a detention,¹³² operations to maintain order,¹³³ or armed conflicts.¹³⁴ It

126. See *Rhazali and Others v. France*, App. No. 37568/09, decision of 10 April 2012; *Théron v. France*, App. No. 21706/10, 2 April 2013; *Lienhardt v. France*, App. No. 12139/10, decision of 13 September 2011.

127. This principle has been constantly reaffirmed since the case of *Airey v. Ireland*, App. No. 6289/73, 9 October 1979, paragraph 24.

128. See the judgment of principle in *McCann and Others v. the United Kingdom*, App. No. 18984/91, 27 September 1995. More recently, see *Mosendz v. Ukraine*, App. No. 52013/08, 17 January 2013, paragraph 94, on the issue of the investigative obligation in the context of Article 2; see *Virabyan v. Armenia*, App. No. 40094/05, 2 October 2012, paragraph 161, on the issue of the investigative obligation in the context of Article 3.

129. See *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, 7 July 2011, paragraph 163.

130. See *Al-Skeini and Others v. the United Kingdom*, paragraph 165; *Nihayet Arici and Others v. Turkey*, App. Nos. 24604/04 and 16855/05, 23 October 2012, paragraph 159.

131. See *Chiriță v. Romania*, App. No. 37147/02, decision of 6 September 2007.

132. See, for example, *Carabulea v. Romania*, App. No. 45661/99, 13 July 2010.

133. See, for example, *Association “21 December 1989” and Others v. Romania*, App. No. 33810/07, 24 May 2011; *Giuliani and Gaggio v. Italy*, App. No. 23458/02, judgment of the Grand Chamber of 24 March 2011.

134. See for example *Isayeva v. Russia*, App. No. 57950/00, judgment of 24 February 2005, paragraphs 180 and 210; *Al-Skeini and Others v. the United Kingdom*, paragraph 164.

applies also when “negligence attributable to State officials or bodies goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, have failed to take measures that have been necessary and sufficient to avert the risks to the victim’s life”.¹³⁵ The procedural obligation applies also when the impugned facts are attributable to private individuals, for example in the context of domestic violence¹³⁶ or medical errors;¹³⁷ the Court has confirmed that Articles 2 and 3 apply to individual relations.¹³⁸

To be effective, the investigation must meet several requirements. The persons responsible must be independent of those involved in the events: this implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms.¹³⁹ The investigation must be prompt and thorough, the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions.¹⁴⁰ The authorities must take all the necessary steps to secure evidence concerning an incident, including, *inter alia* eyewitness testimony and forensic evidence, which should be secured by a thorough examination of the victim’s state of health.¹⁴¹ The investigation must be able to lead to the identification and punishment of those responsible, which is an obligation not of result but of means.¹⁴² The victim should be able to participate effectively in the investigation¹⁴³ or his family must be associated with the procedure insofar as necessary for the protection of their legitimate interests.¹⁴⁴ Moreover, where that attack is racially motivated, the investigation should be pursued “with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism”.¹⁴⁵ Finally, it must be recalled

135. See *Jasinskis v. Latvia*, App. No. 45744/08, judgment of 21 December 2010, paragraph 73; case concerning the death, whilst in police custody, of an injured deaf and mute individual from whom the police officers took away all means of communication and refused all medical assistance.

136. See, for example, *C.A.S. and C.S. v. Romania*, App. No. 26692/05, 20 March 2012, concerning allegations of sexual violence committed by a private individual against their child.

137. See *Silih v. Croatia*, Grand Chamber judgment of 9 April 2009, paragraph 154, concerning a death in hospital following an allergic reaction to a drug prescribed by the duty doctor.

138. See, for example, *Osman v. the United Kingdom*, Grand Chamber judgment of 28 October 1998, a case in which a teacher had murdered the father of a pupil.

139. See *Anca Mocanu and Others v. Romania*, App. Nos. 10865/09, 45886/07 and 32431/08, judgment of 13 November 2012, paragraph 221; *Jasinskis v. Latvia*, paragraphs 74–81.

140. See *El-Masri v. “the former Yugoslav Republic of Macedonia”*, App. No. 39630/09, 13 December 2012, paragraph 183; *Jasinskis v. Latvia*, paragraph 79.

141. See *Timofejevi v. Latvia*, App. No. 45393/02, judgment of 11 December 2012, paragraphs 94 and 99, case wherein the Court namely noted that it seems rather unlikely that, during a forensic test lasting about ten minutes, a thorough examination of the applicant’s state of health could have been made, and *Vovruško v. Latvia*, App. No. 11065/02, judgment of 11 December 2012, paragraphs 42–49, case wherein the forensic expert based his investigation solely on a medical report, without examining the applicant in person.

142. See *Savitsky v. Ukraine*, App. No. 38773/05, 26 July 2012, paragraph 99.

143. See *El-Masri v. “the former Yugoslav Republic of Macedonia”*, paragraph 184.

144. See *Seidova and Others v. Bulgaria*, App. No. 310/04, 18 November 2010, paragraph 52.

145. See *Menson v. the United Kingdom*, App. No. 47916/99, decision of 6 May 2003.

that the obligation on States to undertake an effective investigation continues to apply even if the security conditions are difficult, including in the context of armed conflict.¹⁴⁶

The Court has furthermore indicated that, in the context of allegations of violations of Articles 2 and 3 of the Convention, “Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure”. The Court considers that “the requirements of Article 13 are broader than a Contracting State’s obligation to conduct an effective investigation” under Articles 2 and 3.¹⁴⁷

When the investigation is ineffective, this ineffectiveness undermines the effectiveness of other remedies, including the possibility of bringing a civil action for damages.¹⁴⁸ The Court in effect considers that in the absence of an effective investigation capable of leading to the identification and the punishment of those responsible, a request for compensation is theoretical and illusory.¹⁴⁹ In terms of medical negligence, an appeal before a civil court can however, alone or along with an appeal before a criminal court, determine the relevant liabilities and, where necessary, ensure the implementation of any appropriate civil sanctions, such as compensation for damages and the publication of judgments.¹⁵⁰ However, where medical liability is based on a medical error made by the individual in question, the effectiveness of the investigation is crucial for the possibility of a successful civil action. Hence, the Court emphasised the importance of the link between the liability of the doctor and the notion of risk concerning the practice of the profession to ensure a more effective remedy in terms of compensation for damages caused to patients.¹⁵¹

Example of good practice

The Romanian legal system provides for an investigation to be carried out by the public prosecutor, who takes the decision whether or not to initiate a prosecution against the alleged perpetrators. If a decision to discontinue the criminal investigation is issued, there is the possibility under Article 278 of the Code of Criminal Procedure of appealing to a court which could, on examination of the provisions of the domestic law and the evidence, including witness statements

146. See, for example, *Isayeva v. Russia*, App. No. 57950/00, judgment of 24 February 2005, paragraphs 180 and 210; *Al-Skeini and Others v. the United Kingdom*, paragraph 164.

147. See, for example, in the case of suspicious deaths, *Isayev and Others v. Russia*, App. No. 43368/04, 21 June 2011, paragraphs 186-187; *Angelova v. Bulgaria*, App. No. 38361/97, 13 June 2002, paragraph 161; *Mahmut Kaya v. Turkey*, App. No. 22535/93, judgment of 28 March 2000, paragraph 107; and as regards allegations of ill-treatment, see, for example, *El-Masri v. “the former Yugoslav Republic of Macedonia”* above, paragraph 255; *Labita v. Italy*, App. No. 26772/95, 6 April 2000, paragraph 131.

148. See *Isayev and Others v. Russia* above, paragraph 189.

149. See *El-Masri v. “the former Yugoslav Republic of Macedonia”* above, paragraph 261; *Cobzaru v. Romania*, App. No. 48254/99, 26 July 2007, paragraph 83; *Carabulea v. Romania*, App. No. 45661/99, 13 July 2010, paragraph 166; *Soare and Others v. Romania*, App. No. 24329/02, 22 February 2011, paragraph 195.

150. See *Floarea Pop v. Romania*, App. No. 63101/00, 6 April 2010, paragraph 38.

151. See *Eugenia Lazar v. Romania*, App. No. 32146/05, 16 February 2010, paragraphs 90-91.

and medical reports, direct that a prosecution or other investigatory measures be carried out. The Court has already established that such a remedy was effective within the meaning of the Convention.¹⁵² Furthermore, a civil action under Articles 998 and 999 of the Civil Code can, where breach of the right to life was not intentional, result in the recognition of the breach of the procedural aspect of Articles 2 and 3, and appropriately remedy the damages suffered.¹⁵³

C. Domestic remedies against removal

Article 13 of the Convention, combined with Articles 2 and 3, requires that the person concerned have the right to a suspensive remedy for an arguable complaint that his/her expulsion would expose him/her to a real risk of treatment contrary to Article 3 of the Convention or a real risk of violation of their right to life as protected by Article 2 of the Convention.¹⁵⁴ The same principle applies equally to complaints under Article 4 of Protocol No. 4.¹⁵⁵

By contrast, a remedy with suspensive effect is not normally required when another right of the Convention is invoked in combination with Article 13.

The effectiveness of a remedy also requires close attention by a national authority,¹⁵⁶ an independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3,¹⁵⁷ and particular promptness. The examination of the complaints based on Articles 2 and 3 of the Convention must not take into account either what the person concerned may have done to justify expulsion, or the threat to national security as it may be perceived by the expelling State.¹⁵⁸

The authorities must not, in practice, make the remedies ineffectual and therefore unavailable. That would be the case, for example, when a removal took place with undue haste. The Court has thus considered, in a case involving Article 13 in combination with Article 8 of the Convention, that the shortness of the delay between the applicant's seizing the Court and the execution of the removal decision prevented, in practice, any examination of the applicant's arguments and thereby any possible suspension of the removal.¹⁵⁹ In the same way, the Court has considered that the expulsion of an applicant one working day after notification of the decision rejecting the asylum application had in practice deprived him of the possibility of introducing an appeal against the negative decision, even though such an appeal was in theory available.¹⁶⁰

152. See *Ciubotaru v. Romania*, App. No. 33242/05, decision of 10 January 2012, paragraph 59; *Stoica v. Romania*, App. No. 42722/02, 4 March 2008, paragraphs 105-109; and *Chiriță v. Romania*, App. No. 37147/02, 29 September 2009, paragraph 99.

153. See *Floarea Pop v. Romania*, paragraph 47; *Csiki v. Romania*, App. No. 11273/05, 5 July 2011.

154. See *De Souza Ribeiro v. France*, App. No. 22689/07, Grand Chamber judgment of 13 December 2012, paragraph 82.

155. See *Conka v. Belgium*, App. No. 51564/99, judgment of 5 February 2012, paragraphs 81-84.

156. See *Shamayev and Others v. Georgia and Russia*, App. No. 36378/02, 12 April 2005, paragraph 448.

157. See *Jabari v. Turkey*, App. No. 40035/98, judgment of 11 July 2000, paragraph 50.

158. See *Chahal v. the United Kingdom*, App. No. 22414/93, paragraphs 150-151.

159. See *De Souza Ribeiro v. France* above, paragraph 95.

160. See *Labsi v. Slovakia*, App. No. 33809/08, 15 May 2012, paragraph 139.

The Court has in addition underlined the importance of guaranteeing to persons concerned by a removal measure the right to obtain information sufficient to allow them to have effective access to the procedures to be followed or information to access organisations offering legal advice;¹⁶¹ the difficulties encountered may be aggravated by the issue of languages if no interpretation is provided during preparation of the asylum application.¹⁶²

As regards accelerated asylum procedures, the Court has recognised that they may facilitate the treatment of clearly abusive or manifestly ill-founded applications, and considered that the re-examination of an asylum application by a priority process does not deprive a detained non-national of an effective remedy *per se*, so long as an initial application had been subject to a full examination in the context of a normal asylum procedure.¹⁶³ When the priority process is applied for the initial application, however, and not in the context of a re-examination, this may cause inadequacies in the effectiveness of the remedy exercised. The combination of several circumstances¹⁶⁴ may thus put into question the accessibility in practice of such remedies, even if they are available in theory.

Examples of good practice

In France, the effectiveness of a remedy with full suspensive effect before the administrative courts against decisions on removal and the country of destination was recognised by the Court, deeming this a remedy which should be fully exhausted.¹⁶⁵

In Switzerland, all asylum seekers may remain in the country until the proceedings of the federal migration office have ended. This office's decision can subsequently be appealed before the federal administrative court. This appeal in principle has suspensive effect as a remedy: the federal administrative court can reinstate the suspensive effect and is not bound by the withdrawal of suspensive effect by the federal migration office.¹⁶⁶

In Sweden, matters concerning the right of aliens to enter and remain in Sweden are dealt with by three instances: the Migration Board, the Migration Court and the Migration Court of Appeal. The applicants are entitled to be represented before these bodies by a lawyer appointed by the Migration Board. The entire proceedings have suspensive effect. Following the lodging of an appeal, the Migration Court of Appeal first decides whether leave to appeal should be granted, i.e. if there are special reasons for hearing the case or if the determination of the Migration Court of Appeal may be of importance as a precedent. If leave to appeal is granted, the Migration Court of Appeal will decide the case on the merits, it has full jurisdiction to examine the lawfulness of the appealed deci-

161. See *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, 23 February 2012, paragraph 204; *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011, paragraphs 304-309.

162. See *I.M. v. France*, App. No. 9152/09, judgment of 2 February 2012, paragraph 145.

163. See *Sultani v. France*, App. No. 45223/05, judgment of 20 September 2007, paragraphs 64-65.

164. See *I.M. v. France*, paragraph 142.

165. See *H.R. v. France*, App. No. 647809/09, judgment of 22 September 2011, paragraph 79; *R.N. v. France*, App. No. 49501/09, decision of 27 November 2011; *Mi. L. v. France*, App. No. 23473/11, decision of 11 September 2012, paragraph 34.

166. See *Reza Sharifi v. Switzerland*, App. No. 69486/11, decision of 4 December 2012.

sion and the merits of the case. The Court considered that it constitutes an effective remedy.¹⁶⁷ In addition, the Migration Board may decide to re-examine the case where it may be assumed, on the basis of new circumstances, that there are impediments to enforcement of the deportation or expulsion order, and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not having done so. The re-examination proceedings are comprehensive and suspensive. The Court also considered that it constitutes an effective remedy.¹⁶⁸

D. Remedies for non-execution of domestic court decisions

The effective right of access to a court, protected by Article 6 of the Convention, includes the right to have a court decision enforced without undue delay. An unreasonably long delay in the enforcement of a binding judgment may therefore violate Article 6. Unduly delayed execution of domestic court decisions may also violate the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 of the Convention. The reasonableness of any delay is to be determined having regard to the complexity of the enforcement proceedings, the applicant's own behaviour and that of the competent authorities, and the amount and nature of the court award.¹⁶⁹

Violations due to non-execution of domestic court decisions, in particular those against the State itself, are amongst the most frequent types found by the Court. Such violations are often due to underlying systemic or structural problems.¹⁷⁰ It is the State's obligation to ensure that final decisions against its organs, or entities or companies owned or controlled by the State, are enforced in compliance with Convention requirements. Lack of funds is not a reason that may justify inaction by the State. The State is responsible for the enforcement of final decisions if the factors impeding or blocking their full and timely enforcement are within its control.¹⁷¹

In such situations, the Court also finds violations of the right to an effective remedy under Article 13 of the Convention. The Court's pilot judgments or other judgments of principle addressing these issues thus provide extensive and authoritative guidance on the essential characteristics required of effective remedies for non-execution of domestic court decisions. Further guidance can be found in the various documents prepared in the context of the Committee of

167. See *Haji Hussein v. Sweden*, App. No. 18452/11, decision of 20 September 2011.

168. See *A.I. and Others v. Sweden*, App. No. 25399/11, decision of 9 October 2012.

169. See, for example, *Yuriy Nikolayevich Ivanov v. Ukraine*, App. No. 40450/04, judgment of 15 October 2009 ("Ivanov"), paragraphs 51-53.

170. According to the 5th annual report of the Committee of Ministers on supervision of the execution of judgments and decisions of the European Court of Human Rights, there were pending before the Committee of Ministers in 2011 cases or groups of cases involving important structural or complex problems in relation to non-execution of domestic court decisions in Azerbaijan, Bosnia and Herzegovina, Greece, Italy, Republic of Moldova, Russian Federation, Serbia and Ukraine. The Committee of Ministers has in recent years also addressed such problems in Albania, Croatia and Georgia.

171. See, for example, *Ivanov*, paragraph 54.

Ministers' supervision of execution of judgments.¹⁷² It should also be recalled that this issue is closely related to that of effective remedies for excessive length of proceedings, on which the Committee of Ministers has previously addressed a recommendation to member States, accompanied by a Guide to good practice.¹⁷³

i. Expeditory remedies

A remedy that expedites enforcement is to be preferred. The Court, drawing comparisons with its case-law on remedies for excessive length of proceedings,¹⁷⁴ has stated that “any domestic means to prevent a violation by ensuring timely enforcement is, in principle, of greatest value”.¹⁷⁵ The State may not, however, tolerate a situation in which there is non-execution or unreasonable delay in the execution of domestic court decisions against State authorities, thereby compelling the successful party to proceedings to use such means. “[The] burden to comply with such a judgment lies primarily with the State authorities, which should use all means available in the domestic legal system in order to speed up the enforcement, thus preventing violations of the Convention.”¹⁷⁶

Given the connection between the two issues, one may draw parallels with the Committee of Ministers' Recommendation CM/Rec(2010)3 on effective remedies for excessive length of proceedings. By analogy, therefore, States should:

- ▶ take all necessary steps to ensure that domestic court decisions are executed within a reasonable time;
- ▶ ensure that mechanisms exist to identify judgments that risk not being executed in a timely manner, as well as the underlying causes, with a view also to preventing such violations of Article 6 in the future;

172. See the conclusions of the Round Table on “Effective remedies against non-execution of delayed execution of domestic court decisions” (Strasbourg, 15-16 March 2010; doc. CM/Inf/DH(2010)15) and the conclusions of the Round Table on “Non-enforcement of domestic courts decisions in member States: general measures to comply with European Court judgments” (Strasbourg, 21-22 June 2007; doc. CM/Inf/DH(2007)33); additional references appear below.

173. See CM/Rec(2010)3.

174. See, for example, *Scordino v. Italy (No. 1)*, App. No. 36813/97, Grand Chamber judgment of 29 March 2006, paragraph 183: “The best solution in absolute terms is indisputably, as in many spheres, prevention. The Court ... has stated on many occasions that Article 6 paragraph 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet ... the obligation to hear cases within a reasonable time. Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach a posteriori, as does a compensatory remedy of the type provided for under Italian law for example”. See also Recommendation CM/Rec(2010)3 of the Committee of Ministers to member States on effective remedies for excessive length of proceedings, along with its accompanying Guide to good practice.

175. See, for example, *Burdov v. Russia (No. 2)*, App. No. 33509/04, judgment of 15 January 2009, paragraph 98.

176. *Ibid.*

- ▶ recognise that when an underlying systemic problem is causing non-enforcement of domestic court decisions, measures are required to address this problem, as well as its effects in individual cases;
- ▶ ensure that there are means to expedite execution of domestic court judgments that risks becoming excessively lengthy in order to prevent it from becoming so.

The Committee of Ministers' supervision of execution of Court judgments has highlighted certain specific aspects that may need addressing in order to ensure the effectiveness of expeditory remedies, such as the following:

- ▶ ensuring an adequate regulatory/legislative framework;¹⁷⁷
- ▶ ensuring sufficient budgetary resources to cover potential State liabilities;¹⁷⁸
- ▶ developing the State's obligation to pay in case of delays, including through more coercive measures;¹⁷⁹
- ▶ establishing effective liability of civil servants and other actors for non-enforcement;¹⁸⁰
- ▶ reinforcing the bailiff system;¹⁸¹
- ▶ ensuring the effectiveness of the constitutional complaint or other form of judicial remedy, where applicable (see also section IV of the present document).¹⁸²

Further guidance can be found in other relevant texts of the Committee of Ministers, as well as of the European Commission on the Efficiency of Justice (CEPEJ).¹⁸³

ii. Compensatory remedies

Although an expeditory approach is to be preferred, the Court has accepted that States can also choose to introduce only a compensatory remedy, without that remedy being regarded as ineffective. The effectiveness of such a remedy depends on satisfaction of the following requirements:

- ▶ an action for compensation must be heard within a reasonable time;

177. See, for example, doc. CM/Inf/DH(2010)22 concerning Bosnia and Herzegovina, CM/Inf/DH(2006)19rev3 concerning Russia, CM/Inf/DH(2010)25 concerning Serbia, CM/Inf/DH(2007)30 concerning Ukraine.

178. See, for example, doc. CM/Inf/DH(2011)36 concerning Albania, CM/Inf/DH(2009)28 concerning Georgia, CM/Inf/DH(2006)19rev3 concerning Russia, SG/Inf/DH(2007)30 concerning Ukraine.

179. See, for example, doc. CM/Inf/DH(2006)19rev3 concerning Russia, CM/Inf/DH(2007)30 concerning Ukraine.

180. See, for example, doc. CM/Inf/DH(2011)36 concerning Albania, CM/Inf/DH(2009)28 concerning Georgia, CM/Inf/DH(2006)19rev3 concerning Russia, CM/Inf/DH(2010)25 concerning Serbia.

181. See, for example, doc. CM/Inf/DH(2009)28 concerning Georgia, CM/Inf/DH(2007)30 concerning Ukraine.

182. See, for example, doc. CM/Inf/DH(2011)36 concerning Albania, CM/Inf/DH(2006)19rev3 concerning Russia, CM/Inf/DH(2010)25 concerning Serbia.

183. See, in particular, Committee of Ministers' Recommendations to member States Rec(2003)16 on the execution of administrative and judicial decisions in the field of administrative law and Rec(2003)17 on enforcement, and the CEPEJ Guidelines for a better implementation of the existing Council of Europe Recommendation on enforcement (doc. CEPEJ(2009)11REV2).

- ▶ the compensation must be paid promptly and generally no later than six months from the date on which the decision awarding compensation becomes enforceable;
- ▶ the procedural rules governing an action for compensation must conform to the principle of fairness guaranteed by Article 6 of the Convention;
- ▶ the rules regarding legal costs must not place an excessive burden on litigants where their action is justified;
- ▶ the level of compensation must not be unreasonable in comparison with the awards made by the Court in similar cases.¹⁸⁴

There is a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage. This presumption is particularly strong in the event of excessive delay in enforcement by the State of a judgment delivered against it.¹⁸⁵

The Committee of Ministers' supervision of execution of Court judgments has highlighted certain specific aspects that may need addressing in order to ensure the effectiveness also of compensatory remedies, notably that there be automatic indexation of and default interest on delayed payments.¹⁸⁶

It can be noted that the Court will leave a wide margin of appreciation to the State to organise a domestic compensatory remedy "in a manner consistent with its own legal system and traditions and consonant with the standard of living in the country concerned."¹⁸⁷ In this respect, the Court has accepted, in relation to effective domestic compensatory remedies for length of proceedings, that "[it] will... be easier for the domestic courts to refer to the amounts awarded at domestic level for other types of damage ... and rely on their innermost conviction, even if that results in awards of amounts that are lower than those fixed by the Court in similar cases."¹⁸⁸

Example of good practice

In Serbia, the Constitutional Court, in 2012, brought its case-law into conformity with that of the Strasbourg Court so as to order the State to pay, from its own funds, the sums awarded in final judgments against a socially-owned company undergoing insolvency proceedings. As a result, the Court found the constitutional appeal henceforth to be an effective remedy in such cases, having previously found otherwise.¹⁸⁹

IV. GENERAL DOMESTIC REMEDIES

A general remedy, in the context of Article 13 of the Convention, is one intended to redress a violation of a Convention right or freedom by a public authority, without being limited in application to any particular factual or legal

184. See Ivanov, paragraph 99.

185. *Ibid*, paragraph 100.

186. See, for example, doc. CM/Inf/DH(2009)28 concerning Georgia, CM/Inf/DH(2006)19rev3 concerning Russia, CM/Inf/DH(2007)30 concerning Ukraine.

187. See Ivanov, paragraph 99.

188. See, for example, *Apicella v. Italy*, App. No. 64890/01, Grand Chamber judgment of 29 March 2006, paragraph 78.

189. See *Marinković v. Serbia*, App. No. 5353/11, decision of 29 January 2013, paragraph 59.

context. Although Article 13 obliges States to provide an effective remedy to “everyone” whose rights and freedoms are violated, it does not require that States Parties provide a general remedy as such.

The general principles applicable to the question of whether domestic remedies are effective from the perspective of Article 13 apply also to the effectiveness of general remedies.¹⁹⁰ In broad terms, this means that general remedies must be effective, sufficient and accessible (see further under section II above).

It would appear possible to distinguish two broad types of general domestic remedies: on the one hand, the possibility for individuals in certain States Parties to rely on the provisions of the Convention before any judge in the course of litigation; and on the other, constitutional complaints.

A form of general remedy may be seen in the fact that the Convention may be pleaded as a source of applicable law before several or even all courts or tribunals for the determination of a case.¹⁹¹ Such a system allows allegations of violation of Convention rights to be resolved at an early stage in proceedings, potentially without the need for appeal to higher courts on points of Convention law, whilst remaining subject to review, where necessary, by superior domestic courts.

It can be noted that even certain other domestic remedies of constitutional or legislative basis, which the Court has found not to be effective or on which it has not yet been able to pronounce, may nevertheless be capable of resolving certain complaints of violation.

A. Constitutional complaints

In many member States, it is possible to apply to the national constitutional court for remedy of an allegation of violation of a right protected under the national constitution.¹⁹² As well as providing an ultimate domestic level of recourse for determination of a complaint, this form of general remedy may also contribute to ensuring consistency in, or the development of, interpretation and application of protected rights at domestic level, with the overall result of more generally enhancing that protection. Through its rulings on individual cases that are subsequently the subject of applications to the Strasbourg Court, the consti-

190. See, for example, *Sürmeli v. Germany*, App. No. 75529/01, Grand Chamber judgment of 8 June 2006, paragraphs 97-101.

191. Remedies of this type exist in, for example, Austria (due to the constitutional status of the Convention in Austria, the Austrian authorities and courts must take account of the Convention and the Court’s case-law), Ireland (European Convention on Human Rights Act 2003, section 3; this remedy, before the Circuit and High Courts, is available when no other is, and to that extent may be considered subsidiary), the Netherlands (Article 6:162 of the Civil Code), Norway (Act on the Strengthening of the Position of Human Rights in Norwegian Law 1999, section 3), the United Kingdom (Human Rights Act 1998, section 8).

192. As in, for example, Bosnia and Herzegovina, Croatia, Czech Republic, Germany, Latvia, Serbia, the Slovak Republic, Slovenia, Spain and Turkey. (A comparative study conducted for the European Commission for Democracy through Law (Venice Commission) in 2008 found that “constitutional complaints and similar constitutional remedies” existed in Albania, Andorra, Austria (“partially”), Azerbaijan, Croatia, Czech Republic, Cyprus, “the former Yugoslav Republic of Macedonia”, Georgia, Germany, Hungary, Liechtenstein, Montenegro (“only in administrative matters”), Malta, Poland, Russian Federation, Slovakia, Slovenia, Spain, Switzerland and Ukraine: see doc. CDL-JU(2008)026, 7 November 2008.)

tutional court can engage directly in the judicial dialogue between the national and European levels. These two aspects – of providing remedies for and judicial examination at the highest domestic level of allegations of violations of Convention rights – contribute to effective operation of the principle of subsidiarity within the overall Convention system.

General remedies may also play an important role in providing an effective remedy in situations where no specific remedy exists, so as to satisfy the requirement under Article 13 of the Convention for provision of an effective remedy for “everyone whose rights and freedoms... are violated” (emphasis added). For example, some member States in effect have a constitutional complaint as their domestic remedy for alleged violations of the right to trial within a reasonable time (Article 6(1) of the Convention), on account of an exception to the otherwise applicable rule of exhaustion of other remedies.

Several member States’ constitutions thus foresee some form of constitutional complaint (or appeal) procedure whereby an individual, and in some cases also legal persons,¹⁹³ may complain to the national constitutional court that an act or omission of a public authority has caused a violation of their rights as protected by the constitution. Such remedies are recognised as being effective in the sense of Article 13 of the Convention when the rights protected by the constitution explicitly include or correspond in substance to Convention rights.¹⁹⁴ The Court has stated that, “as regards legal systems which provide constitutional protection for fundamental human rights and freedoms ... it is incumbent on the aggrieved individual to test the extent of that protection.”¹⁹⁵

Restrictions on the legal scope of such a remedy may make it in certain circumstances ineffective under Article 13 of the Convention. For example, the Court has found that a constitutional court’s review of individual complaints was ineffective where an alleged violation resulted not from the unconstitutionality of an applied legal provision (an issue that was within the constitutional court’s jurisdiction), but from the erroneous application or interpretation of a provision whose content was not unconstitutional (which was outside it).¹⁹⁶ Similarly, a constitutional complaint may be ineffective as a remedy under Article 35 of the Convention where it relates only to legislative provisions and not decisions of ordinary courts, when a complaint concerns the latter.¹⁹⁷

193. As in, for example, Austria, Bosnia and Herzegovina, Czech Republic, Latvia, Russian Federation, Slovakia, Slovenia and Turkey.

194. In the case of *Apostol v. Georgia* (App. No. 40765/02, judgment of 28 November 2006), the Court noted that none of the relevant national constitutional provisions “sets forth guarantees against the non-enforcement of binding decisions which are *at least remotely comparable* to those developed in the Court’s case-law” (italics added; paragraph 38).

195. See, for example, *Vinčić and Others v. Serbia*, App. No. 44698/06 and others, judgment of 1 December 2009, paragraph 51.

196. See *Savics v. Latvia*, App. No. 17892/03, judgment of 27 November 2012, paragraphs 113-115; also *Dorota Szott-Medynska v. Poland*, App. No. 47414/99, admissibility decision of 9 October 2003.

197. See, for example, *Rolim Comercial, S.A. v. Portugal*, App. No. 16153/09, judgment of 16 April 2013.

Constitutional complaints are generally subsidiary: before bringing a constitutional complaint, an applicant must first have exhausted accessible, effective remedies available before courts of ordinary law. There may be exceptions to this rule, for instance when its application would cause serious and irreparable harm to the applicant,¹⁹⁸ or in particular types of complaint, such as of excessive length of proceedings before ordinary courts.¹⁹⁹

The way in which the principle of subsidiarity is applied may, however, interfere with the effectiveness under Article 13 of the Convention of a constitutional complaint. For example, the Court has found that a domestic requirement first to exhaust a remedy consisting of an additional cassation appeal to the Supreme Court President, where that prior remedy was ineffective, was an obstacle to the accessibility of the constitutional complaint.²⁰⁰ In another case, the Court found that a domestic requirement limiting the scope of the constitutional complaint to the points of law arguable before the Supreme Court (in this case, admissibility on statutory grounds) “resulted in an actual bar to examination of the applicant’s substantive claims” by the constitutional court.²⁰¹ Where a constitutional court has discretion to admit a complaint on condition that the right has been “grossly violated” with “serious and irreparable consequences” for the applicant, with an absence of sufficient case-law on how these conditions were interpreted and applied, the constitutional complaint “[could not] be regarded with sufficient certainty as an effective remedy in the applicant’s case.”²⁰²

Generally speaking, to be considered an effective remedy, a constitutional complaint must be directly accessible by individuals. The Court has thus refused to consider, for example, the exceptional constitutional remedy available in Italy as an effective remedy, insofar as only the judge may seize the constitutional court, either *ex officio* or at the request of one of the parties: “in the Italian legal system an individual is not entitled to apply directly to the constitutional court for review of a law’s constitutionality. Only a court trying the merits of a case has the right to make a reference to the constitutional court, either of its own motion or at the request of a party. Accordingly, such an application cannot be a remedy whose exhaustion is required under Article 35 of the Convention.”²⁰³

It is essential that the remedy before the constitutional court guarantee effective decision making. Where a court finds itself unable to reach a decision, whether because of a lack of safeguards against deadlock or their failure, the con-

198. An exception of this broad type exists in, for example, Azerbaijan, Germany, Latvia, Slovenia.

199. As in, for example, Croatia, Serbia.

200. See *Ismayilov v. Azerbaijan*, App. No. 4439/04, judgment of 17 January 2008, paragraphs 39-40.

201. *Zborovsky v. Slovakia*, App. No. 14325/08, judgment of 23 October 2012, paragraphs 51-54.

202. See *Horvat v. Croatia*, App. No. 51585/99, judgment of 26 July 2001, paragraphs 41-44. (NB Croatian law was subsequently changed to allow constitutional complaints without prior exhaustion of other remedies in cases of excessive length of proceedings regardless of gravity of violation or its consequences: see *Slaviček v. Croatia*, App. No. 20862/02, admissibility decision of 4 July 2002).

203. See *Immobiliare Saffi v. Italy*, App. No. 22774/93, Grand Chamber judgment of 28 July 1999, paragraph 42. See also, for example, *I.R.S. v. Turkey*, App. No. 26338/95, 28 January 2003.

sequence is to “[restrict] the essence of [the] right of access to a court... [and to deprive] an applicant of an effective right to have his constitutional appeal finally determined”.²⁰⁴

In order for the constitutional complaint procedure to constitute an effective remedy in the sense of Article 13 of the Convention, it must also provide effective redress for a violation. The constitutional court may therefore be equipped with a range of powers. These often include to declare the existence of a violation;²⁰⁵ quash the impugned decision, measure or act;²⁰⁶ where the violation is due to an omission, order the relevant authority to take the necessary action;²⁰⁷ remit the case to the relevant authority for further proceedings, based on the findings of the constitutional court;²⁰⁸ order payment of compensation;²⁰⁹ and/or order *restitutio in integrum*.²¹⁰

These powers must exist not only in theory but be effective in practice. For example, a constitutional court’s order to expedite proceedings must have a preventive effect on violations of the right to trial within a reasonable time by actually accelerating the proceedings.²¹¹

For example, a complaint concerning excessive length of proceedings to a constitutional court empowered not only to declare a violation but also to order that necessary action be taken, further violations abstained from and adequate financial compensation granted would be “an effective remedy in the sense that it is capable of both preventing the continuation of the alleged violation of the right... and of providing adequate redress for any violation that has already occurred”.²¹² On the other hand, where a constitutional court’s powers are limited to a declaration of unconstitutionality and a request to the court concerned to expedite or conclude the proceedings, without the possibility of ordering specific acceleratory measures or awarding compensation, and where the actual impact of the request on subsequent proceedings is uncertain, a constitutional complaint may be ineffective.²¹³

This does not mean, however, that where a constitutional court is empowered only to find a violation and nullify the impugned act, the constitutional complaint procedure is inevitably ineffective as a remedy under Article 13 of the Convention. A “two-step” approach, whereby the complainant may request that

204. See *Marini v. Albania*, App. No. 3738/02, judgment of 18 December 2007, paragraphs 119-123.

205. As in, for example, Albania, Andorra, Armenia, Austria, Belgium, Bosnia and Herzegovina, Czech Republic, Germany, Latvia, Russian Federation, Serbia, Slovak Republic and Slovenia.

206. As in, for example, Albania, Andorra, Armenia, Austria, Belgium, Czech Republic, Germany, Serbia, Slovak Republic and Slovenia.

207. As in, for example, Albania, Czech Republic, Serbia and Slovak Republic.

208. As in, for example, Albania, Bosnia and Herzegovina, Czech Republic, Germany, Slovak Republic and Slovenia.

209. As in, for example, Austria, Bosnia and Herzegovina and Slovak Republic.

210. As in, for example, Slovak Republic.

211. See, for example, *Vičanová v. Slovakia*, App. No. 3305/04, judgment of 18 December 2007.

212. See *Andrasik and Others v. Slovakia*, App. No. 57984/00 and others, admissibility decision of 22 October 2002.

213. See *Sürmeli v. Germany*, App. No. 75529/01, Grand Chamber judgment of 8 June 2006, paragraphs 105-108; *Hartman v. the Czech Republic*, App. No. 53341/99, judgment of 10 July 2003.

the procedure in his/her case before the lower court be reopened or otherwise revised in accordance with the principles set out in the constitutional court judgment finding a violation, may constitute an effective remedy.²¹⁴ The “aggregate” of remedies provided for under domestic law may amount to an effective remedy; as, for example, in the Slovak Republic, where individuals may be required to pursue a constitutional complaint, followed by an application for compensation under the Act on Liability for Damage Caused in the Context of Exercise of Public Authority.²¹⁵

The requirement that the constitutional court be able to order appropriate individual relief is reflected in the distinction between “abstract” constitutional complaints and “specific” constitutional complaints. An “abstract” complaint would not allow, for example, an individual to challenge decisions made by courts or public authorities that directly affect their particular circumstances,²¹⁶ or would only entitle the constitutional court to review the constitutionality of laws in general terms and not allow it to quash or modify specific measures taken against an individual by the State.²¹⁷ A “specific” complaint makes it possible to remedy violations of rights and freedoms committed by authorities or officials or, where the infringement of a right guaranteed by the constitution is the result of an interference other than a decision, to prohibit the authority concerned from continuing to infringe the right and to order it to re-establish the status quo if that is possible.²¹⁸ Such a constitutional complaint also makes it possible to remedy violations resulting immediately and directly from an act or omission of a judicial body, regardless of the facts that had given rise to the proceedings; the abrogation of an unconstitutional law results in the annulment of all the final decisions made by the courts or public authorities on the basis of that law.²¹⁹

Example of good practice

The “right to individual petition before the constitutional court” was introduced in the Turkish legal system following constitutional amendments of September 2010. The constitutional court started receiving applications under this provision as of 23 September 2012. The Court has found that there is no reason for it to say that this remedy does not, in principle, provide the possibility of appropriate redress for complaints under the Convention.²²⁰

214. See *Dorota Szott-Medynska v. Poland*, App. No. 47414/99, admissibility decision of 9 October 2003.

215. See *Omasta v. Slovak Republic*, App. No. 40221/98, decision of 10 December 2002.

216. See, for example, *Apostol v. Georgia*, op. cit., paragraph 40.

217. See, for example, *Vén v. Hungary*, App. No. 21495/93, Commission decision of 30 June 1993.

218. See, for example, *Hartman v. the Czech Republic*, App. No. 53341/99, judgment of 10 July 2003, paragraph 49; *Sürmeli v. Germany*, App. No. 75529/01, Grand Chamber judgment of 8 June 2006, paragraph 62.

219. See, for example, *Riera Blume and Others v. Spain*, App. No. 37680/97, admissibility decision of 9 March 1999; *Voggenreiter v. Germany*, App. No. 47169/99, judgment of 8 January 2004, paragraph 23.

220. See, for example, *Hasan Uzun v. Turkey*, App. No. 10755/13, admissibility decision of 30 April 2013.

B. Direct invocation of the provisions of the Convention in the course of ordinary remedy proceedings

In legal systems where the Convention has the status of domestic law, it is directly applicable by some or all courts in the course of ordinary legal proceedings. This allows persons claiming that their Convention rights had been violated by the act or omission of a public authority to seek a remedy before any domestic court or tribunal competent to address the case. This would, for instance, be the case in monist legal systems, in which the provisions of treaties and resolutions by organisations of international law, which may be binding on all persons by virtue of their substance, become binding upon publication. In some States Parties, the Convention also takes precedence over national law. In this type of system, self-executing treaty provisions such as Convention rights are immediately enforceable by the courts.

Such proceedings would be governed by the standard procedural rules. The relevant court or tribunal may be able to make any order within its powers to redress a violation, which may or may not include the power to award compensation;²²¹ alternatively, it may be limited to awarding compensation.²²² Insofar as the relevant court and tribunal did not have the power to strike down a law, its finding that a violation was due to a fundamental incompatibility between a law and a protected right would not have immediate consequences for the wider applicability of that law. A relevant court or tribunal may, however, be able to declare that the law in question is incompatible with the protected right; this competence is usually limited to higher courts.²²³

As an illustration, in Norway, the Convention is incorporated into national law by the Act on the Strengthening of the Position of Human Rights in Norwegian Law of 21 May 1999 (Human Rights Act). Under section 3 of this Act, provisions of incorporated human rights conventions shall prevail in the event of a conflict with provisions of national legislation. Convention provisions are directly applicable and may be invoked directly before all Norwegian courts. A court may consider whether a provision of national legislation is in conflict with a provision of a human rights convention in a case before it but is not competent to declare a provision of internal law is incompatible in general with human rights provisions. Similarly, under Article 152 § 4 of the Slovak Constitution, the interpretation and application of constitutional laws, laws and other generally binding legal regulations must be in conformity with the constitution; and under Article 154 (c) § 1, the respective international treaties, including the Convention, shall have precedence over laws if they give a wider scope to constitutional rights and freedoms. The combined effect of these provisions on domestic authorities when applying the law is that the Convention and the relevant Court case-law constitute binding interpretative guidance as to the interpretation and legal regulation of fundamental rights and freedoms embodied in the second section of the Constitution, thus creating a framework which may not be exceeded in specific cases by such authorities (see I. ÚS 67/03).

221. As in, for example, the United Kingdom.

222. As in, for example, Ireland.

223. As in, for example, Ireland, the United Kingdom.

Examples of good practice

In France, the Convention has the status of higher law in accordance with Article 55 of the constitution of 4 October 1958, which provides that “treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party”. Any applicant may rely before an ordinary domestic court on the rights and freedoms set forth in the Convention, which are given direct effect. As a result, allegations of violation of Convention provisions must be invoked by the individual before domestic courts so as to permit the latter to prevent or, if necessary, to redress the claimed violation. The applicant is required to present their complaints concerning the Convention violation before the domestic judge. If not, the Court considers the application inadmissible for failure to exhaust domestic remedies.²²⁴ This mechanism provides a very wide-ranging remedy to individuals, capable of being exercised in the course of any litigation. A similar system exists, for example, in Austria, due to the constitutional rank of the Convention.²²⁵

In Sweden, the Supreme Court has developed a practice according to which damages can be awarded for violations of the Convention. Claims for damages for alleged violations of the Convention may be submitted to the Chancellor of Justice. An applicant who has made a claim for damages before the Chancellor of Justice may also lodge such a claim before the general courts, if he/she is not satisfied with the decision by the Chancellor of Justice. It is also possible to make such a claim for damages directly before the general courts, without having turned to the Chancellor of Justice. The Court has found that the practice of the Supreme Court, along with the practice of the Chancellor of Justice, must be regarded as sufficiently certain to find that there now exists an accessible and effective remedy in Sweden that is capable of affording redress in respect of alleged violations of the Convention and that potential applicants may therefore be expected to lodge a domestic claim to seek compensation for alleged breaches of the Convention before applying to the Court.²²⁶

V. CONSIDERATION OF THE CONVENTION BY NATIONAL COURTS AND TRIBUNALS

Each High Contracting Party to the Convention is obliged under Article 1 to secure the Convention rights to everyone within its jurisdiction, and under Article 46 to implement final judgments of the Court in cases to which it is party. Insofar as the Court is encouraged to be consistent in its interpretation of the Convention,²²⁷ it is advisable for all branches of the State, including national

224. See, for example, *Segame SA v. France*, App. No. 4837/06, judgment of 7 June 2012, paragraphs 68 and 71; *A.S.P.A.S. & Lasgrezas v. France*, App. No. 29953/08, judgment of 22 September 2011, paragraph 59.

225. See *Tauernfleisch Vertriebs GmbH et al. v. Austria and 21 others applications*, App. No. 36855/06, decision of 12 March 2013, paragraphs 8, 9, 23 and 24.

226. See *Eriksson v. Sweden*, App. No. 60437/08, judgment of 12 April 2012, §52, cf. also *Berg v. Sweden*, App. No. 26427/06, decision of 29 November 2011 and *Eskilsson v. Sweden*, App. No. 14628/08, decision of 24 January 2012.

227. See paragraphs 23 and 25 (c) of the Brighton Declaration.

courts and tribunals, to have regard to the Court's settled interpretation of the Convention in cases against all High Contracting Parties. This can help prevent violations of the Convention. The effectiveness of a domestic remedy can also be significantly enhanced if it is able to respond to the Court's evolving interpretation of the Convention, in accordance with the living instrument doctrine, without waiting for this to be specifically reflected in the finding of a violation against the relevant High Contracting Party.

The Brighton Declaration draws attention to the importance of the dialogue between the Court and national courts and tribunals.²²⁸ This operates not only through meetings between judges, but especially through the exchange of ideas and principles as expressed in judgments. If national courts and tribunals can have regard to the Convention principles and the Court's jurisprudence, they can discuss these in their judgments, and the Court in turn can then both influence and be influenced by this analysis. This enriches and extends the effect of the Court's role of authoritatively interpreting the Convention. In the Brighton Declaration, the States Parties express their determination to facilitate this relationship.²²⁹

In many legal systems, a court or tribunal may consider any source of law or interpretation, especially when it is considering a novel point on which there is no authority in its own legal system. For example, a court might have regard not only to the decisions of other courts within the same jurisdiction, but also the jurisprudence of international courts and higher courts and tribunals in other jurisdictions. If the rights under the Convention have been incorporated into the national legal order – whether by specific legislation or through a general constitutional arrangement – national courts and tribunals may be called upon to interpret and apply those rights. In this circumstance, it is essential that a national court or tribunal should be able to have regard to the jurisprudence of the European Court of Human Rights,²³⁰ without which it would not necessarily be able to deliver a proper interpretation of the Convention.

For example, in the United Kingdom, a court or tribunal, in deciding a question that has arisen in relation to the Convention rights as they have been incorporated into national law, is obliged to have regard to (but is not formally bound by) the jurisprudence of the Court, which in practice means that domestic courts and tribunals follow the Court's interpretation unless there is a particular reason to depart from it.²³¹

228. See paragraph 12 (c) of the Brighton Declaration.

229. See paragraph 9 (c) iv of the Brighton Declaration.

230. And analogously the European Commission of Human Rights and the Committee of Ministers before Protocol No. 11 to the Convention came into force.

231. Pending a referral to the Grand Chamber in *Al-Khawaja and Tahery v. the United Kingdom*, the United Kingdom Supreme Court in *R v. Horncastle and Others* refused to share the Chamber's doubt as to whether there could be any counterbalancing factors sufficient to justify the admission of hearsay evidence that is the sole or decisive basis for a conviction, holding that domestic law observed the right to a fair trial. The Supreme Court observed that while it would normally apply principles clearly established by the Court, it can decline to follow a Strasbourg decision where it has concerns as to whether the Court sufficiently appreciates or accommodates aspects of domestic procedure. In the light of the *Horncastle* judgment, the Grand Chamber in *Al-Khawaja and Tahery* held that the admission of a hearsay statement that is the sole or decisive evidence against a defendant will not automatically result in a breach of Article 6(1), and found that the United Kingdom law contained strong safeguards to ensure fairness. In his concurring opinion, Judge Bratza considered this a good example of judicial dialogue.

The German Federal Constitutional Court (*Bundesverfassungsgericht*) has addressed the relationship between the Convention and German law in several judgments, effectively raising the ECHR and the Strasbourg jurisprudence to the level of constitutional law. According to the Constitutional Court, the Convention, which formally ranks as an ordinary statute under domestic law, serves as an “aid to interpretation” (*Auslegungshilfe*) of the constitution’s fundamental rights and the rule of law principles. This does not require constitutional precepts to be schematically aligned with those of the Convention, but it does require the Convention values to be taken into consideration to the extent that is compatible with constitutional standards. The Federal Constitutional Court has even overruled its own case-law in the light of Strasbourg Court judgments.²³² A similar approach is taken by Austrian authorities and courts.

Under Article 93 of the Constitution of the Netherlands, international treaties become binding upon publication. Article 94 of the constitution states that statutory regulations in force within the Kingdom will not be applicable if their application conflicts with the provisions of treaties that are binding on all persons. Domestic courts dealing with human rights issues do so in light of the Convention, looking not only into the decisions of the Court against the Netherlands, but reading into the provisions of the Convention the whole *acquis* of the Court: Convention rights should be interpreted in line with the Court’s interpretation.²³³

The Norwegian Supreme Court has stated in several judgments that the domestic courts should use the same method as the Court when interpreting the Convention, thus having regard to the jurisprudence of the Court. If there is doubt about the scope of the decisions of the Court, the courts have to consider whether the facts and the law are comparable in the Court’s jurisprudence and the case before the domestic court. However, since it is primarily the task of the Court to develop the Convention, the Supreme Court has stated that the domestic courts’ interpretation should not be as dynamic as the interpretation of the Court. In practice, the practice developed by the Supreme Court means that the domestic courts follow the jurisprudence of the Court.

When a national court or tribunal is called upon to interpret a provision of national law, it can help avoid a violation if it can have regard to any requirements of the Convention, as interpreted by the Court, in choosing between alternative interpretations. There are different extents to which national courts or tribunals may be permitted to do this. In many legal systems, for example, there is a presumption that where a provision of law is ambiguous, it can be presumed in the absence of any evidence to the contrary that a legislature did not intend to place the State in question in violation of its obligations under the Convention. It is even possible in some legal systems²³⁴ for a national court or tribunal to disregard the interpretation that would otherwise have been given to a provision of law if it considers that this would be incompatible with the rights under the Conven-

232. Preventive Detention, judgment of 4 May 2011, No. 2 BvR 2365/09, at www.bundesverfassungsgericht.de.

233. Similar systems exist, for example, in Greece and Sweden.

234. For example, in Austria, Denmark, Estonia, Finland, Latvia, the Netherlands, Norway, Switzerland, Turkey, the United Kingdom.

tion, and substitute instead an interpretation that either limits the effect of the provision in question or includes additional specifications or safeguards. This can help lead to an interpretation of the law that is compatible with the Convention. One particular circumstance is where the procedures or judgments of national courts and tribunals may themselves cause violations of the Convention. This can be avoided if national courts and tribunals can themselves have regard to the Convention principles as interpreted by the Court in its case-law.

For example, the Swiss Federal Tribunal, in order to fulfil its obligations under Article 13 of the Convention, has declared itself competent to examine an application for which no remedy existed under the relevant federal law.²³⁵ A similar approach is taken by the Austrian Supreme Court.²³⁶

For the Court, it is enough that the relevant Convention rights have been invoked in the course of domestic proceedings for an applicant to be considered as having exhausted domestic remedies. A litigant may nevertheless wish to draw a specific matter in the Convention or the case-law of the Court to the attention of a court or tribunal and can be required to respect national judicial procedure in doing so, but any impediment should be necessary and proportionate in the circumstances. A national court or tribunal might not address such a matter unless its attention is drawn to it by a party to the proceedings.

In many national legal systems, it is not necessary for a litigant to provide a translation of a Court judgment being relied upon in domestic proceedings. In certain member States, however, a litigant might be required to provide a translation of the judgment but any such requirement should not entail an unreasonable burden on the applicant.

Where a litigant seeks to cite in proceedings the Convention or the case-law of the Court, the right of other parties to the proceedings to equality of arms must be respected.

For example, in the Netherlands, it is not necessary to provide the domestic court with a translation of a Court judgment. Questions concerning Court judgments could be addressed to so-called co-ordinators for European law (“GCE”) who exist within each court and are responsible for keeping their colleagues informed about relevant developments in the case-law of the European courts.

235. See *Xhavit Haliti v. Switzerland*, App. No. 14015/02, decision of 1 March 2005; also *Linenkogel v. Switzerland*, App. No. 43874/98, judgment of 1 March 2005, paragraphs 35-38.

236. Judgment of 23 October 2007, 110s 132/06f.

TOOLKIT TO INFORM PUBLIC OFFICIALS ABOUT THE STATE'S OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Adopted by the Committee of Ministers on 18 September 2013

PURPOSE

1. This toolkit aims to provide officials of the States Parties to the European Convention on Human Rights (hereinafter “the Convention”) with information and practical guidance to equip them to respect the Convention rights of the people they deal with, fulfil the State’s Convention obligations and so, as far as possible, avoid breaches of the Convention.

WHO THIS TOOLKIT IS FOR

2. The toolkit is primarily for officials working in the justice system and for those responsible for law enforcement or for the deprivation of a person’s liberty. Specifically, that will include (but not be limited to) **police, prison officers, immigration officers and workers in secure psychiatric institutions or other institutions providing care to vulnerable persons**.
3. More widely, the toolkit is also for any official who interacts with the public in ways which raise potential issues of Convention rights, for instance **social workers, registrars and licensing authority officials**.
4. It is not designed for judges, lawyers or senior civil servants, but for those “at the sharp end”. It assumes no prior legal knowledge.

THE CONVENTION AND HOW IT WORKS

5. The **Convention on Human Rights and Fundamental Freedoms** (to give the Convention its official title) is an international **treaty** between the States (currently 47) members of the **Council of Europe** (not to be confused with the European Union). The Council of Europe was set up after the Second World War as an international organisation for the promotion of democracy, human rights and the rule of law. The Convention was adopted in 1950.

6. States become bound to abide by the obligations of the Convention when they become **party** to it by **ratification**. All the member States have ratified the Convention.
7. There are a number of **optional Protocols** to the Convention, which supplement its provisions by adding to the substantive rights guaranteed by the Convention. Member States may choose whether to accept the optional Protocols by ratifying them, and not all States have accepted all the optional Protocols. You should check which of the optional Protocols have been ratified by your State on the Council of Europe Treaty Office website.
8. States have the right to derogate from, that is contract out of, certain Convention obligations. This decision is taken at the governmental level; unless your authorities inform you that a derogation is in force, you should assume that the Convention and relevant optional protocols apply in full.
9. The primary responsibility to ensure the Convention is implemented at national level rests on the States Parties to it (see paragraph 14 below). Their laws and policies should be framed, and all public officials should carry out their duties, in a way that gives full effect to the Convention. States also have to provide a system of remedies for breaches of the Convention. Only when national remedies for an alleged breach have been tried and found absent or inadequate can a victim resort to the **European Court of Human Rights (hereinafter “the Court”)**.
10. The Court’s function is to ensure observance by the States Parties of the obligations they have undertaken under the Convention and its Protocols. The Court has one judge from each member State and sits in Strasbourg. It has jurisdiction to hear and decide applications from any person claiming to be a victim of a breach of their Convention rights by one or more of the States Parties to the Convention (and to hear inter-State cases, though these are rare and not relevant to this toolkit). The States **undertake to abide by the final judgment of the Court in any case to which they are parties**, which usually entails paying any damages awarded by the Court, reinstating as far as possible the victim to the position before the breach and often making changes to national law and practice in order to prevent future similar breaches. Thus, any breach of the Convention by an agent of a State may have very serious consequences for that State, as well as, of course, for the victim.
11. Each case is decided on its individual facts, but in the process the Court often has to interpret the meaning of the Convention more generally, and lay down principles for its application in accordance with a changing European consensus on matters of law and policy. In the light of the case-law of the Court, the Convention is binding on States Parties and enforced in national law by national courts. Hence the toolkit will often refer to specific decided cases, which illustrate how the Convention provisions have been applied, and serve as a guide to how officials should act to respect them.

USING THE TOOLKIT

12. The toolkit is in three main parts:

- ▶ **Part I:** A guide to the rights conferred by the Convention and its Protocols and to the corresponding obligations of the State, following the order in which the provisions appear. (NB: As pointed out above, not all States are party to all the Protocols; Part III states the position, correct at time of going to press, on who is bound by what.) Those provisions which most often arise in the work of the officials for whom this toolkit has been written are covered in much greater detail than those which rarely arise. The toolkit does not aim to cover all potential issues, as a legal textbook would; it concentrates selectively on the most significant and frequently encountered ones.
- ▶ **Part II:** Questions and checklists highlighting points to consider, to help officials decide whether a potential issue under the Convention arises, plus a flowchart.
- ▶ **Part III:** Text of the right-conferring provisions of the Convention and its Protocols.

PART I – THE RIGHTS AND OBLIGATIONS OF THE CONVENTION AND ITS PROTOCOLS

THE CONVENTION

The obligation to respect human rights (Article 1)

13. The member States' basic obligation is to “**secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention**”, (which includes, for those States Party to the various Protocols, the obligation to secure the rights and freedoms defined in those Protocols).
14. “**Everyone**” is very broad:
 - ▶ non-nationals of the State concerned are covered as well as nationals; the rights are not only for citizens;
 - ▶ legal persons (e.g. companies, NGOs and incorporated associations) are covered as well as natural ones (e.g. individuals and groups of people).
15. “**Within their jurisdiction**” usually means the same as “within the State's territory”, but the Court through its case-law has extended that to cover exceptional cases where a State's agents (for example, diplomats or members of the armed forces) present on foreign territory exercise control and authority over others, or where, through military action, a State exercises effective control over an area outside national territory.

Substantive rights and freedoms

16. Meaning of some technical terms

The following terms used in this guide have a particular meaning in the context of the Convention:

- ▶ **unqualified rights** are rights which cannot be balanced against the needs of other individuals or against any general public interest. They may be subject to specific exceptions, e.g. the right not to be deprived of liberty, Article 5; or to none at all, when they are called **absolute rights**, e.g. freedom from torture, Article 3;
- ▶ **qualified rights** are rights which may be interfered with in order to protect the rights of another or the wider public interest, e.g. the right to private and family life, Article 8;
- ▶ **negative obligations** place a duty on State authorities to refrain from acting in a way that unjustifiably interferes with Convention rights. Most of the Convention rights are framed in this way;
- ▶ **positive obligations** place a duty on State authorities to take active steps in order to safeguard Convention rights. In most cases these are not stated explicitly in the text but have been implied into it by the Court.

Right to life (Article 2)

17. **Paragraph 1** of Article 2 says: “**Everyone’s right to life shall be protected by law. No-one shall be deprived of his life intentionally...**” There follows an exception for the death penalty, which is not relevant in States which are Party to Protocol No. 6 (which abolishes it except, if the State’s law so provides, in time of war) or to Protocol No. 13 (which abolishes it completely). **Paragraph 2** sets out three limited exceptions to the prohibition of intentional deprivation of life.
18. The Court has found the positive obligation on States and their agents to safeguard life requires **preventive measures** in many situations, for example:
 - ▶ to **protect someone from violence by others**, but only where the authorities knew or should have known of a real and immediate risk and failed to do all that could reasonably be expected to avoid it. For example, this obligation was breached where a prisoner on remand was killed by his cellmate, another prisoner with a history of violence and mental illness (*Edwards v. the United Kingdom*). It can also arise where there is a history of domestic violence;
 - ▶ **effectively** to protect the life of someone under your control;
 - ▶ to **protect someone from self-harm**, for example where detainees are known to be a suicide risk;
 - ▶ to **protect people living near dangerous industrial sites**, as where a lethal explosion occurred at a rubbish tip which was known to pose an operational risk (*Öneryıldız v. Turkey*), or to guard against foreseeable natural disasters.
19. So the obligation to protect life does not just mean enacting laws, for example, criminalising unlawful killing. It extends to protecting witnesses and informants, and to those who run prisons, detention centres, care homes and psychiatric institutions protecting those under their care from lethal harm from others or themselves.
20. **Use of lethal force by agents of the State:** paragraph 2 sets out the limited situations in which the use of lethal force will not be a breach of the right not to be intentionally deprived of life. They are:
 - a. to effect a lawful arrest or prevent the escape of someone lawfully detained;
 - b. in lawful action to quell a riot or insurrection.
21. **These are exhaustive exceptions, not illustrations.** The State has to satisfy a very high test before resorting to lethal force: it must be **no more than absolutely necessary** to achieve one or more of the authorised purposes and **strictly proportionate to that purpose**. It is not enough to balance the individual right against the public interest. So for example, firing fifty shots during the storming of a suspected terrorist’s house went well beyond a justifiable self-defence for the police officers involved (*Gül v. Turkey*, 2000).

22. **Procedural obligation to investigate deaths:** the Court, through its case-law, has introduced this obligation. The investigation should be set in motion automatically by the authorities. It must be carried out promptly, effectively and publicly, and independently of the agency which used the lethal force concerned. Investigation is also required when death occurs as a result of the acts of private individuals. Responsibility for such investigation will normally be taken at senior level but officials involved at working level need to prepare for this possibility, for example, by keeping records of information received indicating a risk to life, or details of the watch kept on suicide risks in detention, etc., and they must co-operate fully and honestly with any investigation, which otherwise might fall below the standards the Convention requires.
23. The right to life can also arise in cases of **deportation and extradition** if a person is to be sent to a country where there is a real risk of them being subject to the death penalty. Decisions to deport or extradite are normally taken by courts and ministers, but **immigration officers** and others concerned should be aware of the possibility and take advice before sending a would-be immigrant to another State where they might be at such a risk.

Prohibition of torture and inhuman and degrading treatment (Article 3)

24. **Article 3** simply states that “**No-one shall be subjected to torture or to inhuman and degrading treatment or punishment**”.
25. It is an **absolute** right. Unusually among the Convention provisions, there are **no permitted exceptions** or qualifications, nor have any been implied into it by the Court. That means neither the public interest nor rights of others nor the actions of the victim, however dangerous or criminal, can justify treatment prohibited by the article.
26. Article 3 has been invoked in many different situations, but the most common context where it arises is **treatment of persons deprived of their liberty**. As a result, **police** and others responsible for detainees (**prison officers, immigration officials and persons working in detention centres and secure psychiatric units**) need to take particular care to avoid breaches of the article. It is wise to make an early assessment of the risk of ill-treatment, especially for vulnerable categories (suspected paedophiles, minority groups, etc.).
27. “**Torture**” has been defined as “**deliberate inhuman treatment causing very serious and cruel suffering**”. The degree of suffering is the main difference between torture and inhuman treatment, but it also has to be deliberate, for example, to extract information or to intimidate. NB The fact that the information might save innocent lives does not justify torture. Examples of acts found by the Court to amount to torture include **rape, threats of harm to family, being kept blindfolded and mock executions**. The suffering can be mental as well as physical. The threshold for torture is evol-

ing: what was not considered torture 30 years ago may be so now, as standards rise (*Selmouni v. France*, which concerned a suspect subjected to physical blows). The same is true of inhuman treatment.

28. **“Inhuman treatment”** must **reach a minimum level of severity, and “cause either actual bodily harm or intense mental suffering”**. It need not be deliberate nor inflicted for a purpose. In the typical case of injuries in custody, where a person is in good health before arrest or detention and is proved to be injured after it, the burden of proof is on the authorities to show force was not used, or was not excessive, or was justified by the victim's own conduct. Undue restraint during arrest or of a psychiatric patient can also amount to inhuman treatment.
29. **“Degrading treatment”** involves **humiliation and debasement** as opposed to physical and mental suffering. As with inhuman treatment, it does not have to be deliberate. It is most often the **conditions of detention** that are degrading, for example, dirty and over-crowded conditions over a prolonged period (*Kalashnikov v. Russia*). The same conditions may also be inhuman if severe enough. **Strip searches**, even where justified for security reasons, can be degrading if conducted without respect to a person's dignity, for example, in public or in front of the opposite sex. **Solitary confinement** is not necessarily inhuman or degrading, but can be so, particularly if prolonged. Absence or refusal of **medical assistance** can be degrading where it causes anxiety or stress or suffering, especially to mental patients. The opposite situation of **compulsory medical intervention**, for example, force-feeding, while not in principle inhuman or degrading, may become so if not medically necessary or carried out without safeguards or respect. Contrast two cases where medical intervention was taken to recover drugs swallowed by suspected traffickers. In *Jalloh v. Germany*, an emetic was forcibly administered in order to obtain evidence, despite violent resistance. The way it was done was degrading and carried health risks. A breach of Article 3 was found. In *Bogumil v. Portugal*, surgery to remove a parcel of cocaine from the applicant's stomach was done under medical advice and supervision to save life rather than to obtain evidence. No breach. **The importance of close co-ordination between detaining officers and doctors in such situations cannot be over-stressed.** Handcuffing is not degrading if reasonably necessary, for example, to prevent escape or injury to others, but can be if the handcuffed person is undergoing hospital treatment or is paraded in public or at trial.
30. **Discrimination**, for example, on ethnic grounds, when added to evidence of ill-treatment, can make a finding of breach of Article 3 more likely, for example, where Roma suspects were treated in a hostile and degrading way by judicial and executive authorities (*Moldovan v. Romania No. 2*).
31. **Deportation and extradition:** deporting or extraditing a person to another country where they face a real risk of treatment contrary to Article 3 can result in a breach by the deporting State. As with Article 2, in most cases the decision to deport etc. will be taken at a high judicial or governmental level. But the conditions of return of a deportee are often the responsibility of

police or immigration officers. Humane conditions should always be ensured and a person who is medically unfit to travel should not be forced to do so.

32. **Positive obligations under Article 3:** the obligation to **prevent** treatment contrary to Article 3 is mostly a function of government in making laws and regulations. But it can also arise at working level, for example, where social workers failed to take reasonable steps to protect children from serious and long-term parental neglect of which they were or should have been aware (*Z v. the United Kingdom*). Where vulnerable groups like children, persons of unsound mind or detainees are concerned, the State's obligation to prevent ill-treatment is strengthened.
33. **Procedural obligation to investigate:** as with the right to life (Article 2), where there is an arguable breach of Article 3, there is an obligation to carry out an independent, effective and prompt investigation. For example, injuries need to be medically examined as soon as possible to establish how they occurred. Police and other officials need to keep good and accurate records of their actions, and if accused of ill-treatment, co-operate fully with any investigation.

Prohibition of slavery, servitude and forced labour (Article 4)

34. **“Slavery”** means **“the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised”**. In a case where a young girl brought in from her native country was required to work long hours without payment for a family and to live in their house with no possibility of changing her circumstances, the Court found that she was not a slave (because the family did not “own” her) but she was in **servitude** (*Siliadin v. France*) because her place of residence and her work were forced on her against her will.
35. **“Forced or compulsory labour”** is where a person is required to work or give service under the threat of a penalty. Paragraph 3 of Article 4 lists three situations which are not to be considered forced or compulsory labour:
 - a. work done by prisoners in lawful detention;
 - b. military service (or its recognised equivalent);
 - c. work that is part of normal civic obligations (e.g. jury duty).
36. A **positive obligation to investigate** may also arise here, especially in cases of human trafficking and domestic servitude. The investigation must satisfy the same requirements of openness, effectiveness and independence detailed above on Articles 2 and 3 (see paragraph 23 above).

Right to liberty and security (Article 5)

37. The right not to be deprived of personal liberty without lawful cause is one of the keystones of the Convention system. So Article 5 strongly asserts a **presumption in favour of liberty** at the outset, both positively and nega-

tively: "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..."

38. **Loss of liberty** has two elements: confinement in a particular place for a non-negligible length of time, and lack of consent by the detainee. It does not require being physically locked up. At the same time, some instances of control of large numbers of people for safety reasons do not amount to deprivation of liberty under the article, for example, control of crowds at sporting events or on motorways following an accident. The Court has also found, on the particular facts, that Article 5 did not apply when demonstrators, including some violent elements, were for public safety reasons confined by a police cordon in a narrow city area for some hours (*Austin and Others v. the United Kingdom*).
39. The Court has stressed that **protection from arbitrariness** is at the core of Article 5, which gives a right to security as well as liberty and requires that in all cases procedures prescribed by law be followed. So, where a foreign national wanted for murder in State A could not for legal reasons be extradited there, the police arrested him and forcibly took him by car to the border with State B, from where he could be extradited. The Court found the arrest, which was designed to get round the requirements of the extradition law, was arbitrary and contrary to Article 5 (*Bozano v. France*).
40. In contrast to Article 3, the **right to liberty is not absolute** (see paragraph 17 above); there are obviously legitimate reasons why society may need to deprive people of their liberty in the general interest, especially where their actions pose a danger to themselves or others. So the right is subject to **six specific exceptions**, set out in paragraph 1, sub-paragraphs a to f, which are **exhaustive**. Officials responsible for law enforcement and especially those with powers of arrest and detention have an especially important role to observe strictly the limits set by sub-paragraphs a to f, and submit their actions and decisions promptly to judicial control.
41. The **six exceptions where deprivation of liberty is permitted** are:
 - a. A person can be detained following conviction by a court with authority to decide the case.
 - b. A person can be detained for non-compliance with the order of a court or to secure the fulfilment of any obligation prescribed by law.
 - c. A person can be arrested and detained in order to bring him or her before a court on reasonable suspicion of having committed a criminal offence, or when reasonably necessary to prevent him from committing an offence or fleeing after having done so.
 - d. A minor (i.e. under 18) can be detained to ensure he or she receives education or pending non-criminal court proceedings (e.g. to commit the minor into care; criminal proceedings are covered by sub-paragraph c).
 - e. Persons with infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants may be detained.
 - f. A person may be arrested or detained to prevent unauthorised entry into the country or for the purposes of deportation or extradition.

42. In all six situations there is a specific requirement that the detention be **lawful**. That means not only that it must conform to domestic law and procedure which are both accessible and foreseeable, but also the application of that law must conform to the Convention, i.e. be for a purpose sanctioned in sub-paragraphs a to f.
43. Detention to **secure the fulfilment of a legal obligation** (sub-paragraph b) covers such things as submitting to a road block, a random breath test or an identity check, and other common exercises of police powers. Any detention must be as a last resort, after the person has been given the opportunity to comply voluntarily. It must also be proportionate, and with the aim of securing compliance, not of punishment.
44. **Arrest and detention on suspicion of committing a crime** (sub-paragraph c) is the most common exceptional situation, and the one where problems most often arise. Arrest must be on **reasonable suspicion** with an intention to bring charges rather than to fish for information, which might lead to charges. But the Court accepts that a period of time for interrogation is permissible, which can be longer in some cases, for example, where terrorism acts are suspected, because of the difficulty of obtaining hard evidence on which to base charges.
45. The Court has not defined “**unsound mind**” (sub-paragraph e), because medical opinion and practice is always evolving. The only safe course for officials, therefore, is only to detain people (and keep them in detention) on authoritative, objective and recent medical advice. The place and conditions in which such persons are held must also be appropriate to their situation. Placing a person of unsound mind in a social care home can also amount to a deprivation of liberty.
46. In dealing with **persons of unsound mind, alcoholics, vagrants and drug addicts** (sub-paragraph e), the Court requires a **proportionate** response to the person’s behaviour. In a case where someone who was intoxicated got into an argument in a post office, the police took him to a sobering-up centre and kept him there for over six hours. There was no evidence that he was a danger to others or himself, nor did he have a history of alcoholism. There were other options open to the police (for example, taking him home to sober up). The Court said, “detention of an individual is such a serious matter that it is only justified where other, less severe measures have been considered and found insufficient to safeguard the individual or public” (*Witold Litwa v. Poland*).
47. Detention pending **deportation or extradition** (sub-paragraph f) can be in a detention centre specially set up for fast-track processing of such cases, but only for a short period (seven days was ruled acceptable in *Saadi v. the United Kingdom*). Detention can take place outside any recognised place of custody: a breach was found where asylum seekers were confined to a transit zone in an airport for twenty days, after which they were deported. In theory, they were free to leave but in practice they had nowhere to go and no legal or social assistance. The guarantees of Article 5 had not been applied (*Amuur v. France*).

48. **Paragraph 2** of Article 5 requires that **a person who is arrested must be informed promptly, in a language he or she understands, of the reasons for his or her arrest and any charge against him or her.** It is an elementary safeguard for a person to be told why he or she has been arrested, in simple and non-technical language, so that he or she can deny the offence or challenge his or her detention, if necessary in court (see Article 5(4) below). The understandable language required may be a foreign language or, for example, sign language if the arrested person is deaf. What satisfies the “**promptly**” requirement can vary according to the circumstances of the case, but the Court has indicated it will expect the information to be given to the detainee “within a few hours of his arrest”. Similarly, the **degree of detail** required can vary: in some cases of suspected terrorism, the Court has accepted that the reasons can be brief and less specific than in normal cases, to avoid disclosing too much of what is known and not known to the authorities. In rare cases, the information may be given to the arrested person’s representative (for example, where that person’s mental state precludes their understanding).
49. **Paragraph 3** requires that a person arrested on suspicion of committing an offence **be brought promptly before a judge or other judicial officer and shall be entitled to trial within a reasonable time or to release pending trial.** This must happen automatically; the detainee does not have to apply for it (unlike paragraph 4, below). The person before whom the detainee is brought can be a judge or magistrate, or another judicial officer provided that person is independent of the authorities and the parties and is impartial. The point is that the person have competence to conduct a review on the merits, ascertain the reasons for arrest and detention are sufficient and order release if they are not. What satisfies “**promptly**” can again vary, but normally it should be the next day. The Court has treated four days as a maximum, although shorter periods may also be contrary to the Convention. The decision on **bail** may be taken then or shortly thereafter. The Court requires that detention pending trial be shown to be necessary (for example, if there is a serious risk of the detainee absconding), based on proper examination of the circumstances of each individual case in accordance with the general presumption in favour of liberty. Getting the case to trial within a reasonable time will involve prosecutors and the courts as well as the police. All of them have to work together to that end.
50. **Paragraph 4** is the “**habeas corpus**” provision of the Convention, giving a person arrested or detained the right “**to take proceedings by which the lawfulness of their detention shall be decided speedily by a court and his release ordered if the detention is not lawful**”. This right cannot be used to contest imprisonment as part of a criminal sentence (Article 5(1)(a)). The proceedings have to be adversarial and the two sides must have equality of arms, which implies that detained persons and their representatives must have access to the core documents, on which basis detention is requested. “Speedily” implies that there should be no undue delay in bringing proceedings to the court (for example, delay in translating the docu-

ments used in court proceedings). If detention has been ordered by a court, that will usually satisfy this right. The right normally entails a right periodically to initiate a review of the lawfulness of detention.

51. **Paragraph 5** guarantees a **right to compensation for everyone who has been the victim of arrest and detention in contravention of the provisions of Article 5**. Ensuring this right will fall to others than the officials whose job includes powers of arrest and detention, but it is a powerful incentive to those officials to respect the rights given by Article 5. Failure to do so can cost the State a lot of money.

Right to a fair trial (Article 6)

52. The key provision of Article 6, in the first sentence of paragraph 1, is that **“in the determination of his civil rights and obligations or of any criminal charge against him, anyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”**.
53. Fair trial is a fundamentally important guarantee in any democratic society, so this article is one of the most important, and most frequently invoked, provisions of the Convention. There are more cases about fair trial than about any other issue. Responsibility to ensure a fair trial falls far more on judges, public prosecutors and lawmakers than on the officials dealing directly with the public for whom this toolkit is designed. But **police** (who can in some systems act as prosecutors) and **prison officers** have responsibilities in criminal cases, and other officials – **court officials, social workers, licensing officials and registrars** – also can have responsibilities in civil cases.
54. Because the Convention has to apply to many States, whose legal systems differ substantially, many of the terms in the article have been given their own “autonomous” Convention meaning by the Court. This applies, for example, to “criminal”, “charge” and “civil right”. These terms will not always mean the same as they do in national systems.

Civil proceedings

55. In principle, Article 6 applies broadly to all civil disputes, with some long-standing exceptions. In practice it is simplest to list some of the cases to which the Court has said Article 6 will apply and others to which it will not, but, NB, the lists which follow are not exhaustive and practice is always developing:

Disputes to which Article 6 has been applied:

- ▶ property disputes, e.g. planning disputes;
- ▶ licensing decisions, e.g. the right to practise a profession or sell alcohol;
- ▶ family proceedings, e.g. adoption, fostering, cross-border return of children and placing a child in care;
- ▶ claims for compensation against public authorities including hospitals;

- ▶ welfare benefit claims so long as there is a right, i.e. the benefit is not purely discretionary;
- ▶ disciplinary proceedings against judges and employment disputes of public officials.

Disputes to which Article 6 has been held not to apply:

- ▶ immigration and nationality disputes;
 - ▶ taxation disputes between taxpayer and revenue authorities;
 - ▶ election rights, e.g. the right to stand for elected office.
56. In all civil cases to which it applies, Article 6(1) **expressly** requires:
- ▶ a **public hearing**, subject to some exceptions, for example to protect children in family cases;
 - ▶ an **independent and impartial tribunal**, i.e. one that is independent of the authorities and parties and is unbiased;
 - ▶ trial **within a reasonable time**;
 - ▶ a **publicly pronounced judgment**, i.e. publicly available, not necessarily pronounced in open court.
57. The Court has also **implied into Article 6(1)** the following rights:
- ▶ **access to court** (both physical and procedural);
 - ▶ **legal representation** in civil cases (paragraph 3(c) already gives this right in criminal cases, see below);
 - ▶ **the right to participate effectively**, e.g. through adversarial proceedings, with evidence available to one side disclosed to the other, and equality of arms, i.e. a proper opportunity for both sides to present their case;
 - ▶ **the obligation on the court to take both parties' cases fully and equally into account**;
 - ▶ **the right to a reasoned judgment/decision**;
 - ▶ **the obligation on the State to execute a civil judgment in a timely and effective manner**;
 - ▶ **legal certainty**, including the finality of judicial decisions.
58. The main impact on public officials is to **put those dealing with civil disputes covered by Article 6 on notice that they must ensure the fair trial rights are respected, either at the time of the administrative decision or will be respected later in judicial review**. These include social workers dealing with cases of adoption and placing children in care, etc.; planning officers deciding on planning applications; licensing authorities and professional bodies dealing with licences to practise, etc.; welfare officials dealing with claimants; and so on.

Criminal proceedings

59. For trials that determine a criminal charge, the procedural safeguards are stricter than for other judicial proceedings. The notion of "criminal" has a specific meaning under the Convention and may extend to disciplinary, administrative or fiscal proceedings if they may lead to punishment of the person concerned.

60. In addition to the rights given by paragraph 1, people charged with a criminal offence have the following further specific rights, set out in paragraphs 2 and 3 a to f:

- ▶ **Presumption of innocence (paragraph 2).** A person is innocent until proven guilty according to law. There is a right to silence and not to incriminate oneself. So public officials may breach this right if they state or imply publicly, for example, to the media, that a person is responsible for a crime before a court has found him or her so. The provision does not however prevent preliminary tests like blood or urine tests nor orders to produce documents.
- ▶ **Prompt and intelligible information of the nature and cause of the accusation against him or her (paragraph 3(a)).** This is similar to the right in Article 5(2) (see above) but the purpose is different; in Article 5 it is to enable the person to challenge his or her arrest and detention, in Article 6 to prepare his or her defence. The task will normally fall to the police, court officials or prosecution officials. The person must be able to understand the information, including, if necessary, by being provided with a translation (at State expense, see paragraph 3(e) below). Where the accused has a disability (for example, blindness, deafness or mental illness) which makes it hard for him or her to understand, other special assistance to him or her may be required.
- ▶ **Adequate time and facilities for the preparation of his or her defence (paragraph 3(b)).** The time will vary with the complexity of the case, but the facilities will always need to include, for prisoners on remand, visits by their lawyers, who must be able to have confidential discussions, out of earshot of police or prison officers.
- ▶ **The right to defend him/herself in person or through legal assistance of his or her own choice, provided free where the interests of justice so require (paragraph 3(c)).** Similar issues of access by lawyers to the accused apply here. The Court has held the legal assistance must be practical and effective including at the pre-trial stage as well as in court. Thus, where a high-profile prisoner was interrogated for nearly seven days without being allowed access to his lawyer, there was a breach, because his defence risked being irretrievably prejudiced. In the same case, because the files were so big, two one-hour visits a week were not enough to allow the defence to be prepared (*Öcalan v. Turkey*). As before, consultations need to take place out of earshot of officials. As a rule, the assistance of a lawyer needs to be provided as from the first interrogation by the police.
- ▶ **The right to examine prosecution witnesses and call witnesses in his or her defence (paragraph 3(d)).** Where a witness's evidence is decisive as to the guilt of the accused, the latter must be given a chance to cross-examine that witness, if necessary with legal assistance.
- ▶ **The right to an interpreter, provided free, if he or she cannot understand or use the language used in court (paragraph 3(e)).**

61. As is evident from the above, in criminal cases the role of police and prison officers in respecting and protecting rights is much greater than in civil ones. In addition to the examples given, the **length of time** cases take will depend in part on the efficiency of police investigations. The Court includes the investigatory phase when assessing if the time taken is reasonable.

No punishment without law (Article 7)

62. This provision **forbids retrospective application of the criminal law**. It includes the right not to be tried or punished for an act which was not a criminal offence at the time it was done. **Police need to be careful to ensure that offences and penalties were in force at the time of the acts in respect of which they arrest and charge people**. Again, it should be noted that the notion of “criminal” has a specific meaning under the Convention and may extend to disciplinary, administrative or fiscal proceedings if they may lead to punishment of the person concerned.

Articles 8-11

63. These four articles, respectively on **respect for private and family life; freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association** have several **common features**:
- ▶ they are all **qualified rights**;
 - ▶ they share a **two-paragraph structure**, in which paragraph 1 states the right and paragraph 2 sets out the circumstances in which interference with it may be justifiable;
 - ▶ the second paragraphs vary in detail but have **three common requirements for an interference with the right to be justified**.
64. **First** the interference must be **in accordance with the law**. “Law” includes primary and secondary legislation, common law and EU law for States which use those systems, and rules of professional bodies, universities, etc. The law must be established in the national system. It must also be **accessible**, i.e. publicly available, and **foreseeable**, i.e. sufficiently precise to allow someone to regulate their behaviour to comply with the law. In one of several cases on telephone tapping, the Court found that a law did not contain sufficiently clear and detailed rules especially given the seriousness of the interference and the increasing sophistication of the technology (*Kruslin v. France*).
65. **Second** the interference must **pursue a legitimate aim**. All the second paragraphs set out lists of specific permitted aims, which vary from article to article, such as “prevention of crime”, “protection of public order, health or morals” or “protection of the rights and freedoms of others”.
66. **Third** the interference must be **“necessary in a democratic society”** to pursue the aim in question. “Necessary” means neither “indispensable” at one extreme nor merely “reasonable” at the other. It means the government has to establish that there was a **“pressing social need”** for the interference and that it was **proportionate to the aim pursued**. Despite the word not

appearing in the Convention text, proportionality is at the heart of how the Court has interpreted it. So, even if an action or policy pursues a legitimate aim, it is not permissible if the means used are excessive, arbitrary or unfair. Essentially the Convention requires national authorities to balance the individual's rights against the public interest; it may also be a matter of striking a balance between competing individual rights. The Court has recognised that it is primarily for national authorities to safeguard human rights and strike the right balance, and that they are in principle better placed than the Court itself to assess the necessity for an interference. Hence it has developed a principle that States enjoy a discretion in this area, which it calls the **"margin of appreciation"**, recognising that, as social and other circumstances differ, so may local solutions. This latitude is, however, limited, and is subject always to the supervision of the Court. It will be stronger if practice across Europe varies widely than if there is a consensus which is out of line with the individual State's policy or practice. In the nature of things, social attitudes change, and the decisions of the Court evolve along with those attitudes.

Right to respect for private and family life (Article 8)

67. Under **paragraph 1, everyone has the right to respect for his or her private and family life, home and correspondence**. All these terms have been given an expansive interpretation by the Court, going beyond their ordinary meaning under many national systems. Officials need to be aware of this and not assume that the Convention meaning will be the same as what they are used to.
68. **"Private life"** is much wider than privacy (which is mainly about rights to confidentiality and seclusion). It covers, among other things, personal identity; sexual orientation and activity; gender identity; data protection; freedom from noise or toxic emissions; and freedom from harassment.
69. **"Family life"** similarly is a wide concept under the Convention, going well beyond a traditional married couple with children. It covers unmarried couples (provided there is evidence of a settled long-term relationship); same sex couples and transsexuals; near relatives such as grandparents and grandchildren; and siblings. The issue is, does evidence of close personal ties exist? It has often been applied in deportation cases to allow persons with family ties to remain even where they have committed crimes or overstayed their entry permission.
70. **"Home"** requires a victim to show sufficient and continuous links with the place where they live, but it need not be occupied by them at all times; it can be temporary (like a caravan) or business premises, and sometimes occupied illegally or in contravention of a planning decision. The right protects the peaceful enjoyment of living in the home, free from unauthorised entry and also from nuisances like noise and other pollution.
71. **"Correspondence"** covers not only letters (especially from prisoners) but telephone conversations, emails and texts.

72. **“Respect”** involves both **negative and positive obligations**. Negatively, it is an obligation not to interfere with the rights arbitrarily. Positively, it may involve the adoption of measures designed to secure respect for private and family life not only in relations between the State and the individual but also in the sphere of relations between individuals. So, in a series of cases concerning transsexuals, the issue has not been that the States have prevented gender reassignment surgery (in fact they facilitated it), but that thereafter they refused to alter personal documents like birth certificates to reflect the new identity. This was a breach of their positive obligation to respect private life (*Goodwin v. the United Kingdom*). Cases concerning environmental pollution also concern mostly the positive obligation. Furthermore, in all actions concerning children, the best interests of the child are a primary consideration.
73. **Paragraph 2** follows the pattern explained above, permitting no interference with the right except such as is in accordance with the law and necessary in a democratic society for a legitimate aim. In Article 8 the permitted aims are:
- ▶ **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.**
74. Each time an interference is claimed, there has to be an assessment based on **three questions**:
- ▶ **is it in accordance with the law?**
 - ▶ **does it pursue a permitted aim?**
 - ▶ **is it necessary in democratic society to fulfil that aim, i.e. not excessive, arbitrary or unfair?**
75. An **example** of how this works: in a case concerning the collection and retention of personal data by the police, the applicants were charged with offences and DNA samples and fingerprints were taken. Later they were either acquitted or the charges were dropped, but the samples were retained. The retention was provided for by law and pursued a permitted aim, the prevention of crime. But the Court found it failed the “necessary in a democratic society” test because it was disproportionate, as a blanket provision, which did not permit exceptions where people were suspected of offences but had subsequently been acquitted (*S. and Marper v. the United Kingdom*).
76. **Officials need to ask themselves the same questions before they interfere with Article 8 rights**, to make sure they do not infringe them without justification. This article is one of those most often breached by action at working level. It is impossible to cover all the many ways it has been applied. The following are **examples** (based on decided cases) of **some of the situations where care by particular groups of officials is most needed** (NB these are not exhaustive):

- ▶ **Police:** searching someone's home; taking or retaining physical samples or documents.
- ▶ **Security services:** tapping a person's phone; bugging their home or business premises, retaining data.
- ▶ **Prison officers:** monitoring or interfering with prisoners' correspondence, especially with lawyers or courts; searches of visitors for drugs, etc.; interference with visiting rights; imposing sanctions on serving prisoners.
- ▶ **Registrars:** applying restrictions on choices or changes of name; changing civil status documents after gender-reassignment.
- ▶ **Social workers:** taking children into care; placing them for fostering or adoption (need to inform and consult with natural parent(s), avoid delays that create irretrievable changes in relationships, etc.); facilitating contact of a child with his/her parent who has not been granted custody.
- ▶ **Local government officers:** applying planning laws where people's homes and family lives are affected; using CCTV footage publicly where a person's identity can be revealed; managing plant which can cause pollution by noise or toxic emissions (e.g. waste treatment works).
- ▶ **Medical practitioners:** treatment requiring informed consent.
- ▶ **Immigration officials:** dealing with cases of prospective deportees (e.g. illegal over-stayers, convicted criminals at the end of their sentences) who have family ties in the country.

The above are not situations where Article 8 will necessarily impede the action in question, but where care is needed to ensure justification and proportionality. In several cases, officials may need to check that necessary judicial authorisation has been obtained.

Freedom of thought, conscience and religion (Article 9)

77. **Paragraph 1** is in two parts:

- ▶ an **unqualified right to freedom of thought, conscience and religion, which includes the freedom to change one's religion or belief;**
- ▶ a **qualified right to manifest one's religion or belief**, alone or with others, publicly or in private, in worship, teaching, practice and observance.
Only the second right is subject to the qualifications in paragraph 2.

78. The Court has avoided defining "religion and belief" and has accepted many as qualifying – not just well-established world faiths like Christianity, Judaism and Islam but newer ones like Jehovah's Witnesses and Scientology. Among beliefs it has accepted pacifism, veganism and opposition to abortion but not advocacy of assisted suicide.

79. Generally it is **direct** manifestations of religion or belief that are protected, for example, wearing a cross, turban or Islamic veil or having a kosher diet, not **indirect** ones like distributing pacifist leaflets to soldiers, as opposed to proclaiming pacifist principles.

80. **Paragraph 2** is in the common form explained above (on Articles 8 to 11 – see paragraphs 73 to 75 above).

81. Any restriction of the right must be **prescribed by law**. Thus, where officials broke up a meeting of Jehovah's Witnesses on lawfully rented premises with no legal authority, there was a breach (*Kuznetsov v. Russia*).
82. The legitimate aims listed are **public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others**.
83. **Restrictions which have been upheld include:**
 - ▶ forbidding a nurse from wearing a cross which could pose a health risk to patients;
 - ▶ curbs on religious dress, especially the wearing of the Islamic veil in schools or universities, where the Court has given a wide discretion to governments on grounds of the rights and freedoms of others;
 - ▶ forbidding a prisoner from conducting religious rituals which disturbed others.
84. **Restrictions not upheld include:**
 - ▶ a person prosecuted for "proselytism" when he was merely seeking to persuade others of the virtues of his beliefs;
 - ▶ An airline check-in clerk who was not allowed to wear a cross because of company policy;
 - ▶ Refusing to grant a prisoner's request for a meat-free diet.
85. **Issues of belief and its manifestation are often controversial and sensitive, especially in an increasingly pluralist society. Officials need to be sure they have clear legal authority before applying restrictions, as well as a legitimate aim proportionately applied.**

Freedom of expression (Article 10)

86. **Paragraph 1 states: "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".**
87. Freedom of expression is a **cornerstone of democracy** and key to the enjoyment of many other rights. The right protected is very widely drawn, going far beyond the freedom of the press. It covers political speech, commercial speech and artistic expression. The Court has stressed its constitutional importance and said **interference can be justified only by imperative necessities and exceptions must be interpreted narrowly**. It has also said expression protected by Paragraph 1 includes **"not only ideas that are favourably received or regarded as inoffensive... but also those that offend, shock or disturb the State or any sector of the population"**. So opinions that might be regarded as extreme and offensive and art that might be considered obscene may in principle be expressed and displayed, subject to the qualified exceptions in paragraph 2, which are to be interpreted narrowly. **The presumption is in favour of free expression.**

88. **Paragraph 2** sets out the qualifications to the right, in the common pattern explained above, requiring restrictions to be (i) prescribed by law, (ii) for a permitted purpose and (iii) necessary in a democratic society, proportionate and non-discriminatory (see paragraphs 73 to 75 above). But this article also recognises that the exercise of freedom of expression “carries with it duties and responsibilities”. These words have been used by the Court, for example, to justify restrictions on public servants’ participation in political activities (*Ahmed v. the United Kingdom*).
89. The permitted aims for restrictions, formalities, conditions or penalties are:
- ▶ **national security, territorial integrity or public safety;**
 - ▶ **prevention of disorder or crime;**
 - ▶ **protection of health or morals;**
 - ▶ **protection of the reputation or rights of others;**
 - ▶ **preventing the disclosure of information received in confidence;**
 - ▶ **maintaining the authority and impartiality of the judiciary.**
90. Few of the many cases decided on freedom of expression have complained of the actions of police or other officials dealing directly with the public. Usually the complaint concerns either the national laws applied, or the actions of senior officials, prosecutors or the courts in deciding to forbid the expression of unwelcome opinions or ideas or prosecute and convict people for expressing them. **For the police, the safest course is to err on the side of permitting free expression and only restricting it where strong reasons for doing so for one of the stated aims exist, and where the restriction is proportionate and non-discriminatory.** Even where the ideas concerned are extreme, suppressing them requires strong justification. Great care should also be taken in issuing and executing search warrants of newspaper publishers’ premises; journalists have the right to protect their sources.

Freedom of assembly and association (Article 11)

91. Article 11 guarantees two rights to act collectively with others.
92. **Freedom of assembly** includes public or private meetings, marches, processions, demonstrations and sit-ins. The purpose may be political, religious or spiritual, social or another purpose; no limit has been imposed on purpose, but any assembly **must be peaceful**. Incidental violence will not mean an assembly forfeits protection unless it had a disruptive purpose.
93. **Positive obligations:** the State has a duty to protect those exercising their right of peaceful assembly from violence by counter-demonstrators. In one case, the police had formed a cordon to keep rival demonstrators apart but failed to prevent physical attack and damage to property. The Court found they had not done enough to enable a lawful demonstration to proceed peacefully (*United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*).

94. **Restrictions or bans on assemblies require justification under paragraph 2**, which is in the common form explained above, requiring restrictions to be (i) prescribed by law (ii) for a permitted purpose and (iii) necessary in a democratic society, proportionate and non-discriminatory (see paragraphs 73 to 75 above). The permitted purposes are:
- ▶ **national security or public safety;**
 - ▶ **prevention of disorder or crime;**
 - ▶ **protection of health or morals;**
 - ▶ **protection of the rights and freedoms of others.**
95. Authorities have substantial discretion in assessing whether a proposed assembly poses any risk of endangering public safety, etc., which could justify interference, but the **presumption must be that a peaceful assembly be allowed**. It is not a breach to require prior notification or authorisation but refusing permission is an interference, which requires justification by the strict standards of paragraph 2. There can be a breach even if the assemblies went ahead in defiance of the refusal (*Baczowski v. Poland*).
96. The authorities need to be careful that restrictions are **non-discriminatory**. The fact that organisers are an unpopular group of individuals is not a sufficient reason to prevent their assembly. So, where an evangelical church was refused permission to hold a service in a park because it might cause discontent among the followers of the majority religion in the area, there was a breach. The role of the authorities in such situations had to be informed by “pluralism, tolerance and broadmindedness”. The same principles would apply to minority ethnic or political groups, or to other minorities like lesbians, gays, bisexuals and transsexuals (LGBT) wishing to hold marches and demonstrations.
97. As decisions on whether to allow demonstrations, etc. are usually for **police**, this provision is very important. The key will usually be the **risk of violence**, intentional or not. Its presence may justify restrictions; its absence means restrictions are very unlikely to be justifiable.
98. **Freedom of association** is the right to associate with others to form bodies in which to pursue common objectives collectively. It specifically includes the right to form **trade unions** for the protection of members’ interests. As well as trade unions, two sorts of associations of particular importance are **political parties** and **religious bodies**.
99. Bans or restrictions on **political parties** are hard to justify. The Court has stressed that a plurality of parties is important for a democratic society and will require convincing and compelling reasons for a ban. The fact that a party’s programme wanted to debate the situation of part of the state’s population did not make it acceptable to ban it for threatening territorial integrity (*United Communist Party of Turkey v. Turkey*). Similar considerations apply when registration as a political party is refused, which operates like a ban.

100. With **religious groups**, Article 11 read with Article 9 creates an expectation that believers will be able to associate freely, without State intervention. As with political parties, there is a duty of neutrality and impartiality. A refusal without good reason to re-register a church after a change in the law was in breach of Article 11 (*Moscow Branch of the Salvation Army v. Russia*).
101. **Trade unions** have the right to bargain collectively and to enter into collective agreements (*Demir and Baykara v. Turkey*). The Court has treated restrictions on industrial action as interferences with freedom of association which the State is required to justify under paragraph 2. By a **specific exception to paragraph 2**, the exercise of Article 11 rights may be restricted for members of the armed forces, of the police or of the administration of the State. Any such restriction will be strictly construed by the Court.
102. Most cases on freedom of association complain of the laws of a State or the actions of senior officials or courts. But **police and registration officers** dealing with prospective or existing associations, especially trade unions and political parties and religious bodies, need to be aware of the duty of impartiality and the need for restrictions to be justified by compelling reasons.

Right to marry (Article 12)

103. **Article 12** says: “**Men and women have the right to marry and to found a family according to the national laws governing the exercise of this right**”.
104. This only applies to marriage, not to cohabitation or civil partnerships. It also only applies to heterosexual marriage: the Convention does not require a State to grant same-sex couples the right to marry. But transsexuals may marry in their new gender. Marriage laws may vary from State to State, for example, on issues like marriage with relatives as well as same-sex marriage.
105. Issues under this article are unlikely to arise for police, but more likely for **registrars**, and for **prison officers**. Although recognising the right of prisoners to marry, the Court has nevertheless not found a right to conjugal visits for prisoners in Article 12 to enable them to found a family (but more than half the member States allow this). Cases of separation of spouses under deportation or immigration rules will usually be dealt with under Article 8, not Article 12.

Right to an effective remedy (Article 13)

106. **Article 13** requires the provision of effective national remedies for the breach of a Convention right.
107. Claims under this Article will usually involve the Court examining the domestic legal regime to see if it gives a remedy in the circumstances and whether that remedy is effective, so it essentially concerns lawmakers and the courts rather than officials dealing with the public. The Article specifically requires a remedy “notwithstanding that the violation has been committed by persons acting in an official capacity”, so **national laws giving immunity to public officials are contrary to the Convention**.

Prohibition of discrimination (Article 14)

108. **Article 14 requires that “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”.**
109. Article 14 does **not give a free standing right**. It can only be used **in conjunction with another right** given by the Convention (or Protocols, if ratified). It may, however, be breached when read with that other right even if the other right on its own is not breached. NB Protocol No. 12 gives a free-standing right in the same terms as Article 14, which should make it more widely applicable, but it is not yet ratified by many States (see below).
110. **List of grounds for discrimination not exhaustive:** The words “such as” and “or other status” flag up that the list is only illustrative. The Court has also recognised, for example, **conscientious objection, disability, illegitimacy and sexual orientation** as prohibited grounds of discrimination, and may add more.
111. **Discrimination is harder to justify on some grounds than on others:** though all the grounds are important, the Court has said it will require particular weighty reasons to justify discrimination on grounds of sex, sexual orientation, race, colour, nationality (except in regard to immigration), illegitimacy and religion.
112. **What is discrimination? It is treating people in analogous situations differently, or people in different situations alike, without objective and reasonable justification.** So, not all differential treatment is discrimination. A prisoner and a free person, for example, are not in analogous situations, so different treatment may be justified. The two main situations can be illustrated as follows: where a lesbian was not allowed to adopt a child solely because of her sexual orientation, while other unmarried people were allowed to, there was a breach (people in analogous situations treated differently) (*EB v. France*). Conversely, where a Jehovah's Witness who had been convicted of refusing to wear a uniform was denied the right to qualify as an accountant because of a previous conviction, there was also a breach, because he, with a very minor conviction, was treated the same as people in very different situations, with convictions for dishonesty and fraud (*Thlimmenos v. Greece*).
113. **“Objective and reasonable justification”:** the Court, through its case-law, has introduced this concept similarly to the permitted exceptions in the second paragraphs of Articles 8 to 11: that is the burden is on the State to prove the justification, which must also be proportionately applied (see paragraphs 73 to 75 above).
114. **Violence motivated by discrimination** is particularly serious and important for agents of the State authorised to use force (for example, **police or armed forces**) to avoid. In a case of an assault by police on a Roma individual during racial confrontations in a village, the Court found a breach

because there was evidence that the attack was racially motivated (*Stoica v. Romania*). In another case where two Roma conscripts were shot by police, the Court found no breach of Article 14 read with Article 2 because there was insufficient evidence of racial motivation, but there was a breach of a **procedural obligation** on the State to investigate properly cases where violence used by its agents might be motivated by discrimination (*Nachova v. Bulgaria*). State toleration of discriminatory violence used by private persons can also be a breach, as where a congregation of one religious group was violently attacked by followers of another and the authorities refused to intervene to stop it and were indifferent to prosecuting the perpetrators (*97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*).

115. **Indirect discrimination** is where a generally applicable law or policy has a disproportionately adverse effect on members of a particular group, even if there is no discriminatory intent. So a breach was found where a disproportionately high number of children from an ethnic group were sent to special schools for the less able, even though the policy was of general application. The problem was with how the policy had been applied (*D.H. and Others v. the Czech Republic*).
116. Discrimination on any of the grounds identified in Article 14 or by the Court can arise in almost any instance where officials deal with the public in relation to areas within the ambit of the Convention rights and freedoms. Great care and vigilance are needed by all officials to refrain from differential treatment that amounts to discrimination.

Right of individual application to the Court (Article 34)

117. This is a **procedural** provision guaranteeing the right of any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of their rights under the Convention or its Protocols to introduce an application before the Court. "Any individual" includes persons of unsound mind and minors. It is included here because it contains a substantive obligation on States "**not to hinder in any way the effective exercise of this right**". This is particularly important in the case of individuals deprived of their liberty. No obstacle may be put in the way of them taking an application to the Court.
118. The Court may also indicate to a defendant State **interim measures** which it should take to preserve the current position, including the applicant's ability effectively to exercise the right of individual application, pending the Court's determination of the case. It will only do this where it considers that there is a real risk of serious, irreparable harm if the measure is not applied. Interim measures are thus similar to injunctions issued by national courts. States normally have an obligation to comply with them. They are most frequently issued where an applicant is challenging deportation or extradition on the ground that he or she would face a risk of ill-treatment in the desti-

nation State. If a State does not implement an interim measure ordered by the Court, for example by nevertheless removing a person to another country, this may amount to a violation of the obligation under Article 34.

PROTOCOL No. 1

Protection of property (Article 1)

119. This article lays down a general rule followed by two specific rules to protect the right to property.

General rule: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions”.

120. **“Possessions”** includes shares, patents, licences, leases and welfare benefits (provided they are enjoyed by legal right, not by discretion). In many cases concerning property expropriated under previous regimes in Eastern Europe it has been crucial whether the applicant’s right survived in national law; a mere hope of restitution is not enough.

121. **“Peaceful enjoyment”** includes the right of access to the property. There can be positive obligations on the state to protect enjoyment of property rights, for example, by properly maintaining dangerous installations near homes.

122. In cases of interference with property rights that do not obviously fall under one of the two specific rules set out below, the Court has applied the general rule and implied into it a test of “fair balance” between the individual and the general interest (see below).

First specific rule: Deprivation of property

123. Deprivation is only permitted if it is:

- ▶ lawful;
- ▶ in the public interest;
- ▶ in accordance with the general principles of international law;
- ▶ reasonably proportionate (“fair balance” test).

124. States have a wide discretion over what is “in the public interest”. Provided a legitimate aim is pursued, for example, social justice, it is acceptable that some people should get a windfall and others lose out.

125. The **“fair balance test”** applied by the Court is less stringent than the test of “necessary in a democratic society” found in Convention Articles 8 to 11. It requires the State to show it has struck a fair balance between the person’s right and the public interest. That will not be achieved if the individual (or company) has to bear an excessive burden, or where he or she has no or few procedural avenues to challenge the deprivation.

Second specific rule: Control of property

126. Under **paragraph 2**, States may “**control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties**”.

Controls can involve, for example:

- ▶ confiscation or forfeiture of assets by the courts or the revenue or customs officers;
- ▶ requirements to use property in a particular way, such as planning or rent controls;
- ▶ withdrawal of a licence, e.g. to sell alcoholic drinks.

127. The control must be:

- ▶ lawful;
- ▶ in the general interest or to secure the payment of taxes or penalties;
- ▶ respecting a “fair balance”.

128. The discretion of the State under this rule is even wider than under the first rule: the laws the State may enforce to control use of property are those “it deems necessary” for that purpose. Applicants need to show they were required to shoulder an excessive burden, as where a rent-control scheme in force for 11 years imposed very severe restrictions on private landlords (*Hutten-Czapska v. Poland*).

Duties of public officials

129. Action to confiscate or otherwise interfere with property rights is usually taken by lawmakers, senior officials and courts, but **customs and revenue officers, licensing authorities, rent control officers and other public officials** may also exercise powers in this area. They need to ensure:

1. they have a legal basis for their action;
2. it pursues a public interest;
3. it strikes a fair balance between the individual and the general interest.

Right to education (Article 2)

130. “**No person shall be denied the right to education**”, which is in practice a right to access to such education as the State has undertaken to provide, and as regulated by that State. Regulations may, for example, make education compulsory up to a certain age, permit (or ban) home schooling, and allow schools to exclude unruly pupils. The article does not require any particular system of education; even less does it require access to a particular school. It is neutral as between public and private education and has been interpreted to guarantee freedom to establish private schools.

131. Education that is provided, whether public or private, must respect parents’ religious and philosophical convictions. But so long as the curriculum and tuition are objective and pluralistic, the fact that it may conflict with some parents’ convictions is not a breach.

Right to free elections (Article 3)

132. Rather than asserting rights, this Article puts an obligation on the States to **“hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the electorate in the choice of the legislature”**. But the Court has derived from this obligation a **right to vote** and a **right to stand for election**.
133. The Article does not require any particular electoral system and the States have a wide discretion in how they regulate elections, including the conditions to be fulfilled by would-be candidates for office. The principle of universal suffrage, however, is very strong and States will be strictly required to justify the loss of the vote by individuals or categories of persons, for example, prisoners.

PROTOCOL No. 4

Prohibition of imprisonment for debt (Article 1)

“No-one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.”

134. The **“merely”** clause is important: the article does not forbid imprisonment where there is an extra element like fraud or negligence. What it does prevent is imprisonment solely on the ground of failing to pay a contractual debt or fulfilling some other contractual obligation.

Freedom of movement (Article 2)

135. This contains two rights:

- 1. everyone lawfully within a State's territory may move freely within that territory and choose their residence there;**
- 2. everyone may leave any country including their own.**

136. Restrictions on these rights are allowed under similar conditions to those for Convention Articles 8 to 11, i.e.:

- ▶ in accordance with the law;
- ▶ necessary in a democratic society for specific aims, namely: in the interests of national security, public safety and public order; prevention of crime; protection of health and morals; protection of the rights and freedoms of others.

137. “Everyone” includes non-nationals, as in Convention Article 1.

138. Restrictions on free movement are less severe than the deprivation of liberty dealt with in Convention Article 5. They can include things like house arrest, curfews, confinement to or exclusion from a particular town or area of country and obligations to report regularly to the authorities. Acceptable reasons for imposing such restrictions include the risk that a suspect may abscond abroad, or divulge State secrets or meet with criminal (for example, Mafia) associates.

139. Any restriction must be proportionate to the permitted aim pursued. In several decided cases, restrictions on free movement, which had started off as justifiable, became unjustified when they were continued for several years (for example, *Labita v. Italy*).
140. Restrictions on free movement are usually imposed by courts but administered by the police, who need to be careful to monitor that the initial justification is and remains valid.

Prohibition of expulsion of nationals (Article 3)

141. **This is an absolute and unconditional right for a person not to be expelled from the territory of a State of which he or she is a national.**
142. Expulsion does **not include extradition**. It occurs where a person is obliged permanently to leave the territory of a State of which he or she is a national without being left the possibility of returning later. Whether someone is a “national” for the purpose of this provision will be determined by the national law of the State concerned.

Prohibition of collective expulsion of aliens (Article 4)

143. **This is an absolute and unconditional prohibition of the collective expulsion of aliens.**
144. “Expulsion” means the same as in Article 3 above. Expulsion of a group will not be “collective” if the authorities have reasonably and objectively examined the case of each individual in the group.

PROTOCOLS Nos. 6 AND 13

Abolition of the death penalty

145. Protocol No. 6 abolishes the death penalty in peacetime but allows States to provide for its imposition in time of war or threat of war. Protocol No. 13 goes further and abolishes it altogether.

PROTOCOL No. 7

Procedural safeguards relating to expulsion of aliens (Article 1)

146. This guarantees that **an individual non-national lawfully resident in the territory of a State shall not be expelled except by a lawful decision and subject to a right:**
- ▶ to submit reasons against his or her expulsion;
 - ▶ to have his or her case reviewed;
 - ▶ to be represented for this purpose before the competent authority.

147. “Expulsion” means the same as in Protocol No. 4 Article 3, i.e. it does not cover extradition. It does not prohibit expulsion of individuals, but only gives certain procedural safeguards. Aliens facing deportation may also have rights under the Convention, for example, Articles 2, 3, 5, 6 and 8 and Protocol No. 4 Article 4.

However, in exceptional cases where the expulsion is necessary in the interests of public order or is grounded on reasons of national security, an individual may be expelled before the exercise of his procedural rights guaranteed by Article 1 of this Protocol.

Right of appeal in criminal matters (Article 2)

148. This guarantees that **everyone convicted of a criminal offence by a tribunal shall have the right to have his or her conviction or sentence reviewed by a higher tribunal.**

149. States have a lot of discretion on how this provision is implemented so long as they do not destroy the essence of the right. Thus, they do not have to allow an appeal on the merits of the judgment, may restrict the right to points of law only and may require that leave to appeal be sought first.

Compensation for wrongful conviction (Article 3)

150. This only gives a right of compensation where a conviction has been overturned or a pardon granted because new or newly discovered facts show conclusively that there has been a miscarriage of justice.

Right not to be tried or punished twice (Article 4)

151. This prohibits trying or punishing someone again for an offence of which he or she has already been acquitted or convicted. There are exceptions under paragraph 2 if new or newly discovered facts arise or there was a fundamental defect in the earlier proceedings. Complicated situations can arise where one set of facts gives rise to more than one offence or more than one procedure, for example, where someone was convicted of drink-driving and in later proceedings had his licence taken away; the latter procedure was viewed as part of the sanction for the offence (*Nilsson v. Sweden*). Only if two separate offences rest on identical facts or facts that are substantially the same will there be a breach.

Equality between spouses (Article 5)

152. This gives spouses equal rights under private law between them and in their relations with their children during a marriage and in the event of its dissolution. It does not prevent the State from taking measures to protect children (which may raise issues under Article 8).

PROTOCOL No. 12

153. This protocol repeats the **prohibition on discrimination** in identical language to that in Convention Article 14, but with the **key difference that it makes it a free standing right, not tied to the ambit of another Convention right**. So far relatively few States are parties and there is very little decided case-law, so it is hard to give guidance on its likely effect.

PART II – CHECKLIST FOR PUBLIC OFFICIALS

This checklist is designed to direct officials to the most relevant articles and some of the issues they need to consider in their various job situations. The issues listed are not exhaustive. For the detailed considerations on each article see Part I above. References to article numbers are to the Convention except where a Protocol is specified.

Rights and issues I need to consider when my job involves:

Use of force

Articles 2 Right to life, 3 Prohibition of torture, 8 Respect for private and family life, 14 Prohibition of discrimination.

- ▶ Is there a justification for use of force (defence of self or others, effecting an arrest, quelling a riot)?
- ▶ Is the force strictly necessary and proportionate to the aim pursued, or could lesser force achieve the desired result?
- ▶ Does the force amount to torture or inhuman treatment?
- ▶ Have any injuries been promptly examined by a doctor?
- ▶ Are adequate records being kept against the possible need for an enquiry into the circumstances of the use of force?

Protection of others from violence, injury and risk to life

Articles 2 Right to life, 3 Prohibition of torture, 8 Respect for private and family life, 14 Prohibition of discrimination, Protocol No. 1 Article 1 Protection of property.

- ▶ Do I, or should I know of risks or threats of violence, including domestic violence, to someone I have a duty to protect (e.g. as a police officer)?
- ▶ Is a detainee or psychiatric patient in my charge at risk of harm from themselves or others?
- ▶ Have all necessary and reasonable steps been taken to assess the person's medical condition, especially if there is an indication that they may have been injured?
- ▶ Are there risks of installations I am in charge of (e.g. municipal waste plants) threatening homes or lives of people living nearby?

Being in charge of persons deprived of their liberty (in any context)

Articles 2 Right to life, 3 Prohibition of torture, 5 Right to liberty, 8 Respect for private and family life, 14 Prohibition of discrimination, 34 Right of individual application, Protocol No. 4 Article 2 Freedom of movement.

- ▶ Have less severe measures than deprivation of liberty been considered and found insufficient?

- ▶ Are the conditions where the person is being held adequate as to cleanliness, food and bedding, and not overcrowded?
- ▶ Where persons belonging to vulnerable minority groups are detained, are they being treated without discrimination?
- ▶ Have all necessary and reasonable steps been taken to assess the detainee's medical condition, especially if there is an indication that they may have been injured?
- ▶ Are detainees assessed early on for risk of self-harm and those found to be at such risk regularly monitored?
- ▶ Are detainees protected from violence at the hands of other detainees?
- ▶ Are vulnerable detainees (due to illness, disability, age, sexual orientation, etc.) given appropriate care and protection?
- ▶ Are detainees given the right to correspond, especially with their lawyers and the courts?
- ▶ Is any interference with this right lawful, for a legitimate permitted aim and proportionate?
- ▶ Is the right of detainees to apply to the European Court of Human Rights hindered in any way?
- ▶ Have remand prisoners been fully informed of the nature and cause of the accusation against them?
- ▶ Have they been given adequate time and facilities, especially access in private to their lawyers, to prepare their defence?

Arresting and detaining people on suspicion of committing a criminal offence

Articles 2 Right to life, 3 Prohibition of torture, 5 Right to liberty, 7 No punishment without law, 8 Respect for private and family life, 14 Prohibition of discrimination, Protocol No. 4 Article 2 Freedom of movement.

In addition to the general issues arising on any deprivation of liberty set out above, the following issues arise:

- ▶ Is the arrest allowed under Article 5, especially 5(1)(c) and (f)?
- ▶ Have persons arrested been told their rights and the reason for their arrest as soon as possible?
- ▶ Are there procedures to bring them promptly before a court?
- ▶ Have they been given access to a lawyer before interrogation starts?
- ▶ In specific situations like offences involving children and sexual offences, has the need for special interviewing procedures been considered?
- ▶ Was the offence for which the arrest was made in force at the time when it was committed?

Dealing with would-be immigrants

Articles 2 Right to life, 3 Prohibition of torture, 5 Right to liberty, 8 Respect for private and family life, 14 Prohibition of discrimination, Protocol No. 4 Article 4. Protocol No. 7 Article 1, 34 Right of individual application.

In addition to the general issues arising on any deprivation of liberty set out above, the following issues arise:

- ▶ Is any arrest or detention justified under Article 5 (1) (f)?
- ▶ Are would-be immigrants being kept separately from persons detained within criminal proceedings and from convicts?
- ▶ Have the specific accommodation needs of families, women and children been met?
- ▶ Is any force used to restrain reluctant deportees moderate and proportionate?
- ▶ Where would-be immigrants have family in the country, have their rights of family life been considered and respected?
- ▶ Where groups of non-nationals are to be expelled, have each of their cases been examined individually?
- ▶ Have individuals facing expulsion been given the procedural rights of Protocol 7 Article 1?

Looking after psychiatric patients

Articles 2 Right to life, 3 Prohibition of torture, 5 Right to liberty, 8 Respect for private and family life, 34 Right of individual application.

In addition to the general issues arising on any deprivation of liberty set out above, the following issues arise:

- ▶ Was the detention properly authorised on medical advice?
- ▶ Is the medical necessity for the detention regularly monitored?
- ▶ Is any force used to restrain the patient medically sanctioned and proportionate to the need?
- ▶ Does the patient or his/ her family have adequate rights to challenge the continuing need for his/her detention?
- ▶ Have they been informed of these rights?

Eavesdropping or secretly monitoring communications

Article 8 Respect for private and family life, home and correspondence.

- ▶ Is the bugging or monitoring authorised by law?
- ▶ Does it pursue a legitimate permitted aim, e.g. national security, prevention of crime?
- ▶ Does it meet a “pressing social need”?
- ▶ Is it proportionate to the aim and non-discriminatory?
- ▶ Has the scope and duration of the interference been judicially authorised?
- ▶ Does actual eavesdropping or monitoring comply with the authorised scope and duration?

Dealing with family issues like adoption and taking children into care

Articles 3 Prohibition of inhuman and degrading treatment, 8 Respect for private and family life, 6 Right to a fair trial, 14 Prohibition of discrimination.

- ▶ Is any interference with family life in accordance with law, for a permitted aim (e.g. the rights of the children) and proportionate to that aim?
- ▶ Have the best interests of the child been properly considered?

- ▶ Have the parents and other interested parties been given full and timely information and the opportunity to contribute to decisions on the future of the children, especially where those are irrevocable or hard to reverse?
- ▶ Do parents and others have the right to challenge the decision before an independent and impartial tribunal?
- ▶ Have they been informed of their rights of challenge and the time limits for doing so?
- ▶ Are children at such risk of harm at the hands of their parents or guardians as makes it necessary to take them into care?

Authorising or policing meetings or demonstrations

Articles 2 Right to life, 3 Prohibition of torture, 9 Freedom of religion, 10 Freedom of expression, 11 Freedom of assembly and association.

- ▶ Is the presumption in favour of the right to free expression being applied?
- ▶ Is there a legitimate reason (e.g. maintenance of public order, risk of violence) to refuse permission for a meeting or demonstration?
- ▶ Is any interference with any of the rights in the three articles mentioned in accordance with law, for a permitted aim and proportionate?
- ▶ Where the gathering has a religious purpose, have the rights in Article 9 been respected?
- ▶ Have necessary steps been taken to protect the demonstrators, including where simultaneous, conflicting demonstrations are planned?

Dealing with planning applications

Articles 6 Right to fair trial, 8 Respect for private and family life and home, 14 Prohibition of discrimination, Protocol No. 1 Article 1 Protection of property.

- ▶ Is any interference with a person's right to respect for his/her home in accordance with law, for a permitted aim (e.g. the rights of others) and proportionate?
- ▶ Does a person whose property or family rights have been affected by the planning decision have the right to challenge it before an independent and impartial tribunal?
- ▶ Has the person's right to peaceful enjoyment of his/ her property been affected?
- ▶ If so, has the interference struck a fair balance between the individual and the general interest?
- ▶ If the person affected is a member of a vulnerable group, e.g. Roma or Travellers, has he or she been treated differently from others, and, if so, is there objective and reasonable justification for the different treatment?

Taking decisions affecting a person's right to carry on a business, trade or profession

Article 6 Right to fair trial, Protocol No. 1 Article 1 Protection of property.

- ▶ Is there a legal basis for the decision?
- ▶ Is there a public interest for the decision?

- ▶ Does the decision strike a fair balance between the individual and the general interest?
- ▶ Does the individual have the right to challenge the decision before an independent and impartial tribunal?

FLOWCHART

Do you touch on any of the Convention rights in your work?



YES



Is there a victim?

→ NO

→ Check again – remember the Convention rights have broad application



YES



Can the Convention right be Interfered with legitimately?

→ NO

→ You may be in breach



YES



Is your action in accordance with law?

→ NO

→ You may be in breach



YES



Are you pursuing a legitimate permitted aim?

→ NO

→ You may be in breach



YES



Is your action necessary in a democratic society (answers a pressing social need and is proportionate)?

→ NO

→ You may be in breach



YES



Your action may be Convention compliant, but check again.

NB: When in doubt, seek guidance from senior officials and where possible take legal advice. The above chart fits the pattern of several Convention articles (especially 8 to 11) but not all: some are absolute, others only permit specified exceptions. Check Part I for the details.

REPORTS OF THE
STEERING COMMITTEE
FOR HUMAN RIGHTS
(CDDH)

CDDH OPINION ON ISSUES TO BE COVERED AT THE INTERLAKEN CONFERENCE

Adopted by the CDDH on 1 December 2009

Introduction

The Ministers' Deputies have asked the Steering Committee for Human Rights (CDDH) to prepare an opinion on the issues to be discussed at the High-Level Conference on the Future of the European Court of Human Rights being organised by the Swiss Presidency of the Committee of Ministers at Interlaken, Switzerland on 18-19 February 2010.¹

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

The CDDH views its mandate as requiring it to propose a list of issues for discussion at the Interlaken Conference on the basis of a vision of how the shared responsibilities of those charged by the Convention with protecting human rights – not only the Court, but also the member states, including when sitting on the Committee of Ministers to supervise execution of Court judgments – should better be discharged in 2019 and beyond, in accordance with the principle of subsidiarity. This opinion therefore sets out (i) the background to the current situation and (ii) the CDDH's medium- and long-term vision for the Convention system, along with short-term steps to improve the situation in the interim.² When analysing the following proposals, the future accession of the European Union to the Convention must also be borne in mind.

It is important that the Interlaken Conference propose ambitious but realistic timeframes for the completion of any subsequent work, to be set by the Committee of Ministers, and that continuous evaluation of the results of measures taken be carried out. The CDDH draws attention to the need to consider these matters in combination with the human and financial resources required for

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

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

such work, including to commission independent studies and/or obtain detailed information from the Court on relevant issues, as necessary.

Background

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

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

Around 50% of those cases that are admissible are “**repetitive applications**” raising issues that have already been the subject of Court judgments in the past but which may not yet have been resolved by the respective respondent state. They are often determined by what are little more than summary judgments, simply recalling earlier judgments and awarding just satisfaction. This is neither appropriate for an international human rights tribunal nor consistent with its essential role in interpreting the Convention and ensuring subsidiary protection for violations that have not been remedied at national level.

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

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

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

The CDDH remains profoundly attached to **the right of individual application** to the Court, as contained in Article 34 of the Convention. This should remain the cornerstone of any reform, so that alleged violations that are unresolved at

national level can be brought before the Court. Decisions taken at the Interlaken Conference should be consistent with effective maintenance of this right.

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

It requires national authorities to assume their primary responsibilities under the Convention to provide effective protection for human rights and remedies for any violations, in particular those arising from situations that have already been the subject of repeated judgments of the Court.³

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

Finally, it requires member states to execute the Court's judgments fully and diligently and the Committee of Ministers to supervise the execution of Court judgments promptly and efficiently.

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

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

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

Prompt and effective **supervision by the Committee of Ministers of the execution of judgments** is important to enhancing the interpretative authority and impact of the Court's case law. The Court's authority and the system's credibility both depend to a large extent on the effectiveness of this process. The Interlaken

3. Notably those concerning excessive length of proceedings.

Conference should therefore consider how to encourage full execution of judgments by respondent states and efficient supervision by the Committee of Ministers.

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

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

Implementation of the Convention at national level

The Interlaken Conference should decide that further action be taken to improve implementation of the Convention at national level in the following areas.

Enhancing national authorities' knowledge and understanding of the Court's case law, notably through the following measures:

- ▶ exploring the need to enhance, through legislative and practical measures, the capacity of national legal systems to give effect, as appropriate, to the Court's case law and improve the interaction between national and European levels;
- ▶ recognising the interpretative authority of the Court's case law as having potential effects on the national legal order of states other than the Respondent in the case;
- ▶ ensuring review of implementation of the recommendations to member states adopted by the Committee of Ministers as part of the 2004 reform package.⁴

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

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

Improving domestic remedies, by:

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

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

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

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

The situation of the European Court of Human Rights

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

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

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

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

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

- ▶ a Statute for the Court, established at a legal level between the Convention and the existing Rules of Court; and/ or
- ▶ a new provision in the Convention similar to that found in Article 41 (d) of the Statute of the Council of Europe setting out a simplified procedure for amendments of certain articles.⁵

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

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

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

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

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

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

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

in addition to the paragraph above, the Court developing its interpretation *à droit constant*⁶ of certain procedural provisions of the Convention, for example of Article 37 (1) (c) in such a way as to give effect to the rule *de minimis non curat praetor*.⁷

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

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

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

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

6. I.e. without amendment of the Convention.

7. The judge is not concerned by trivial matters.

Execution of judgments and supervision of execution

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

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

Final comments

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

CDDH FINAL REPORT ON MEASURES THAT RESULT FROM THE INTERLAKEN DECLARATION THAT DO NOT REQUIRE AMENDMENT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Adopted by the CDDH on 5 November 2010

I. INTRODUCTION

1. In its initial ad hoc terms of reference of 10 March 2010 to consider the relevant parts of the Interlaken Declaration (see Appendix I), the Steering Committee for Human Rights (CDDH) was instructed by the Committee of Ministers to submit by 31 December 2010 a final report on its activities “to elaborate specific proposals for measures that result from the Interlaken Declaration and that do not require amendment of the European Convention of Human Rights, if necessary, additional to those it has already submitted to the Committee of Ministers.” The present document constitutes that report.¹

2. The CDDH recalls its earlier Activity Report,² which contained various proposals for measures not requiring amendment of the Convention but which has not yet been formally examined by the Committee of Ministers. Some of the proposals contained in the earlier report have therefore been incorporated into the present document.

3. The CDDH observes that the present report represents the culmination of a series of proposals to enhance the functioning of the Convention system that do not require amendment of the Convention that it has made since before the Rome Conference in 2000. These most recently include its contribution to preparation of the Interlaken Conference, much of which was taken up in the Interlaken Declaration. Many of the earlier proposals, notably for non-binding texts of the Committee of Ministers, have been adopted; it is now important to ensure effective implementation of these measures, to which end both the Interlaken Declaration and, in greater detail, this report make several suggestions.

1. See also the “CDDH First report on implementation of the Interlaken Declaration,” doc. CDDH(2010)010 Addendum I.

2. See the Activity Report on “Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights,” doc. CDDH(2009)007 Addendum I, adopted by the CDDH at its 68th meeting (24-27 March 2009).

4. The CDDH also notes that the present report may mark a pause in its work on this issue and that, in accordance with its ad hoc terms of reference, its attention will now turn to potentially more far-reaching proposals that would require amendment of the Convention.

5. At the same time, however, it observes that the Interlaken Declaration called upon member States to provide information on the measures taken to implement relevant parts of the Interlaken Declaration to the Committee of Ministers by the end of 2011. Analysis of the implications of this information, when received, would form a valuable starting point for resuming work on measures not requiring amendment of the Convention in future. The CDDH considers that this exercise would benefit from (i) clarification of the modalities for presentation of information by member States, in order to make the information received as digestible as possible, and (ii) preparation for the reception and examination of and follow-up to this information by the Committee of Ministers. It therefore proposes to address these issues at a future meeting, in order to provide the appropriate assistance to member States as soon as possible so that they might begin preparing their reports at the earliest opportunity.

6. The Interlaken Declaration also called “in particular upon the Committee of Ministers and the States Parties to consult with civil society on effective means to implement the Action Plan”. The CDDH also notes that, in addition to civil society organisations, national human rights institutions and Ombudsmen may have a role to play in implementation of relevant parts of the Interlaken Declaration (notably provision to potential applicants of comprehensive and objective information on the Convention and the Court’s case-law, in particular on the application procedures and admissibility criteria). It therefore encourages member States and the Committee of Ministers to organise such consultations at an early stage and decides itself to return to the matter at a future meeting.

7. Details of the relevant activities of the CDDH and its subordinate bodies since the Interlaken Conference can be found at Appendix II.

II. PROPOSALS

Responding to the problem of repetitive applications

8. The CDDH considers that, along with the very high number of inadmissible applications, the number of admissible cases raising issues relating to the same underlying problem, frequently structural or systemic and often the subject of previous Court judgments, is one of the most serious problems facing the Convention system. It therefore proposes a series of possible measures that may contribute to alleviating this problem.

i. Measures implying action by member States

- ▶ In accordance with the principle of subsidiarity, member States should ensure effective implementation of the Convention at national level, including provision of effective domestic remedies and implementation of relevant Committee of Ministers’ recommendations. The CDDH intends to return to this issue in future on the basis of information on the measures taken to implement relevant parts of the Interlaken Declaration, to be provided by member States to the Committee of Ministers by the end of 2011 (see further below).

ii. Measures implying action by the Committee of Ministers

- ▶ The information to be provided by States before the end of 2011 concerning the implementation of the Interlaken Action Plan (see further under para. 5 above) could form the basis for new recommendations or guidelines concerning situations which are regularly the subject of repetitive applications.
- ▶ In particular, the CDDH recalls that the Deputies' decisions on follow-up to the 2008 Stockholm Colloquy mentioned "the possibility of drawing up more specific non-binding instruments on effective domestic remedies regarding in particular excessive length of domestic proceedings, including practical steps to prevent violations"³ It notes that this left open the possibility of drawing up such instruments in relation to other areas in which existing domestic remedies are ineffective or in relation to general remedies.
- ▶ In this connection, it may be noted that on 24 February 2010, the Committee of Ministers adopted Recommendation Rec(2010)3 to member States on effective remedies for excessive length of proceedings. The Committee of Ministers should encourage member States to implement fully this important text.
- ▶ The Committee of Ministers could examine possible modalities for supervising the execution of unilateral declarations, especially (in the present context) of any general measures proposed by a respondent State as part of a unilateral declaration.

iii. Measures implying coordinated action by the Committee of Ministers and member States

- ▶ An effective review of the implementation of the six recommendations to member States adopted by the Committee of Ministers between 2000 and 2008,⁴ in accordance with the Interlaken Declaration, could contribute to identifying measures that would help to address the problem of repetitive applications.
- ▶ The Committee of Ministers, in its supervision of the execution of judgments, should give a priority to cases that reveal a structural problem and indicate to the Respondent State that it can, on request, obtain the necessary practical and legal assistance from the Council of Europe.

3. See doc. CM/Del/Dec(2008)1039/4.6.

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

- ▶ Groups of Deputies, either of their own motion or at the instigation of their Government Agents,⁵ confronted with similar problems could meet to seek together solutions and elaborate draft resolutions for submission to the plenary Committee, in collaboration with the Execution Department and other relevant bodies of the Council of Europe.

iv. Measures implying action by the Court

- ▶ The Court could be invited to develop further its practice of striking cases out of its list, where the State's commitments and/ or concession contained in a unilateral declaration allow the former to conclude that respect for human rights does not require it to examine such cases further.
- ▶ The Court could be invited to ensure that its case-law on the application of Article 41 is sufficiently foreseeable and detailed for the applicant governments to encourage recourse to friendly settlements and/ or unilateral declarations.
- ▶ When a violation has already been declared by the Court in a particular case and the State has taken effective measures to avoid its repetition, the Court could be invited to apply the maxim *de minimis non curat praetor* ("the court is not concerned with trivial matters") by way of Article 35(3)(b) ECHR as amended by Protocol No. 14 or Article 37 ECHR. This may prove to be useful for settling similar cases that do not lead to disadvantage requiring reparation by an award of just satisfaction or other individual measures in favour of the applicant.⁶
- ▶ For cases arising from structural problems and for which a well-established case-law does not yet exist (and which are thus not subject to determination by a three-judge committee), the adoption of a pilot judgment may be an adequate solution.
- ▶ The Court could be invited:
 - to explain the criteria having led to application of the pilot judgment procedure and, in that context, to the choice of a pilot case, and
 - to define possible avenues to remedy a given repetitive case.

v. Measures implying action by member States and the Court

- ▶ Promotion of a more systematic recourse to the Registry's practice of putting itself at the disposal of the parties at any time during the proceedings in order to arrive at a friendly settlement of the case and encouragement to States parties to make greater use of friendly settlements in repetitive cases.
- ▶ Promotion of a more systematic recourse to the practice of unilateral declarations by Respondent States, with the Court encouraging the 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.

5. It being noted that some Government Agents act as Minister's Deputy for the purposes of the Committee of Ministers' supervision of execution of Court judgments under art. 46 ECHR.

6. In this connection, the CDDH notes the Court's decision to strike out the case of *Bock v. Germany* (App. No. 22051/07, decision of 19/01/10) under Article 35(3) as being an abuse of the right of application. This case had concerned the length of domestic proceedings surrounding the applicant's complaint of non-reimbursement of €7.99 for the cost of magnesium tablets prescribed by his physician.

- ▶ Regular meetings between the government agent and the Section Registrar responsible for dealing with applications against that State, in order to exchange information on the existence and the possible treatment of repetitive applications.
- ▶ States should, as called for in the Interlaken Declaration, extrapolate principles from the Court's case-law to their own legal systems. The Court itself has been examining the question of the clarity and consistency of its case-law, and could be encouraged particularly to bear in mind the importance in this regard of providing reasoned and consistent guidance on its interpretation of the Convention for the benefit of all States parties.
- ▶ Greater use should be made of third party interventions. In this connection, the Court could issue prompt press releases whenever it invites or grants leave to make a third party intervention or a case has been identified as likely to lead to a judgment that may have implications for other States parties. The Court could also exercise more flexibly its discretion to extend the time limits for requesting leave to intervene.

vi. Measures implying action by other actors

- ▶ Providing Council of Europe assistance to encourage a pro-active approach by States when presenting to the Committee of Ministers, in the course of its supervision of execution of judgments, action plans and schedules for the introduction of remedies for persons who find themselves in a situation similar to that condemned by the Court.
- ▶ Regular review by national institutions of a State's execution of judgments rendered against it.

Ensuring the independence of judges and the impartiality and quality of the Court

9. The CDDH intends to prepare a compilation of national practices for the selection of candidates for the office of judge of the Court. This compilation will be analysed in order to identify good practices, bearing in mind in particular the standards necessary for a satisfactory national selection procedure, with a view in particular to the significant number of forthcoming elections.

10. Since the Parliamentary Assembly is responsible for electing judges to the Court, it could be invited to consider how it too might contribute to the implementation of para. 8.a. of the Interlaken Declaration.⁷

Relations between national legal systems and the Court

11. Subject to the operational requirements and capacity of the Court, more frequent secondment of national judges (as well as of other high-level independent lawyers) to the Registry, notably by simplifying the administrative procedures at national level, could be beneficial to both the Court and domestic

7. Para. 8.a. of the Interlaken Declaration reads as follows:

“Stressing the importance of maintaining the independence of the judges and of preserving the impartiality and quality of the Court, the Conference calls upon States Parties and the Council of Europe to: a) ensure, if necessary by improving the transparency and quality of the selection procedure at both national and European levels, full satisfaction of the Convention's criteria for office as a judge of the Court, including knowledge of public international law and of the national legal systems as well as proficiency in at least one official language. In addition, the Court's composition should comprise the necessary practical legal experience; [...]”

legal systems.⁸ The CDDH notes that the Court has written to member States inviting them either to second a national judge to the Registry or to make a voluntary contribution to the budget, allowing recruitment of an additional lawyer to the Registry, and encourages those States that have not yet responded to do so.

*Development of the Court's case-law à droit constant*⁹

12. The Court could be invited to develop further its interpretation of certain articles of the Convention relating to procedure. For example, Article 37(1)(c), which deals with the circumstances in which the Court may strike cases out of its list, could be interpreted in such a way as to give effect to the rule *de minimis non curat praetor*.

III. OTHER MEASURES EXAMINED

Access to the Court – fees for applicants

13. The CDDH's preliminary consideration of this complex and controversial issue was reflected in its First Report to the Committee of Ministers.¹⁰ Following the subsequent GT-SUIVI.Interlaken meeting of 29 June 2010, at which it was noted that more information was necessary before any decision could be taken, a consultant expert was engaged to prepare a study on the various systems in certain member States requiring applicants to the highest courts to pay a fee or other sum.¹¹ This study, which will include identification of possible models that might be suitable for use in the Convention system, will be finalised by the end of 2010, for examination at a subsequent meeting. A cost-benefit analysis of identified models would be performed as a further step in consideration of the issue.

14. It should be noted that the CDDH is still in the early stages of examining this complicated issue, of which one aspect, yet to be resolved, is whether introduction of a fee would require amendment of the Convention or whether it could be done under the current provisions or, for example, by way of amendment of the Rules of Court.¹² The CDDH notes that the answer to this question may vary depending on the model. It nevertheless intends to continue its examination of the issue of fees in 2011.

Pilot judgment procedure

15. The CDDH has examined a compilation of the various contributions made by States and other actors to the Court's preparation of future Rules of Court governing the pilot judgment procedure, taking into account also the results of

8. The CDDH notes that, according to information given to the CL-CEDH "liaison committee" by the Registrar on 14 October 2010, 9 states have so far responded to the request, thereby providing a total of 14 such "externally-funded officials," and a further 10 are in discussion with the Registry.

9. "Under existing law," i.e. without amendment of the Convention.

10. For the full account of this issue, see doc. CDDH(2010)010 Appendix II.

11. For the synopsis of the GT-SUIVI.Interlaken meeting, see doc. GT-SUIVI.Interlaken(2010)CB5. It may also be recalled that the CDDH's ad hoc terms of reference allow it to commission the necessary studies (see doc. CM/Del/Dec(2010)1079/1.6 Appendix 2). For details of the DH-GDR's exchange of views with the consultant expert at its 4th meeting, see doc. DH-GDR(2010)017.

12. See doc. CDDH(2010)010 Appendix II para. 26

the Seminar on pilot judgments organised by London Metropolitan University in Strasbourg on 14 June 2010. The CDDH stands ready to assist the Court in its rule-drafting exercise and will keep the issue on its agenda.

Execution of judgments and its supervision by the Committee of Ministers

16. The CDDH remains available to contribute to further work on implementation of the relevant parts of the Interlaken Declaration and maintains its willingness to establish a working group of restricted composition consisting of both DH-PR members and experts appointed by the Committee of Ministers, should the Committee of Ministers wish to request the CDDH's assistance in any eventual drafting of new rules of procedure.

APPENDIX I

*Initial ad hoc terms of reference for the Steering
Committee for Human Rights (CDDH)
to consider the relevant parts of the Interlaken Declaration*

1079th meeting – 10 March 2010

Appendix 2

(Item 1.6)

1. Name of Committee

- ▶ Steering Committee for Human Rights (CDDH)

2. Source

- ▶ Committee of Ministers

3. Duration

These terms of reference shall expire on 31 December 2010 and 15 April 2012.

Subject to more specific guidance which may be given by the Committee of Ministers at any time, consider all the relevant parts of the Interlaken Declaration.

In particular:

- to elaborate specific proposals for measures that result from the Interlaken Declaration and that do not require amendment of the European Convention of Human Rights, if necessary, additional to those it has already submitted to the Committee of Ministers;
This part of the terms of reference shall be executed through the presentation of a final report to the Committee of Ministers by 31 December 2010;
- to elaborate specific proposals for measures requiring amendment of the Convention, including proposals, with different options, for a filtering mechanism within the European Court of Human Rights and proposals for making it possible to simplify amendment of the Convention's provisions on organisational issues;
This part of the terms of reference shall be executed through the presentation of a final report to the Committee of Ministers by 15 April 2012; an interim activity report shall be submitted by 15 April 2011.
- Work on items (a) and (b) shall be pursued in parallel.
In the execution of these terms of reference, the CDDH may commission and conduct the necessary studies and consultations with other bodies, in particular the Court, as well as civil society representatives. It may assign appropriate tasks to its subordinate structures. The Court and its Registry may at all stages contribute to the execution of these terms of reference.

The CDDH shall keep itself informed of action being taken or envisaged by other actors involved in the implementation of the Interlaken Declaration and, if appropriate, may present its views thereon to the Committee of Ministers. In this context, it shall also take into account the first effects of the entry into force of the new procedures foreseen by Protocol No. 14.

The CDDH shall regularly report on progress of work and present its proposals to the Committee of Ministers as and when they are finalised. A first report shall be submitted before the end of June 2010. The Committee of Ministers shall provide the CDDH with the necessary guidance.

APPENDIX II

Relevant activities of the CDDH and its subordinate bodies

1. The Chairperson of the CDDH is Mrs Almut Wittling-Vogel (Germany) and its Vice-chairperson Mr Derek Walton (United Kingdom). The CDDH has met twice since the Interlaken Conference, on 15-18 June 2010 and 2-5 November 2010. At the former meeting, it examined and adopted its First Report on implementation of the Interlaken Declaration (see doc. CDDH(2010)010 Add. I); at the latter, the present Final Report.

2. The Committee of experts on the improvement of procedures for the protection of human rights (DH-PR), a CDDH subordinate body of plenary composition, has as its Chairperson Mrs Björg Thorarensen (Iceland) and its Vice-Chairperson Mrs Isabelle Niedlispacher (Belgium). It has met once since the Interlaken Conference, on 10-12 May 2010.¹³ At this meeting, it considered the following items of relevance:

- ▶ proposals for making it possible to simplify amendment of the Convention's provisions on organisational issues;
- ▶ execution of Court judgments and its supervision by the Committee of Ministers; and
- ▶ action at national level.

3. The Committee of experts on the reform of the Court (DH-GDR), a CDDH subordinate body of restricted composition, has as its Chairperson Mrs Anne-Françoise Tissier (France) and its Vice-chairperson and Mr Frank Schürmann (Switzerland). It has met three times since the Interlaken Conference, on 24-26 March 2010, 5-7 May 2010 and 15-17 September 2010.¹⁴ At these meetings, it has considered the following items:

- ▶ repetitive applications – proposals not requiring amendment of the Convention;
- ▶ the pilot judgment procedure;
- ▶ the election of judges of the Court;
- ▶ access to the Court – fees for applicants;
- ▶ filtering – inadmissible applications and repetitive applications – judicial treatment (in essence, the possible creation of new filtering mechanism for the Court).

4. The Committee of experts on a simplified procedure for amendment of certain provisions of the ECHR (DH-PS), a CDDH subordinate body of restricted composition, has as its Chairperson Mrs Björg Thorarensen (Iceland). It has met once since the Interlaken Conference, on 6-8 October 2010.¹⁵ Its mandate covers only one issue, as suggested by its title and set out in its terms of reference, subject to the clarification given by the GT-SUIVI. Interlaken.¹⁶

13. See the meeting report, doc. DH-PR(2010)002.

14. See the meeting reports, docs. DH-GDR(2010)002, DH-GDR(2010)0080 and DH-GDR(2010)17 respectively.

15. See the meeting report, doc. DH-PS(2010)003.

16. For both the terms of reference and the relevant extract from the synopsis of the GT-SUIVI. Interlaken meeting, see doc. DH-PS(2010)001.

CDDH FINAL REPORT ON MEASURES REQUIRING AMENDMENT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Adopted by the CDDH on 10 February 2012

A. INTRODUCTION

I. Interlaken and İzmir Conferences and the CDDH's terms of reference

1. The high-level Conference on the future of the European Court of Human Rights, held by the Swiss Chairmanship of the Committee of Ministers in Interlaken, Switzerland, on 18-19 February 2010, invited the Committee of Ministers to issue terms of reference with a view to preparing specific proposals for measures requiring amendment of the Convention. A second conference was organised by the Turkish Chairmanship in İzmir, Turkey, on 26-27 April 2011. The various decisions taken by the Ministers' Deputies on follow-up to these conferences have since been consolidated into the terms of reference for the CDDH and its subordinate bodies for the biennium 2012-2013.¹

2. These terms of reference require the CDDH to prepare a report for the Committee of Ministers containing specific proposals, with different options, setting out in each case the main practical arguments for and against, on:

- ▶ a filtering mechanism within the European Court of Human Rights;
- ▶ a simplified amendment procedure for the Convention's provisions on organisational issues;
- ▶ the issue of fees for applicants to the European Court of Human Rights;
- ▶ any other possible new procedural rules or practices concerning access to the Court;
- ▶ a system allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention.

1. See Appendix I for the CDDH's current terms of reference. It should be recalled that, further to the original decisions on follow-up to the Interlaken Conference, the CDDH submitted an Interim Activity Report on specific proposals for measures requiring amendment of the Convention in April 2011 (see doc. CDDH(2011)R72 Addendum I).

3. The CDDH has adopted detailed reports covering all but the second of these issues,² which can be found in appendix to the present document. It also decided that the aim of the final report would not be to present the CDDH's unanimous conclusions but rather to attempt to sketch the outlines of an eventual package of reforms.

4. The present report was drawn up in time to be considered by the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers on 18-20 April 2012. For a comprehensive view of the CDDH's position on the reform of the Court and the Convention mechanism, the present document should be read alongside the CDDH's Contribution to this conference, along with its earlier Final Report on measures that result from the Interlaken Declaration that do not require amendment of the Convention.³

II. The purpose of the reform proposals

5. The reform proposals set out in the present report aim at ensuring the continuing effectiveness of the European Court of Human Rights. The current situation presents a number of challenges which call for rapid and decisive action in order to maintain the effectiveness of the Court and preserve its authority and credibility. Amongst the various challenges, the following are specifically addressed in the present report:

- a. The very large number (64,500 in 2011) of applications made to the Court.
- b. The very large, although recently diminished,⁴ number (91,900, as of 31 January 2012) of applications pending before the Single Judge formation of the Court.
- c. The very large number (60,300, as of 31 January 2012) of applications pending before Committees and Chambers of the Court.
- d. Relations between the Court and national authorities, which are characterised by the principle of subsidiarity.

B. THE REFORM PROPOSALS

6. This section of the report presents the CDDH's approach to the various proposals in simplified, summary form. For full details, see the appended issue-specific reports.

I. Measures to regulate access to the Court

7. The following proposals would regulate access to the Court. They all share a principal aim of addressing the problem of the very large number of clearly inadmissible, and even futile or abusive applications.

2. The CDDH intends to present its final report on a simplified amendment procedure for the Convention's provisions on organisational issues following its meeting in June 2012. To this end, the Ministers' Deputies on 7 December 2011 extended the terms of reference of the Committee of Experts on a simplified procedure for amendment of certain provisions of the ECHR (DH-PS) until 31 May 2012.

3. See doc. CDDH(2012)R74 Addendum III and CDDH(2012)R74 Addendum II, respectively.

4. For further details, see para. 34.

Fees for applicants to the Court

8. In accordance with its terms of reference, the CDDH has not addressed the question of principle concerning whether or not introduction of a system of fees would represent an unacceptable limitation of the right of individual application. Instead, it has examined the practicality and utility of such a system.

9. Certain aspects of a possible system of fees may depend to some extent on the purpose or vision underlying its introduction. There are at least three possibilities here, which may overlap: a system intended as a deterrent to discourage clearly inadmissible applications; a system intended as a penalty for those introducing clearly inadmissible applications; and a system intended to reflect the fact that many member States' highest courts themselves require applicants to pay a fee.⁵

10. Whatever the underlying purpose or vision, there is general concern, reflected also in the İzmir and, to similar effect, Interlaken Declarations, that measures taken to regulate access to the Court should not prevent well-founded applications from being examined by it. Certain aspects of a fee system are seen as particularly relevant to this, as explained in the appended report. A related issue is that of possible inequity or even discrimination between applicants; again, this issue is explored in detail in the appended report. In this context, it would be necessary also to consider at what moment payment of the fee should be required.

11. A further issue is how the fee could be paid. Several possibilities exist, including by bank transfer, internet, stamp or a combination of these.

12. The introduction of any system of fees involves reconciling tensions between competing interests.

- a. First, between minimising administrative and budgetary consequences, on the one hand, and minimising possible discriminatory effects, on the other.
- b. Second, between the competing interests of maximising deterrent effect against clearly inadmissible applications, on the one hand, and avoiding discriminatory deterrence of well-founded applications, on the other.

13. In order to illustrate these dilemmas, two possible models are presented, deliberately situated towards the extremes of a spectrum of possible models: a first, whose implementation would appear to have lesser administrative and budgetary consequences; and a second, more complex, but whose impact would appear to be less discriminatory. The CDDH has not been in a position to undertake a technical evaluation or cost-benefit analysis, which would be required if the proposal were to be implemented.

14. For further details of these models and of the CDDH's analysis of the overall issue, see Appendix III section 1.

Compulsory legal representation

15. It has been suggested that making representation by a lawyer compulsory from the outset could be an effective and appropriate means of ensuring applicants receive proper legal advice before filing an application and would increase the quality of drafting of applications. It would be consistent with the principle

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

of subsidiarity in so far as it links directly into the national legal system. The suggestion was made on condition that any introduction of compulsory representation should be subject to the setting-up of appropriate legal aid facilities for applicants at national level.

16. The CDDH considers that this proposal, by putting the applicant to a cost, could present disadvantages similar to those for introduction of a fee: without provision of legal aid for persons of insufficient means, it would impact the right of individual application. It was not certain that lawyers succeeded in dissuading clients from making clearly inadmissible applications, nor did the Court's statistics show that applications brought by legally represented persons were proportionally less likely to be clearly inadmissible than those brought by unrepresented persons. Requiring legal aid in simple cases would unnecessarily add to procedural costs.

17. As to the issue of legal aid, the CDDH notes the substantial budgetary implications for those member States that do not currently provide legal aid to applicants. It could not be granted without an assessment of the merits of the application; should legal aid then be refused, there would be a risk of that decision being challenged before the Court as a violation of Article 34 of the Convention. Should administration of legal aid instead be conferred on the Court, it would create a new burden, contrary to the intended objective.

18. For the above reasons, the CDDH concludes that this proposal would be problematic. For further details, see Appendix III section 2.

A sanction in futile cases

19. The proposal would be to impose a pecuniary sanction in "futile" cases, where an applicant has repeatedly submitted applications that are clearly inadmissible and lacking in substance. Although the Court would be unable directly to enforce payment of the sanction, the applicant would be informed that no further applications would be processed until the sanction had been paid. There could be a derogation from this where the further application concerned "core rights" guaranteed by the Convention (e.g. Articles 2, 3 and 4). A sanction system would not be an alternative to a system of fees (see above).

20. It has been suggested that such a sanction would seek to reduce the burden of futile cases, which are manifestly not due for adjudication before an international court. It would have an educative effect on the applicant concerned and a disciplining influence on the behaviour of others. It would involve minimal additional administrative cost and would not deter well-founded applications.

21. The following arguments were raised against the proposal. A sanctions system would not be in conformity with the purpose, spirit and even the letter of the Convention. It was not established that many people engaged in abusive litigation before the Court. Those that did, did not necessarily only engage in such litigation. Such applications were in any case already dealt with simply and were not a major case-processing problem: there may be few opportunities when a judicial formation might impose a sanction, all the more given that the Court rarely uses its existing competence to find applications inadmissible for abuse of the right of individual application. There would inevitably be a cost in terms of financial and human resources, along with a heavy discretionary burden on the Court when deciding who or what case to sanction. The sanction would create inequality between applicants of different financial means.

22. It was also suggested that there should be a preliminary estimation of the number of such cases and the extent to which they over-load the role of the Court. Consideration should also be given to introduction of sanctions for legal representatives who submit futile applications on behalf of their clients, and/ or for States that failed to execute judgments in repetitive cases.

23. For further details, see Appendix III section 3.

Amendment of the “significant disadvantage” admissibility criterion

24. The proposal would be to amend the “significant disadvantage” admissibility criterion in Article 35(3)(b) of the Convention, by removing the safeguard requiring prior due consideration by a domestic tribunal.

25. In favour of the proposal, it has been argued that the safeguard is unnecessary in the light of Article 35(1), which requires exhaustion of (effective) domestic remedies. Indeed, the requirement for “due consideration” sets a higher standard for cases not involving significant disadvantage to the applicant than for those that do. There would still be a requirement of examination on the merits if respect for human rights so requires. The proposal would give greater effect to the maxim *de minimis no curat praetor*.⁶ It would reinforce subsidiarity by further relieving the Court of the obligation to deal with cases in which international judicial adjudication is not warranted. The right of individual petition would remain intact.

26. Arguments against include that the proposal would probably have little effect, given how infrequently the Court has applied the criterion. The Court should be given more time to develop its interpretation of the current criterion, allowing its long-term effects to become clearer. The current text was a carefully drafted compromise. Removing the safeguard would lead to a decrease in judicial protection offered to applicants. The safeguard in fact underlines the importance of subsidiarity, since State Parties are required to provide domestic judicial protection.

27. For further details, see the report at Appendix III section 4.

Introduction of a new admissibility criterion relating to cases properly considered by national courts

28. The proposal to introduce a new admissibility criterion relating to cases properly considered by national courts is intended to address not only the problem of the very large number of cases pending before Chambers, but also the issue of relations between the Court and national courts, which should respect the principle of subsidiarity. An application would be inadmissible if it were substantially the same as a matter that had already been examined by a domestic tribunal applying Convention rights, unless that tribunal had manifestly erred in its interpretation or application of the Convention rights or the application raised a serious question affecting interpretation or application of the Convention. The proposal could have special relevance with regard to Convention rights such as those contained in Articles 8 to 11.

29. It has been argued that the proposal emphasises the subsidiary nature of the judicial control conducted by the Court and the idea that the Court should not act as a fourth instance. The exceptions would still allow the Court to exercise

6. “The Court does not concern itself with petty affairs.”

its supervision. The proposal builds on principles already found in the Court's case-law. Such codification of the existing principle that the Court is not a "fourth instance" would allow clearer and more transparent guidelines for the Court in applying it. The new criterion could encourage national courts and tribunals further to apply explicitly the Convention and the Court's case-law.

30. Arguments against were that the proposal would place unacceptable restrictions on access to the Court and undermine the right of individual petition, without decreasing the Court's workload. It would limit the jurisdiction of the Court and its ability to address gaps in protection of Convention rights. The substantive application of the Convention by domestic courts is an issue which should be considered at the merits, rather than the admissibility stage. By limiting the scope of review to correction of manifest error, the criterion could jeopardise maintenance of uniform Convention interpretation. The notion of "manifest error" will be difficult to apply in practice. A finding of "manifest error" in a domestic court decision could undermine relations between the Court and the national judiciary concerned. There would be generalised focus on the overall quality of the domestic legal system, instead of on its treatment of the applicant's case.

31. It was also suggested that it might be worthwhile to explore additional ways of conveying the essence of the proposal, notably further elaboration of the doctrine of margin of appreciation.

32. For further details, see the report at Appendix III section 5.

II. Measures to address the number of applications pending before the Court

33. The following measures would address in various ways the problems of the very large numbers of cases pending before both Single Judges, and Committees and Chambers of the Court.

A filtering mechanism within the European Court of Human Rights/ increasing the Court's capacity to process applications

34. At the 73rd CDDH meeting (6-9 December 2011), the Registry announced important new information concerning filtering. It recalled that on 31 August 2011, the number of cases pending at the single-judge level had reached a new high of 101,800. On that same date, the number of applications decided by Single Judges since the beginning of the year was 21,400. By 30 November, however, the number of Single-Judge decisions had reached almost 42,100 and the number of pending Single-Judge cases had, month-by-month, decreased to 94,000. (On 31 December 2011, these figures stood at 46,930 and 92,050, respectively.) The main reason was a great increase in the rate of decision-making, achieved thanks to restructuring of the Registry, reinforcement of the Registry by seconded national judges and continual simplification of procedure and working methods. The Court considers these results to be sustainable. Indeed, it has projected that it will be able not only soon to process all new clearly inadmissible applications within a short period of their arrival, but also, over the period 2012-2015 and, subject to (so far unspecified) reinforcement of the Registry's staff, progressively to resolve all applications currently pending before single judges.

35. Over the course of time, there has been growing concern in the CDDH over the Court's increasing backlog of Committee and Chamber cases. While clearly

inadmissible applications subject to filtering are the most numerous, but can be disposed of quickly, the heaviest part of the case-load consists of cases which cannot be declared inadmissible without further examination, require a more in-depth analysis and may lead to a finding of a violation of the Convention. A new filtering mechanism alone thus cannot free sufficient resources to tackle that part of the Court's case-load which is most important from the point of view of both respect for human rights and the time needed to process it. The CDDH's concern has been but heightened by the latest information from the Registry, according to which the time required for the treatment of Committee and Chamber cases had increased in 2011 compared to 2010.

36. The CDDH's analysis reflects these circumstances by shifting the emphasis of its report from possible measures to increase the Court's filtering capacity to possible measures to increase the Court's capacity to process applications generally. In accordance with its terms of reference, it nevertheless presents detailed analysis of and proposals for an alternative new filtering mechanism requiring amendment of the Convention, on the understanding that recent developments appear to many to suggest that such proposals may not need to be given immediate effect. In this connection, the CDDH notes that it is unlikely that any new filtering mechanism, given that its introduction would require entry into force of an amending protocol to the Convention, could come into effect or, at least, have yet had any great impact by the envisaged date of 2015 for resolution of the backlog.

37. The CDDH nevertheless considers that these proposals could be implemented as part of the current round of Court reform but on a contingency basis, in case it transpires that other approaches are required. In this respect, the CDDH foresees two situations in which it might be considered necessary to activate a new filtering mechanism. The first would be if the expected results are not achieved. The second would be if, regardless of the effects of the Single Judge system and associated internal Court reforms, the time taken by the Court to deal with other cases became too long. Some delegations consider that the second situation already prevails.

38. As regards increasing the Court's general case-processing capacity, in particular to address Committee and Chamber cases, two proposals have been made. The first would be to establish a pool of temporary judges, making it possible to reinforce the Court's general decision-making capacity - all the functions of regular judges, other than sitting on the Grand Chamber or Plenary Court - when necessary. The second would be a variant on the "new category of judge" proposal for a new filtering mechanism (see further below); instead of being devoted primarily to filtering and secondarily to work on repetitive cases, judges of the new category, who would be employed for a fixed period of time, would instead be allocated primarily to work on repetitive cases in Committees. In this respect, it was also mentioned that increasing the Court's general case-processing capacity may depend on an increase in the size of the Registry and the reinforcement of the Registry through secondments.

39. "Filtering" is the expression used to mean the process of issuing decisions on clearly inadmissible applications. Under Protocol No. 14, it is done by Single Judges, assisted by experienced members of the Registry known as Non-judicial Rapporteurs.⁷ Proposals aimed at enhancing filtering are intended to address the problem of the very large backlog of applications pending before Single Judges,

7. "The Court does not concern itself with petty affairs."

and to allow the existing judges to devote all, or at least most of their working time to more important cases.

40. The CDDH proposes three options for a new filtering mechanism, all of which would require amendment of the Convention: (i) authorising experienced Registry lawyers to take final decisions on clearly inadmissible applications; (ii) entrusting filtering to a new category of judge; and (iii) a combined option, with specific members of the Registry given the competence to deal with applications that have been provisionally identified as clearly inadmissible for purely procedural reasons under Article 35(1) and (2) of the Convention and a new category of filtering judge created to deal with cases provisionally identified as inadmissible under Article 35(3).⁸ In both options involving a new category of judge, the CDDH considered that such judges could also sit on three-judge Committees to deal with repetitive cases.⁹ In this respect, the proposals could be seen as relevant to increasing the Court's general case-processing capacity.

41. Any measure to increase the Court's capacity, whether for filtering or general case-processing, that involves either additional Registry staff, additional judges or both will obviously have budgetary consequences.

42. For further details, see the report at Appendix IV section 1.

The “sunset clause” for applications not addressed within a reasonable time

43. The proposal is based on the premise that it is not realistic to expect the Court, using current resources and working methods, to be able to give a prompt, reasoned judicial decision to every application. Under the proposal, an application could be automatically struck off the Court's list of cases a set period of time after it was first made, unless during that period the Court had notified the case to the government and invited it to submit observations.

44. It has been argued that the proposal would work in harmony with the Court's prioritisation policy, which, with a large backlog of applications, would mean that large numbers of applications would remain pending before the Court with no realistic prospect of being resolved either within a reasonable time or at all. The proposal is intended to cover those cases that fall into the lowest priority categories, releasing the Court from having to issue individual decisions on each application and thereby freeing resources to deal with more serious complaints. Applicants would be informed of the outcome of their case more quickly than at present.

45. Arguments raised against the proposal are that an automatic strike-out of cases without any judicial examination would be incompatible with the idea of access to justice and the right of individual petition. There would be no guarantee that only lowest priority category cases would be affected; well-founded

8. Article 35(1) of the Convention sets out the admissibility criteria on exhaustion of domestic remedies and the six-month rule; Article 35(2) of the Convention excludes applications that are anonymous, or that have already been examined by the Court or submitted to another international mechanism. Article 35(3) of the Convention excludes applications that are incompatible with the Convention, manifestly ill-founded or an abuse of the right of individual petition, or that do not involve significant disadvantage for the applicant.

9. “Repetitive cases” in this sense refers to those that are dealt with by three-judge Committees in accordance with well-established case-law of the Court (see Article 28 of the Convention).

applications could also be affected. Decisions giving no reason for why an application is ill-founded would fail to deter future ill-founded applications. There would be no relief of the Registry since it would remain responsible for triage.¹⁰ A sunset clause could harm the Court's authority. The proposal could have adverse effects, in that it could induce the Court to devote more of its capacity to adjudicating less important cases. The proposal also fails to take account of recent developments (see paragraph 34 above).

46. For further details, see Appendix IV section 2.

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

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

48. In its favour, it has been argued that it would make the Court's judicial task more manageable and allow all applications to be processed to a conclusion in a reasonable, foreseeable time. By allowing the Court to focus on highest priority cases, it would contribute to ensuring high-quality, consistent case-law. It would formalise the Court's existing prioritisation policy, without necessarily excluding the right of individual petition. It is uncertain that other proposals alone would suffice and unlikely that they would without additional resources.

49. Arguments expressed against include that it would radically change the Convention system and significantly restrict the right of individual application by removing the requirement that decisions be taken by a judge. It offers a solution with respect to new applications, when other solutions might suffice, but none for the existing backlog. It presupposes a high level of national implementation of the Convention that is not so far universally realised. It would not reduce the workload of the Registry, which would still have to analyse applications and provide information to the judges.

50. For further details, see Appendix IV section 3.

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

Extending the Court's jurisdiction to give advisory opinions¹¹

51. A proposal has been made to extend the Court's jurisdiction to give advisory opinions, which would aim at reducing the backlog of applications pending before Committees, enhancing relations between the Court and national courts and reinforcing subsidiarity. The proposal features the following characteristics:

10. "Triage" consists of an initial screening of applications and their provisional assignment to the different judicial formations. Under the Court's new working methods, it now also incorporates, wherever possible, the preparation of draft Single Judge decisions on clearly inadmissible applications.

11. The Court's current jurisdiction to give advisory opinions is governed by Article 47 of the Convention. It is limited to requests from the Committee of Ministers on legal questions concerning the interpretation of the Convention and the Protocols thereto, excluding questions relating to the scope of the rights of freedoms contained therein or any other question which the Committee of Ministers might have to consider in consequence of any proceedings as could be instituted in accordance with the Convention.

- a. A request for an advisory opinion could only be made in cases revealing a potential systemic or structural problem (an alternative proposal would limit requests to cases concerning the compatibility of domestic law with the Convention).
- b. A request could only be made by a national court against whose decision there is no judicial remedy under national law.
- c. It should always be optional for the national court to make a request.
- d. The Court should enjoy full discretion to refuse to deal with a request, without giving reasons.
- e. All States Parties to the Convention should have the opportunity to submit written submissions to the Court on the relevant legal issues.
- f. Requests should be given priority by the Court.
- g. An advisory opinion should not be binding for the State Party whose national court has requested it.
- h. The fact of the Court having given an advisory opinion on a matter should not in any way restrict the right of an individual to bring the same question before the Court under Article 34 of the Convention.
- i. Extension of the Court's jurisdiction in this respect would be based in the Convention.

52. General arguments in favour of the proposal include that it could contribute to decreasing the Court's work-load in the medium- and long-term; allow the Court to give clear guidance on numerous potential cases bringing forward the same question; allow for a clarification of the law at an earlier stage, increasing the chances of the issue being settled at national level by providing national courts with a solid legal base for deciding the case; and could reinforce the principle of subsidiarity by underlining the primary responsibility of the national court, enhancing the authority of the Court and its case-law in the member States whilst fostering dialogue between the Convention mechanism and domestic legal orders.

53. Arguments against the proposal include that it lacks clarity and may be unsuitable to the specificities of the Convention mechanism; would increase the Court's workload by creating a new group of cases which the Court may have difficulty in absorbing satisfactorily; is unnecessary, since the Court already has many cases revealing potential systemic or structural problems; would cause additional work for national courts and introduce a delay into national proceedings; would put the Court's authority in question if the opinion were not followed; and may create conflicts of competence between national constitutional courts and the Court.

54. As to specific aspects of the proposal, there was broad agreement (assuming the proposal were adopted) on points (i) (either the original proposal or the alternative), (ii) (with the possible addition of the government), (iii), (vi) and (ix) of paragraph 51 above. In addition, there was broad agreement that the government of the State of which a national court or tribunal had requested an advisory opinion should be able to intervene; that the relevant national authority may only request an advisory opinion once the factual circumstances had been sufficiently examined by the national court; that the relevant national authority should provide the Strasbourg Court with an indication of its views on the question; that the competence to deliver advisory opinions should be limited to the Grand Chamber; and that there could be scope for flexibility by making it optional for

States Parties to submit to an extension of the Court's jurisdiction to give advisory opinions.

55. If this proposal is retained in principle, some aspects on which there is no broad agreement would have to be clarified further, notably: the extent to which the Court should take account of the factual circumstances giving rise to the request for an advisory opinion; whether the Court should have discretion to refuse requests; whether it should give reasons for any refusal; whether other interested actors, including other States Parties, should be able to intervene; the effects of the advisory opinion in the relationship between the Court and the requesting national authority, including whether or not it be binding on the latter; and whether there should be limitations on the right of an individual to bring the same legal issue before the Court under Article 34 of the Convention.

56. For further details, see Appendix V.

C. FINAL CONSIDERATIONS RELEVANT TO DECISIONS ON THE AMENDMENT PROPOSALS

57. The CDDH considers that the situation outlined in paragraph 5 above calls for rapid and decisive action, some of which will require amendments to the Convention. When preparing any new protocol, past experience should be taken into account: following the 2000 Rome Conference, work leading up to Protocol No. 14 took four years, with a further six between its being opened for signature and entering into force; and work on many of the current proposals began in 2006, with the Report of the Group of Wise Persons, although it should be noted that progress was delayed pending entry into force of Protocol No. 14. Furthermore, while there has not yet been a comprehensive evaluation of the effectiveness of Protocol No. 14, additional reform measures are necessary for both the medium- and long-terms. If it is decided to start negotiating a new amending protocol, a sufficiently forward-looking approach should be adopted to provide effective and enduring solutions.

58. The CDDH notes that budgetary issues must be addressed, notably with respect to certain of the above proposals. Although it has not been in a position to conduct this exercise itself, it has undertaken a preliminary analysis of certain budgetary issues relevant to the proposals to introduce fees for applicants (see Appendix III section 1) and for a new filtering mechanism/ increasing the Court's capacity to process applications (see Appendix IV section 1, paras. 46-50). It may be considered necessary to examine these issues further before final decisions are taken. (See also the CDDH's Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers for further consideration of budgetary issues.)

59. The CDDH recalls that certain of the proposals deliberately contain elements of flexibility, which might facilitate their acceptance, implementation, and combination as part of an overall package. These include notably the suggestion that a new filtering mechanism could be introduced on a contingency basis and that extension of the Court's jurisdiction to give advisory opinions need not be accepted by all States Parties but could instead be optional.¹² It also notes that amendment measures could be introduced alongside and in combination with

12. This could conceivably take various forms, e.g. an optional part of an amendment protocol or an additional protocol entering into force following a limited number of ratifications.

non-amendment measures, recalling its earlier Final Report on these latter issues. Equally, decisions on measures to be implemented immediately could be taken at the same time as initiating preparatory work on reforms that may only be implemented further into the future.

60. The proposals contained in this report are in principle not mutually exclusive. Only that to confer a discretionary power on the Court to decide which cases to consider could make some of the other proposals concerning access to the Court redundant, since the latter are based on the premise that the Court would continue to deliver decisions on all admissible applications. Similarly, a system of fees would make little sense for a Court with such a discretionary power.

61. The CDDH would underline that the present report is essentially intended to respond to the specific terms of reference given to the CDDH by the Committee of Ministers. As noted above, however, the CDDH has also prepared a Contribution to the United Kingdom Conference, which will address broader issues. An overall package of measures to reform the Convention system as a whole could therefore be composed of elements taken from both documents, along with the CDDH's earlier report on measures not requiring amendment of the Convention. Finally, the CDDH considers that with the present report, it has fulfilled the relevant terms of reference given to it by the Committee of Ministers.

APPENDIX I

*Terms of reference*¹³

*Steering Committee for Human Rights (CDDH)*¹⁴

Main tasks

Under the authority of the Committee of Ministers, the CDDH will (i) oversee and coordinate the intergovernmental work of the Council of Europe in the human rights field, including gender equality and bioethics, and (ii) advise the Committee of Ministers on all questions within its field of competence, taking due account of relevant transversal perspectives. For this purpose, the CDDH is instructed to elaborate common standards for the 47 member states and fulfil any other activity which might be assigned to it by the Committee of Ministers. In particular, the CDDH will:

- (i) contribute to the protection of human rights by improving the effectiveness of the control mechanism of the European Convention on Human Rights and the implementation of the Convention at national level;
- (ii) contribute to the promotion and development of human rights through awareness raising and further standard-setting activities;
- (iii) carry out substantive legal analysis of human rights issues and contribute to the development of Council of Europe policies on such issues;
- (iv) ensure appropriate follow-up to legal instruments prepared by the Steering Committee;
- (v) ensure oversight from the human rights perspective of work on gender equality and bioethics;
- (vi) carry out work regarding the rights of persons belonging to national minorities;
- (vii) follow the human rights activities of other international organisations and institutions, in particular the United Nations and its Human Rights Council, the European Union and the OSCE, with a view to identifying opportunities for Council of Europe input and/or complementary Council of Europe action;
- (viii) contribute, in co-operation with the CDPC and the CDCJ, to the preparation of the 31st Conference of Ministers of Justice (Vienna, 2012) and ensure, as appropriate, the follow-up of any decision taken by the Committee of Ministers subsequent to the Conference.

13. Valid from 1 January 2012 – 31 December 2013.

14. Set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.

Pillar/Sector/Programme

- ▶ Pillar: Human Rights
- ▶ Sector: Ensuring Protection of Human Rights
- ▶ Programme: Enhancing the Effectiveness of the ECHR System at national and European level

Expected results

Protection of human rights

The long-term effectiveness and relevance of the Convention system at national and European level, notably the reform of the European Court of Human Rights, continues to be secured (see also the terms of reference of the Committee of Experts on the Reform of the Court (DH-GDR)).

Development and promotion of human rights

Human rights are better guaranteed through activities related to the development, promotion of and appropriate follow-up to human rights instruments.

- (i) A non-binding instrument is elaborated on the promotion of the rights and dignity of the elderly;
- (ii) studies are conducted to examine the feasibility and added value of standard-setting work regarding human rights in culturally diverse societies and corporate social responsibility in the human rights field;
- (iii) a study is conducted to identify possible other priority areas for development and promotion of human rights in the Council of Europe and to formulate proposals for specific activities as appropriate.

Gender equality

Supervision is ensured of activities aimed at (i) promoting the mainstreaming of gender equality issues in the work of other Council of Europe bodies and (ii) promoting the exchange of good practices and supporting the implementation of the existing standards in member states (see also the terms of reference of the Gender Equality Commission (GEC)).

Bioethics

Supervision is ensured from the human rights perspective of the intergovernmental work in the field of bioethics (see also the terms of reference of the Committee on Bioethics (DH-BIO)).

Composition

Members

Governments of member states are invited to designate one or more representatives of the highest possible rank in the field of human rights.

The Council of Europe will bear the travel and subsistence expenses of one representative from each member state (two in the case of the state whose representative has been elected Chair).

Each member of the committee shall have one vote. Where a government designates more than one member, only one of them is entitled to take part in the voting.

Participants

The following may send representatives without the right to vote and at the charge of their corresponding administrative budgets:

- ▶ Parliamentary Assembly of the Council of Europe;
- ▶ Congress of Local and Regional Authorities of the Council of Europe;
- ▶ European Court of Human Rights;
- ▶ Council of Europe Commissioner for Human Rights;
- ▶ Conference of INGOs of the Council of Europe;
- ▶ committees or other bodies of the Council of Europe engaged in related work, as appropriate.

The following may send representatives without the right to vote and without defrayal of expenses:

- ▶ European Union (one or more representatives, including, as appropriate, the European Union Agency for Fundamental Rights (FRA));
- ▶ Observer States to the Council of Europe: Canada, Holy See, Japan, Mexico, United States of America;
- ▶ representatives of other international organisations (Organisation for Security and Co-operation in Europe (OSCE) / Office for Democratic Institutions and Human Rights (ODIHR), Office of the United Nations High Commissioner for Human Rights).

Observers

The following may send representatives without the right to vote and without defrayal of expenses:

- ▶ Belarus;
- ▶ Non-governmental organisations (Amnesty International, International Commission of Jurists (ICJ), International Federation of Human Rights (FIDH), European Roma and Travellers Forum), as well as the European Group for National Human Rights Institutions (NHRIs).

Working methods

Plenary meetings

- ▶ 48 members, 3 meetings in 2012, 4 days
- ▶ 48 members, 3 meetings in 2013, 4 days

Bureau

- ▶ 8 members, 3 meetings in 2012, 2 days
- ▶ 8 members, 3 meetings in 2013, 2 days

The Committee will also appoint a Gender Equality Rapporteur from amongst its members.

The rules of procedure of the Committee are governed by Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.

The CDDH may instruct, if necessary, a drafting group (up to 12 members) to fulfil specific tasks for the elaboration of a non-binding instrument on the promotion of the rights and dignity of the elderly, between and during meetings.

Subject to the agenda, the Chairs of the subordinate structures to the CDDH may be invited to attend CDDH Bureau and/or plenary meetings.

Subordinate structure(s) to the CDDH

The CDDH has a coordinating, supervising and monitoring role in the functioning of its subordinate bodies:

- ▶ **Committee of experts on the Reform of the Court (DH-GDR)** (see separate terms of reference) and **Drafting Group**;
- ▶ **Committee on Bioethics (DH-BIO)** (see separate terms of reference);
- ▶ **Gender Equality Commission (GEC)** (see separate terms of reference).

Committee of Experts on the Reform of the Court (DH-GDR)¹⁵

Main tasks

Under the supervision of the Steering Committee for Human Rights (CDDH), the DH-GDR will conduct the intergovernmental work on the protection of human rights assigned by the Committee of Ministers to the Steering Committee as an important part of the follow-up to the Interlaken and İzmir Declarations.

Expected results

- (i) a draft report is produced for the Committee of Ministers containing specific proposals, with different options, setting out in each case the main practical arguments for and against, on:
 - a. a filtering mechanism within the European Court of Human Rights;
 - b. a simplified amendment procedure for the Convention's provisions on organisational issues;
 - c. the issue of fees for applicants to the European Court of Human Rights;
 - d. any other possible new procedural rules or practices concerning access to the Court;

15. Set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.

- e. a system allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention;
- (ii) a non-binding Committee of Ministers instrument is drafted concerning the selection of candidates for the post of judge at the European Court of Human Rights and the establishment of lists of ad hoc judges under Article 26(4) of the ECHR, accompanied by additional explanations if appropriate, and a compilation of good practices;
- (iii) draft legal instruments are prepared to implement decisions to be taken by the Committee of Ministers on the basis of the report in (i) above;
- (iv) a draft report is prepared for the Committee of Ministers containing (a) an analysis of the responses given by member states in their national reports submitted by 31 December 2011 on measures taken to implement the relevant parts of the Interlaken Declaration, and (b) recommendations for follow-up;
- (v) a draft report is prepared for the Committee of Ministers containing elements to contribute to the evaluation of the effects of Protocol No. 14 to the Convention and the implementation of the Interlaken and İzmir Declarations on the Court's situation;
- (vi) a draft interim report for the Committee of Ministers is prepared on possible proposals for long-term reform of the Convention system.

Composition

Members

Governments of member states are invited to designate one or more representatives of the highest possible rank in the field of human rights.

The Council of Europe will bear the travel and subsistence expenses of one representative from each member state (two in the case of the state whose representative has been elected Chair).

Each member of the committee shall have one vote. Where a government designates more than one member, only one of them is entitled to take part in the voting.

Participants

The following may send representatives without the right to vote and at the charge of their corresponding administrative budgets:

- ▶ Parliamentary Assembly of the Council of Europe;
- ▶ Congress of Local and Regional Authorities of the Council of Europe;
- ▶ European Court of Human Rights;
- ▶ Council of Europe Commissioner for Human Rights;
- ▶ Conference of INGOs of the Council of Europe;
- ▶ committees or other bodies of the Council of Europe engaged in related work, as appropriate.

The following may send representatives without the right to vote and without defrayal of expenses:

- ▶ European Union (one or more representatives, including, as appropriate, the European Union Agency for Fundamental Rights - FRA);
- ▶ Observer States to the Council of Europe: Canada, Holy See, Japan, Mexico, United States of America;
- ▶ Representatives of other International Organisations (Organisation for Security and Co-operation in Europe (OSCE) / Office for Democratic Institutions and Human Rights (ODIHR), Office of the United Nations High Commissioner for Human Rights).

Observers

The following may send representatives without the right to vote and without defrayal of expenses:

- ▶ Belarus;
- ▶ non-governmental organisations (Amnesty International, International Commission of Jurists (ICJ), International Federation of Human Rights (FIDH), European Roma and Travellers Forum), as well as the European Group for National Human Rights Institutions (NHRIs).

Working methods

Meetings

- ▶ 48 members, 2 meetings in 2012, 3 days
- ▶ 48 members, 2 meetings in 2013, 3 days

The Committee will also appoint a Gender Equality Rapporteur from amongst its members.

The rules of procedure of the Committee are governed by Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.

The Chair of the DH-GDR may be invited to attend the meetings of the CDDH and its Bureau in order to inform on progress of the work.

The CDDH may instruct, if necessary, a drafting group (up to 12 members) to fulfil specific tasks in this field between and during meetings of the DH-GDR.

APPENDIX II

List of documents (selected reference texts)

Reference	Title	Origin
DH-GDR(2010)006	Written contributions to the report on access to the Court – fees for applicants	(Secretariat)
DH-GDR(2010)007	Written contributions to the report on proposals for dealing with repetitive applications that would not require amendment of the Convention	(Secretariat)
DH-GDR(2010)009	Written contributions to the report on the issues of filtering – a new filtering mechanism and repetitive applications – judicial treatment	(Secretariat)
DH-GDR(2010)011	Compilation of contributions to the Court's preparation of possible rules of court governing the pilot judgment procedure	(Secretariat)
DH-GDR(2010)014	Creation of a new filtering mechanism for inadmissible applications – the German proposal	Germany
DH-GDR(2010)016	Questions concerning the introduction of fees – position paper of Germany	Germany
DH-GDR(2010)019	Advisory opinions: previous discussions in the DH-S-GDR and CDDH	Secretariat
DH-GDR(2010)020	Compilation of comments submitted by member States on the Court's Jurisconsult's report on the principle of subsidiarity and on the clarity and consistency of the Court's case-law	(Secretariat)
DH-GDR(2011)002 REV.	Study on the possible introduction of a system of fees for applicants to the European Court of Human Rights	Julien Lhuillier, expert-consultant
DH-GDR(2011)006	Compilation of contributions to the draft Collective Response to the Court's Jurisconsult's notes on the principle of subsidiarity and on the clarity and consistency of the Court's case-law	(Secretariat)
DH-GDR(2011)007	Response of the European Group of National Human Rights Institutions (EGNHRI) on Reform of the European Court of Human Rights – Selected Issues	EGNHRI
DH-GDR(2011)008	Joint NGO Comments on follow-up of the Interlaken Declaration	Amnesty International, AIRE Centre, European Human Rights Advocacy Centre, International Commission of Jurists, Interights, Justice & Liberty

Reference	Title	Origin
DH-GDR(2011)009	Statement prepared for consultations with representatives of civil society and national human rights institutions	Helsinki Foundation for Human Rights (Warsaw)
DH-GDR(2011)010	Ideas for the consultation with representatives of civil society and national human rights institutions	ILGA-Europe
DH-GDR(2011)012	German proposal to introduce a sanction in futile cases	Germany
DH-GDR(2011)013	German statement as to the assessment of the admissibility criteria	Germany
DH-GDR(2011)014	Non-paper “Filtering: combined options”	
DH-GDR(2011)019	Norway’s views on filtering of applications and treatment of repetitive applications	Norway
DH-GDR(2011)020	Note on possible new procedural rules of practices concerning access to the Court	Switzerland/ United Kingdom
DH-GDR(2011)021	Estonian comments on the draft preliminary report on the proposal to extend the Court’s jurisdiction to give advisory opinions	Estonia
DH-GDR(2011)022	German proposal – judicial filtering mechanism	Germany
DH-GDR(2011)023	Filtering by whom? Why judges should be vested with the task of filtering and not the registry staff	Germany
DH-GDR(2011)024	German proposal – amendment of Article 35 paragraph 3.b ECHR	Germany
DH-GDR(2011)026	Note on compulsory legal representation	European Court of Human Rights
DH-GDR(2011)027	Registry note on Court fees	Registry of the Court
DH-GDR(2011)028	Concept of a general domestic remedy	Poland
DH-GDR(2011)030	Reform of the European Court of Human Rights – Selected Issues	EGNHRI
DH-GDR(2011)031	Russian Federation’s position on the proposal to extend the Court’s jurisdiction to give advisory opinions	Russian Federation
DH-GDR(2011)035	Compendium of written contributions to the draft preliminary report on possible new procedural rules of practices concerning access to the Court	(Secretariat)
DH-GDR(2012)001	Report of the Wilton Park Conference “2020 Vision for the European Court of Human Rights”	

Reference	Title	Origin
DH-GDR(2012)002	Joint NGO Comments on follow-up of the Interlaken and İzmir Declarations on the future of the European Court of Human Rights	Amnesty International, AIRE Centre, European Human Rights Advocacy Centre, International Commission of Jurists, Interights, Justice & Helsinki Foundation for Human Rights (Warsaw)
DH-GDR(2012)003	French views on enhancing the subsidiarity principle	France
DH-GDR(2012)005 & Addendum	Information on cases pending before the European Court of Human Rights	Registry of the Court
DH-GDR(2012)006	Submission to DH-GDR	EGNHRI

APPENDIX III

CDDH Report on measures to regulate access to the Court

1. A SYSTEM OF FEES FOR APPLICANTS TO THE COURT

A. Introduction

1. The Declaration adopted at the İzmir Conference of 26-27 April 2011 “invites the Committee of Ministers to continue its reflection on the issue of charging fees to applicants...”¹⁶ Following the subsequent Istanbul ministerial session (11 May 2011), the Ministers’ Deputies adopted follow-up decisions in which they inter alia “invited the CDDH, in order to facilitate decisions by the Committee of Ministers, ... to advise, setting out ... the main practical arguments for and against: on the issue of fees for applicants to the European Court of Human Rights...”¹⁷

2. The paper does not address the question of principle concerning whether or not introduction of a system of fees would represent an unacceptable limitation on or barrier to exercise of the right of individual application to the Court. Instead, it seeks to facilitate further examination of the practicality and utility of such a system.

3. The Registry of the Court made a technical contribution, which was examined during preparation of this report.¹⁸

B. The main aspects of a system of fees

4. Certain aspects of a possible system of fees may depend to some extent on the purpose or vision underlying its introduction. There are at least three possibilities here, which may overlap: a system intended as a deterrent to discourage clearly inadmissible applications;¹⁹ a system intended as a penalty for those introducing clearly inadmissible applications; and a system intended to reflect the fact that many member States’ highest courts themselves require applicants to pay a fee, although it has been suggested that a direct comparison between the situation of national courts and that of the Strasbourg Court may be inappropriate, for reasons including that legal aid is often available for proceedings before the former.

5. Whilst complete elaboration (or, at least, implementation) of a final model would require consideration of additional technical aspects,²⁰ it is suggested that at this stage, the most relevant to be addressed are the following:

- a. at what stage of proceedings payment of the fee would be required;
- b. whether the fee would be set at a low level or a more significant one;

16. See doc. CDDH(2011)010, para. A.2.

17. See doc. CM/Dep/Dec(2011)1114/1.5.

18. See doc. DH-GDR(2011)027.

19. Including applications considered abusive in the sense of Art. 35(3) ECHR, in application of the principle *de minimis non curat praeior* (see footnote 6 above) (cf. *Bock v. Germany*, App. No. 22051/07, decision of 19/01/10, and *Dudek v. Germany*, App. No. 12977/09, decision of 23/11/10).

20. For a list of some of these aspects, see section E below.

- c. whether the level of fee would vary depending on the applicant's country of residence;
 - d. whether there would be exemptions based on the applicant's means;
 - e. whether there would be exemptions for specific categories of applicant;
 - f. whether the Court would have discretion to waive the fee;
 - g. whether the fee could be refunded should certain conditions be satisfied;
 - h. how the fee could be paid.
6. The following are amongst the possible options for these aspects:

a. The stage at which payment would be required

- i. Payment could be required at the **outset**. This should be taken to mean when the completed application form is submitted to the Registry, as opposed to when the first communication is sent (since the application is not registered or subject to triage until a completed form is received). It would involve at least some risk of detering well-founded applications. On the other hand, it has been suggested that deterrence of clearly inadmissible applications is most effective if the court fee is required from the outset.
- ii. Payment could be required at a **later stage**. This could allow the Registry to advise those making applications preliminarily considered to be inadmissible of this fact and either to withdraw them or, should they wish to proceed to judicial determination, to pay the fee. It would have the advantage of having no deterrent effect on well-founded applications. It could, however, imply administrative and budgetary consequences prior to having any deterrent effect on clearly inadmissible applications. These consequences could be minimised if the Registry were to send the applicant a standard letter stating that after a preliminary examination, the application will probably be declared inadmissible, and inviting the applicant to pay an advance fee if s/he wished to obtain a judicial decision. Should the applicant not pay within the time limit, the application would be struck out of the list (or whatever may be the legal effect that would result from non-payment). It has nevertheless been suggested that such a system would be less effective in achieving the desired result of freeing resources to deal with admissible applications, instead increasing the Registry's work-load and decreasing the Court's case-processing capacity.

b. The level of the fee

- i. The fee could be set at a deliberately **low level**, so as to avoid deterring well-founded applications; figures of up to €50 have been mentioned. In this case, however, it might not be sufficient to deter a significant number of ill-founded applications.
- ii. The fee could be set at a **higher level**, to ensure deterrence of ill-founded applications.²¹ In this case, however, it would be necessary to include compensatory mechanisms in the system (e.g. exemptions, waivers or refunds) to avoid or minimise deterrence of well-founded applications and to differ-

21. It has been suggested that applicants pay a fee equal to 10% of the average cost of processing an application, which on 2010 figures would result in a fee of, say, €150 (€1,420 average cost per case).

entiate according to country of residence (see further below). Such mechanisms, however, may have administrative and budgetary consequences (see further below).

The expert consultant's study²² notes that "the amount demanded as a court fee is extremely variable from one State to another and sometimes even within the same State, between different matters. In certain States ..., the amounts have been set so as to be quite low, most often so as to be limited to dissuading ill-founded applications or to ensure full or partial financial autonomy for the court. In other States..., the amounts are in some situations deliberately high in order to be really effective or are shortly going to be subject to large increases... Court fees in administrative matters vary considerably".²³

c. A fee variable according to the applicant's country of residence²⁴

- i. The fee could be **the same** regardless of an applicant's country of residence. In this case, however, a higher level of fee may be inappropriate, since it could be insufficient to deter a significant number of ill-founded applications from applicants resident in countries with higher per capita income but too high to avoid deterring well-founded applications from applicants resident in countries with lower per capita income. For this reason, a system involving a standard level of fee for applicants wherever resident might be considered discriminatory, the more so if set at a higher level.
- ii. The fee could **vary** depending on the applicant's country of residence, being set,²⁵ for example, according to relative levels of per capita national income. Indeed, the Court already assesses relative levels of national income when fixing levels of just satisfaction in individual cases, with division of member States into four zones on the basis of World Bank figures. Calculation of the different levels of fee may thus in principle have minimal administrative and budgetary consequences, although there may be cases in which the Court would be required to determine the applicant's place of residence; a further difficulty could be the question of what fee should be applied to applicants resident in non-member States. A differentiated system however would enhance the deterrent function of the fee system.
The expert consultant's study notes that "it is possible to imagine a variability [in the fee] based on the disparity in average standard of living... In practice, no State clearly applies this criteria. Certain States make use, however, of a comparable approach..."²⁶

22. See document DH-GDR(2011)002 REV., "Study on the possible introduction of a system of fees for applicants to the European Court of Human Rights (revised)"; prepared by Mr Julien Lhuiller, Institut de Criminologie et de Droit Pénal, University of Lausanne, Switzerland.

23. *Ibid.*, pp. 10-11.

24. It should be noted that a variable level of fee would not necessarily exclude the need for other compensatory mechanisms such as exemptions (see below).

25. See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 8: it should be noted that the CDDH report refers to "state of origin"; it is suggested that this could be confused with the concept of "country of origin" used in refugee law, in which case it may not be appropriate for current purposes.

26. See doc. DH-GDR(2010)002 REV., p. 10.

The fee may vary according to relative standard of living in up to five of the 25 States on which the expert consultant was able to obtain detailed information.²⁷

d. Exemptions based on the applicant's means

- i. The fee could be the same regardless of an applicant's means (financial situation), i.e. with **no exemptions** based on means.²⁸ Again, in this case a higher level of fee may be inappropriate, since it could deter well-founded applications from persons of limited means. On the other hand, a lower level of fee may be less effective, as it would fail to deter ill-founded applications from applicants of greater means. A system without exemptions based on means might thus be considered discriminatory as between applicants from the same country but of different means. It should be noted, however, that the expert consultant's study has not clearly established that all national fee systems include means-based exemptions (although the question of relative means may be addressed otherwise, for example through provision of legal aid for those of lesser means). Consideration could be given to whether it would be open to States to challenge an applicant's eligibility for an exemption, for example by disputing their real personal circumstances or financial status.
- ii. Certain applicants could be **exempted** from the fee on account of their means. This could be established, for example, by reference to entitlement to state benefits, free legal representation or remission from court fees in the country of residence. Such an exemption would help avoid deterring well-founded applications from persons of limited means and thereby reduce any discriminatory effect. Determination of whether individual applicants qualified for exemption could, however, have considerable administrative and budgetary consequences. Furthermore, the existence of different grounds for qualification to certain entitlements in different countries could be considered as contributing to a form of discrimination as between applicants from different countries when determining entitlement to exemption from the fee. That said, it should be noted that the Registry has experience of administering a system of means-testing in the context of grants of legal aid. An approach inspired by the Registry's practice in that context may avoid some of the problems that could arise in the current context, although it would still entail some administrative or budgetary consequences. The expert consultant's study notes that "Numerous States take account ... of the personal financial situation of the parties at some point in the fee procedure, for example, in case of a request for exoneration from the fee."²⁹ The fee is variable according to the financial situation of the parties in at least eight of the 25 States on which the expert consultant was able to obtain detailed information.³⁰

27. *Ibid*, p. 27.

28. See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 10.

29. See doc. DH-GDR(2010)002 REV., p. 10.

30. *Ibid*, p. 27.

e. Exemptions for specific categories of applicants

- i. There could be **no exemptions** for any applicants.
- ii. Certain categories of applicant could be **exempted** from the fee. This could in particular be the case for persons deprived of their liberty.³¹ Depending on the definition of categories and the ease with which proof of qualification could be established, determination of qualification may have only minimal administrative and budgetary consequences. (The option of charging fees only to legal persons would not seem to be sufficient as a response to the overall number of inadmissible applications.)

The expert consultant's study notes that "Exemptions relating to the applicant can arise from a certain vulnerability, but they can also be based on the very nature of the applicant. The applicant who exhibits a certain vulnerability can be exempted from paying procedural fees. Cases in which the exceptions are possible are defined by law and most often correspond to cases of intellectual, material [including persons deprived of their liberty] and financial [including impecuniosity] vulnerability."³²

f. Court discretion to waive the fee

- i. The Court could have **no discretionary power** to waive the fee in any circumstances.
- ii. The Court could have a **discretion** to waive the fee. This discretion could be either unfettered or limited to specific circumstances.³³ It would give the Court greater flexibility in addressing individual and exceptional circumstances. Introducing such a feature into a system of fees would, however, potentially prolong and complicate the procedure and would thus have administrative and budgetary consequences. Furthermore, it has been suggested that it would be unnecessary to include such a feature in addition to exemptions such as those described above.

The expert consultant's study notes that "in several States, the nature of certain cases allows direct exemption of the applicants. It is often so in family matters...."³⁴

The fee may be variable according to the type of case in at least 21 of the 25 States on which the expert consultant was able to obtain detailed information.³⁵

g. Refund of the fee

- i. The fee could **not be refundable** under any conditions.
- ii. The fee could be **refunded** should certain conditions be satisfied.³⁶ This could include refund by the respondent State as part of the award of costs in the event of the Court finding one or more violations. Should the fee be

31. See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 11. It has also been suggested that exemptions be given to applicants complaining of violations of certain "core rights" guaranteed by the Convention (e.g. Articles 2, 3 and 4).

32. See doc. DH-GDR(2010)002 REV., p.12.

33. See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 13.

34. See doc. DH-GDR(2010)002 REV., p.12.

35. *Ibid*, p. 27.

36. See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 14.

set at a high level so as to maximise the deterrent effect against clearly inadmissible applications, it could be refunded to those whose applications were not dismissed by a single judge as clearly inadmissible. In any case, there would inevitably be certain administrative or budgetary consequences.

(This question is not addressed in the expert consultant's study.)

h. Payment of the fee

- i. The fee could be paid by bank transfer (as in at least 22 of the 25 States on which the expert consultant was able to obtain detailed information).³⁷
- ii. The fee could be paid by internet (as in at least 8 of the 25 States on which the expert consultant was able to obtain detailed information).³⁸
- iii. The fee could be paid by stamp (as in 7 of the 25 States on which the expert consultant was able to obtain detailed information).³⁹
- iv. The fee could be paid by a combination of some or all of the above.⁴⁰
The expert consultant's study notes that "the modalities for the collection of fees differ greatly from one member State to another". The study mentions *inter alia* the following modalities: payment at the court, a bank or a post office; payment by cash, bank transfer, tax stamps, telephone or internet. It also notes that "the collection of fees is sometimes sub-contracted to a private body, most often an accredited bank, [in other cases] to a special private body ... or public bodies".⁴¹

C. Two possible models

7. The above analysis of different possible options for certain aspects of a fee system may be seen as revealing tensions between competing interests.
 - a. There may be tension between minimising administrative and budgetary consequences, on the one hand, and minimising discriminatory effect, on the other. For example, the risk of discrimination between applicants of different means from the same country may need to be reduced or avoided by allowing for exemptions based on means, which could have administrative and budgetary consequences. Similarly, the risk of discrimination between applicants from countries of different per capita national income may need to be reduced or avoided by having different levels of fee for different countries, which could have administrative or budgetary consequences.
 - b. There may also be a tension between the competing interests of maximising deterrent effect against clearly inadmissible applications, on the one hand, and discriminatory deterrence of well-founded applications, on the other; and, as described above, there may then be a further tension between measures to reduce or avoid such discrimination, on the one hand, and minimis-

37. *Ibid.*, p. 27.

38. *Ibid.*

39. *Ibid.*

40. It is suggested that other modalities that are mentioned in the expert consultant's study, such as payment by telephone or cheque, would not appear appropriate in the present context.

41. See doc. DH-GDR(2010)002 REV., pp. 17-19.

ing administrative and budgetary consequences, on the other. For example, a higher fee intended to maximise deterrent effect may need, in order to avoid deterring also well-founded applications, to be accompanied by exemptions and/ or refunds, which could have administrative and budgetary consequences.

8. The following models are deliberately situated towards the extremes of a spectrum of possible models. They do not represent the only possibilities but are rather intended to illustrate certain consequences of various approaches. A cost-benefit analysis of these models is difficult and has not yet been possible; any final choice would require an evaluation and an adaptation of the mechanism.

I. Model I – lesser administrative and budgetary consequences

9. On the basis of the above analysis of the various options for each aspect of a fee system, a model with the following characteristics would appear to have lesser administrative and budgetary consequences.

- a. Fee set at a low level
 - b. Flat rate fee for applicants, regardless of their country of residence
 - c. No exemptions based on applicants' means
 - d. Exemptions only for those in detention
 - e. Court has no discretion to waive the fee
 - f. Refunds only to successful applicants as part of the award of costs
 - g. Payment by bank transfer, internet or stamps
10. It has been suggested that Model I exhibits the following advantages:
- a. It is practical, simple and uniform in application and entails the least amount of administrative and budgetary burden.
 - b. It would be sufficient as a form of deterrent to "futile" or ill-founded applications and would not offend any applicant; its mere introduction and use alone would improve the quality of applications.
 - c. It would not be punitive in effect or imply a penalty to the applicant and thus would not represent an unacceptable limitation on, or a barrier to, the exercise of the right of individual application to the court.
 - d. It could be enhanced and/or modified to meet any prevailing caseload in order to be more effective in deterring inadmissible applications.
11. The principal possible disadvantages to such a model may be a lesser deterrent effect against inadmissible applications and discrimination on the basis of applicants' financial situation, as between both persons with average means resident in countries of different per capita national income and persons with different means within the same country of residence.

II. Model II – lesser discriminatory effect

12. On the basis of the above analysis of the various options for each aspect of a fee system, a model with the following characteristics would appear to be less discriminatory.

- a. Fee set at a higher level
- b. Fee varies according to the applicant's country of residence
- c. Exemptions based on applicants' means
- d. Exemptions at least for those in detention

- e. Court has a discretion to waive fees for cases in specific circumstances
 - f. Refund where the application is ruled admissible (alternatively, where not ruled clearly inadmissible)
 - g. Payment by bank transfer, internet or stamps
13. It has been suggested that Model II exhibits the following advantages:
- a. It would appear to be more effective in dissuading ill-founded applications.
 - b. It would be less discriminatory, especially between applicants of different means.
 - c. Better account would be taken of the special characteristics of applicants and their applications.
 - d. A greater resulting revenue could cover the costs of administration.
14. The principal possible disadvantage to such a model may be the administrative consequences of exemptions based on applicants' means or circumstances and of determining their country of residence. There would also be administrative consequences attached to refunding the fee where an application is ruled admissible. There would remain some risk of deterrence of well-founded applications.

D. Legal basis of introduction of a system of fees

15. The CDDH has consulted the Legal Advice Department, which gave the following opinion on this issue.

“It would appear that the only issue at stake that could be examined from a legal and not practical standpoint is the question of whether or not an application to the European Court of Human Rights could be rejected in the case of non-payment of fees. The existing legal framework provides for two rejection possibilities: an application could be declared inadmissible by the Court or refused by the Registry.

1. An application is declared inadmissible

It follows from the provisions of Article 35 of the European Convention on Human Rights that an application can only be rejected as being inadmissible if one or more criteria listed in the same Article are not complied with. Therefore, in order to enable the Court to declare an application inadmissible due to non-payment of fees, Article 35 of the Convention would need to be amended.

2. An application is not examined by the Court

According to Rule 47 of the Rules of Court, adopted by the plenary Court pursuant to Article 25 of the Convention, failure to comply with the requirements set out in paragraphs 1 and 2 of this Rule may result in the application not being examined by the Court. It could be envisaged to introduce an additional requirement of payment of fees to Rule 47. Thus, a failure to pay the fee would result in the refusal of the application by the Registry. As the Rule provides that failure to comply with any of the requirements **may** (and not shall) result in the application not being examined, this would have the advantage of allowing for fees to be waived in certain cases (for example prisoners). Furthermore, of course, this model would not require any amendment of the European Convention.”

16. This opinion will require further examination before the issue can be definitively resolved.⁴²

E. Additional technical aspects to be examined at a later stage

17. The following technical aspects, although not essential to taking political decisions on whether or not to introduce a system of fees, would have to be addressed and resolved before any such system could be introduced.

- a. Whether the fee would be applied to applications already lodged with the Court. In this case, it may be possible to apply the procedure whereby the Registry advises those making applications preliminarily considered to be inadmissible either to withdraw them or, should they wish to proceed to judicial determination, to pay the fee.⁴³ The retrospective nature of such an approach, however, may be problematic.
- b. Who would be responsible for setting the level of the fee, whether the Committee of Ministers or the Court, and who would be responsible for revising it.
- c. Whether the initial general level of fee could be revised in the light of practical experience of operation of the system or a change in circumstances.
- d. How relative levels of fee between countries of different per capita income could be revised and whether there would be a mechanism for irregular revision in exceptional circumstances.
- e. Whether to establish a mechanism to regularly monitor and periodically evaluate the impact of fees, in order to establish whether and, if so, the extent to which they firstly, meet the objective of deterring clearly inadmissible cases and secondly, deter well-founded cases, the results to be made public.
- f. What the consequence would be if an applicant (who had not been exempted from payment) did not pay (the question arises independently of the stage of the procedure at which payment is requested – see above paragraph 6.a.i. and ii.): (1) “information” solution, i.e. letter from the Registry informing the applicant that his/her application will not be (further) examined for failure to pay the fee, or else (2) “formal” solution, either (a) decision of inadmissibility (which would require amendment of the Convention to introduce a new admissibility criterion) or (b) application of Article 37(1)(c) of the Convention.

42. It can be recalled that, in its Final Report on measures that result from the Interlaken Declaration that do not require amendment of the Convention, the CDDH had previously stated that “one aspect, yet to be resolved, is whether introduction of a fee would require amendment of the Convention or whether it could be done under the current provisions or, for example, by way of amendment of the Rules of Court. The CDDH notes that the answer to this question may vary depending on the model” (see doc. CDDH(2010)013 Addendum I, para. 14).

43. See para. 6.a.ii. above.

2. COMPULSORY LEGAL REPRESENTATION

A. Introduction

18. In its opinion of 4 April 2011 given with a view to the İzmir Conference, the Court considered “*that compulsory representation by a lawyer could be an effective and appropriate means of ensuring proper legal advice before filing an application and would increase the quality in respect of drafting applications. It would be consistent with the principle of subsidiarity in so far as it links directly into the national legal system. Any introduction of compulsory representation should be subject to the setting-up of appropriate legal aid facilities for applicants at national level.*”

19. It should immediately be noted that the Court itself, on further reflection, has since concluded that this proposal would be problematic.⁴⁴ The CDDH, following its own examination of the issue, has come to the same conclusion.

B. Arguments in favour

20. The following arguments had been suggested in favour of making legal representation compulsory from the outset:

- a. It would enhance the quality of applications brought before the Court, since prospective applicants would be advised professionally, notably on the admissibility conditions the envisaged application would face, which may perhaps reduce the number of applications.
- b. Applications would be drafted to a professional standard, which may allow their treatment by the Court’s Registry to be accelerated.
- c. It would maintain a direct link, through the person of the legal representative, with the preceding domestic proceedings that would be in keeping with the principle of subsidiarity.

C. Arguments against

21. Upon examination, however, the following arguments against have become apparent.

- a. Such a measure, which would put the applicant to a financial cost, would make application to the Court less straightforward and therefore could present disadvantages similar to those for introduction of a fee. Without provision of legal aid for persons of insufficient means, the measure would impact on the right of individual application (see further below).
- b. It is not certain that lawyers succeed in dissuading their clients from making applications, even when they appear manifestly inadmissible. The Court’s statistics furthermore do not show that the applications made through legal representatives result in fewer decisions of clear inadmissibility than those presented by an individual alone.⁴⁵
- c. Legal representation is already in principle required of applicants whose cases are communicated to the respondent State, other than in simple cases. Imposing it also for simple cases would unnecessarily add to procedural costs.

44. See doc. DH-GDR(2011)026, “Note on compulsory legal representation of applicants”, European Court of Human Rights (Court ref. #3709276), 21 October 2011.

45. *Ibid.*

22. As regards the necessity to extend legal aid to those of insufficient means, the following disadvantages have been mentioned.
 - a. Should the States finance and manage the provision of legal aid, this would have substantial budgetary implications for those member states that do not currently provide legal aid to pay for legal representation of those making applications to the Court.
 - b. Such legal aid could not be granted by the States without an assessment of the well-foundedness of the application. As soon as legal aid had been refused on account of the application's lack of well-foundedness, the Court would risk being seized with new applications challenging the failure to grant legal aid by the State concerned on the basis of a violation of Article 34 of the Convention.
 - c. Alternatively, should the task of administering legal aid be conferred on the Court, this would in turn create a new administrative and legal burden, which would be clearly contrary to the intended objective of relieving the Court's overload.

3. INTRODUCTION OF A SANCTION IN FUTILE CASES

A. Introduction

23. At the 7th meeting of the DH-GDR (30 May – 1 June 2011), the German expert presented a proposal to introduce a pecuniary sanction in futile cases.⁴⁶ This proposal would fall within the Deputies' invitation to the CDDH "to advise, setting out ... the main practical arguments for and against, on any other possible new procedural rules of practices concerning access to the Court".⁴⁷ The present document represents the CDDH's report on the proposal.⁴⁸

24. The German proposal would empower the Court "to charge a fee ... where the applicants have repeatedly submitted applications that are manifestly inadmissible and lacking in substance, for such applications are manifestly not due for adjudication before an international court and ... place an undue burden on the Court". (To avoid any confusion, this paper will hereafter employ the term "sanction" rather than "fee".)

25. Other details concerning operation of this sanction system included that:
- a. It would be incumbent upon the judicial formation dealing with an application to assess whether or not to impose a sanction.
 - b. The sanction would be imposed at the Court's discretion once proceedings had been concluded, which could include doing so in the decision on inadmissibility.
 - c. The sanction should not be too low, so as to reinforce its educative effect, it should be higher than any general fee; its specific amount would be set at the Court's discretion, taking into account the specific features of the individual case, up to a given maximum amount. (It was not specified who would be competent to set this maximum amount.)

46. See doc. DH-GDR(2011)012.

47. See doc. CM/Del/Dec(2011)1114/1.5, "other" in this context meaning "other than a system of fees for applicants to the Court" (see doc. DH-GDR(2011)011 REV.).

48. See doc. DH-GDR(2011)R7.

- d. The Court would be unable directly to enforce payment of the sanction. The applicant would, however, be informed that no further applications would be processed until the sanction had been paid.
- e. One could foresee a derogation to the principle that the Court refuse to process further applications brought by applicants who had not paid a sanction, in cases where the further application concerned “core rights” guaranteed by the Convention (e.g. Articles 2, 3 and 4).
- f. Should the same applicant, having paid a sanction, subsequently make further applications “lacking in substance,” a further, possibly higher sanction could be applied.

B. Arguments in favour

26. The following arguments have been advanced in favour of introducing a sanction in futile cases:

- a. Such applications place an undue burden upon the Court: the sanction would seek to reduce this burden. It would provide the Court with a case-management tool, similar to what is available within certain national judicial systems, to deal better with those whose numerous applications use resources without contributing to positive development in the field of human rights, whether for individuals (the applicant) or in general.
- b. The sanction would have an educative effect on the instant applicant. Even if such a system would not have a massive effect on the number of clearly inadmissible applications, it could nevertheless have a preventive effect on those who make applications without considering whether their applications meet the admissibility criteria. Imposition of the sanction may have a positive effect in any case: applicants who pay will have learnt something about the seriousness of applications; those who do not pay may find that the Court refuses to examine any future applications they may file.
- c. Once there was general awareness of the practice, it may also have a disciplining influence on the behaviour of other applicants. The system could thus contribute to consolidating the role of the Court, whose current situation, notably its case-load, is in part due to it being seen by many applicants as a fourth-instance court.
- d. The decision on whether to implement the sanction would be taken by the judicial formation seized of the case and so would involve minimal additional administrative cost. Managing the sanction would not imply additional work for the Court disproportionate to the possible effects, because the Court would have discretion to decide whether to impose the sanction: if it felt that to deliver a quick decision without any sanction would be a better way to manage the case, it could do so.
- e. A sanction system would respond to one of the objections of those opposed to a general fee for applicants, since it would not deter well-founded applications, the Court deciding on its application after having assessed the case. The potential impact on the effectiveness of the right of individual application to the Court would seem minimal, given the conditions under which the sanction is envisaged; it is, in effect, left to the discretion of the judge, as to both its application and its amount.

C. Arguments against

27. The following arguments have been advanced against the proposal:
- a. A “sanctions system” would not be in conformity with the purpose, spirit and even the letter of the Convention. Each applicant must be presumed to be in good faith when he or she lodges an application. Applicants rarely, if ever, imagine that their cases could be considered as “futile.” Inadmissibility is the sole “sanction” for a clearly ill-founded or even abusive application. Any other sanction would in effect give the appearance of criminalising applicants to the Court, something which should not be envisaged for a judicial human rights protection mechanism. It penalises the applicant before (s)he has even made out a case, even if that case turns out to be inadmissible. It goes against the maxim “justice must not only be done, but must be seen to be done”.
 - b. Even if there may undoubtedly be those who spend their time in abusive litigation, including before the Court, they are very few in number and do not necessarily only submit futile, inadmissible applications, which is a further problem. Most “abusive” applications involve repetitions of or minor variations on previously dismissed applications. At present, once a pattern of such applications has been established – which could involve as few as two Single Judge decisions (the second made under Article 35(2)(b) ECHR) – further applications were dealt with by the Registry simply informing the applicant that there would be no further judicial examination of their case. In other words, abusive applications were not a major case-processing problem and there may be few opportunities for a judicial formation to consider imposing any sanction.
 - c. The Court rarely uses its existing competence to find applications inadmissible for abuse of the right of individual application (Article 35(3)(a)) and therefore would be unlikely to exercise a power to impose a sanction. Consolidation of its case-law for rejecting⁴⁹ futile applications could achieve the same goal as this proposal. The development of this case-law, however, could prevent future futile applications without the need for a complex system of sanctions. An accumulation of efforts aimed at the same goal, on the other hand, would tend to burden the Court with additional tasks, rather than to relieve it.
 - d. Implementation of the proposal could require mobilisation of financial and human resources and place a heavy discretionary burden on the Court when deciding who or what case to “sanctio”. The Court was under the obligation to treat every application in the same way, giving the same weight and consideration to each, and so would be obliged to determine whether and explain why certain applications were lacking in substance; in other words, to distinguish degrees of inadmissibility. It would be obliged to analyse, at least briefly, future applications introduced by the person in question, if only to avoid the situation in which possible violations of “core rights” would remain unexamined.

49. See the Court’s decisions in the cases of *Bock v. Germany* and *Dudek (VIII) v. Germany*.

- e. It has been suggested that there would have to be the possibility of appealing against imposition of the sanction, which would increase the Court's workload. Any system of pecuniary sanctions would in principle have to be accompanied by the possibility of requesting the re-examination or reduction of the amount of the fine. This would also involve additional resources.
- f. A sanctions system would create inequality between applicants. It would not affect futile applications made by applicants of solid financial status. The envisaged system could thus appear discriminatory on the basis of financial resources.
- g. The viability and feasibility of such a system within the Convention, even once amended, would be questionable, difficult and complicated to implement.

D. Other issues raised

28. In addition to the above, the following other issues were raised during discussion:

- a. The proposal should not be considered as an alternative to a general fee, although it could be introduced in addition. It cannot take the place of a fees system or even be introduced as an alternative to fees, since unlike sanctions, the purpose of a possible fees system would be to add quality and uniformity to the introduction of applications.
- b. Alongside introduction of a sanction for abusive applicants, consideration should also be given to introduction of sanctions for legal representatives who submit futile applications on behalf of their clients, and/ or for States that failed to execute judgments in repetitive cases.
- c. The effective impact of this proposal on the prevention of futile applications remains to be analysed, on the basis of a possible relevant report that could perhaps be drawn up by the Court itself. From the outset, therefore, a preliminary estimation of the number of such cases and the extent to which they over-load the role of the Court would be appropriate.
- d. There could also be a study of the possibility that the States Parties be responsible for recovering, possibly on behalf of the Court, the sanctions. In this case, it would no longer be necessary to fix as a rule that the Court refuse to process further applications following non-payment of a sanction.

4. AMENDMENT OF THE “SIGNIFICANT DISADVANTAGE” ADMISSIBILITY CRITERION

A. Introduction

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

30. Article 35(3) of the Convention would then read:

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

[...]

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.”

B. Arguments in favour

31. The following arguments have been advanced in favour of the proposal:
 - a. The additional safeguard requiring prior due consideration by a domestic tribunal in Article 35(3) is unnecessary in view of the fact that paragraph 1 already mentions that all domestic remedies have to be exhausted.
 - b. Article 35(1) of the Convention does not mention the additional safeguard of “due consideration” by those domestic remedies. It is peculiar that paragraph 3, which concerns cases in which the applicant did not suffer a significant disadvantage, does offer such an additional safeguard.
 - c. Even in a case where the applicant’s concerns have not been given due consideration on the national level, the applicant does not need to be granted relief by the Court where his case is negligible in its significance. In any case, the provision would still contain the requirement that an application receive an examination on the merits if respect for human rights so requires.
 - d. It would render the existing *de minimis non curat praetor* rule more effective and easily applicable. The (already overburdened) Court would be provided with a further instrument to focus on more important questions of human rights protection under the Convention. Amendment of the provision would also provide a clear political signal in this regard.
 - e. It would further emphasise the subsidiary nature of the judicial protection offered by the European Court of Human Rights. The reference to “duly considered” in the current text of Article 35(3) of the Convention may induce the European Court to deal substantively with cases in which judicial supervision by an international human rights court is not warranted.
 - f. The right of individual petition remains intact in all cases, unless the case is of negligible importance.

C. Arguments against

32. The following arguments have been advanced against the proposal:
 - a. The current text of the provision was the result of a carefully drafted compromise during the negotiations leading up to Protocol No. 14. It remains highly uncertain whether a political agreement could now be reached on deletion of this safeguard.
 - b. The current provision has only been in force for a limited period of time (see in this regard also the transitory provision laid down in Article 20(2) of Protocol No. 14). The Court should be given more time for the full development of the interpretation of the safeguard in its case-law. The full effects of this provision still remain unclear. It would not be timely to amend the text of the provision.

- c. Removal of the safeguard would in itself in all probability not contribute significantly to the decrease of the Court's workload, given the fact that the criterion has so far been used by the Court in only a handful of cases. In most cases, the Court would still be able to declare a complaint inadmissible using other provisions of the Convention, even though the case was not duly considered by domestic courts. At the same time, it could also be argued that removal of the safeguard will not result in any substantial change, since the effectiveness of a domestic remedy is still required under Article 13 of the Convention.
- d. In the alternative, removal of the safeguard would result in a decrease of judicial protection offered to individual complainants. The current safeguard contributes to offering protection in case of a denial of justice, even though the importance of such a case is minimal.
- e. The safeguard underlines the importance of the principle of subsidiarity. High Contracting Parties are obliged to offer primary judicial protection on the domestic level. The safeguard requiring "due consideration" emphasises this duty.

D. Other issues raised

- 33. It was also recalled that Article 13 of the Convention requires the existence of an effective remedy before a domestic authority, which need not necessarily be a tribunal. This consideration could be taken to weigh either for or against the proposal, or both.
- 34. The CDDH noted that the information concerning recent tendencies in the number of pending applications and the Court's forecasts for future treatment of clearly inadmissible cases may have implications for an evaluation of the necessity of this proposal: see further paragraph 34 of the Final Report.

5. A NEW ADMISSIBILITY CRITERION RELATING TO CASES PROPERLY CONSIDERED BY NATIONAL COURTS

A. Introduction

- 35. A new admissibility criterion could be introduced with the following elements:
 - a. an application would be inadmissible if it were substantially the same as a matter that had already been examined by a domestic tribunal applying the rights guaranteed by the Convention and the Protocols thereto;
 - b. an exception would be made where the national tribunal had manifestly erred in its interpretation or application of the Convention rights;
 - c. a further exception would apply where the application raises a serious question affecting interpretation or application of the Convention or the Protocols thereto.

B. Arguments in favour

36. The following arguments have been advanced in favour of the proposal:
- a. The proposal emphasises the subsidiary nature of the judicial control conducted by the Court and the idea that the Court should not act as a fourth instance. Where national courts apply the Convention in the light of the Court's case-law and consider cases fully and fairly, the circumstances in which the Strasbourg Court should need to reconsider the case and substitute its own view for that of the national court should be relatively limited. The proposal could have special relevance with regard to certain Convention rights, such as those found in Articles 8 to 11 of the Convention. When applying those provisions of the Convention, a domestic tribunal balances the applicant's interests against those of another party to proceedings or a general public interest. It is inherent in such a balancing act that it may fall either way. In these circumstances, one could question the added value of further scrutiny by the Court, which might well merely repeat the same balancing act. The proposal could help further clarify the role of the Court in determining such cases.
 - b. The Court would be called upon to consider the merits of fewer applications, thus making better use of its finite capacity to deliver reasoned judgments.
 - c. The Court would still examine decisions of national courts where they clearly failed to apply the Convention and the Court's case-law either properly or at all. Likewise, the Court would also continue to consider cases that raise important points of interpretation and application of the Convention.
 - d. Such codification of the existing principle that the Court is not a "fourth instance" would provide an opportunity to establish clearer and more transparent guidelines for the Court on when to apply the rule.
 - e. The proposal builds on principles already found in the Court's case-law as part of the "manifestly ill-founded" admissibility criterion.⁵⁰ It would provide a more transparent and principled basis for such decisions to be taken and would encourage a fuller application of these principles.
 - f. It has been suggested that such a criterion could encourage national courts and tribunals further to apply (explicitly) the principles underlying the Court's case-law in a more in-depth way. It would also provide an incentive for the creation of general domestic remedies, where they do not already exist.
 - g. The examination of a case by the Court would concentrate on whether there has been an in-depth examination at the national level by a tribunal and on whether the outcome of the domestic proceedings requires further examination by the Strasbourg Court. Arguably, that way filtering could be done more speedily.

50. See, for example, the Court's Practical Guide on Admissibility Criteria, section IIIA(2) and cases such as *Kemmache v. France*, *Garcia Ruiz v. Spain* and *Siojeva a.o. v. Latvia*; see also section IIIA(3) of the Guide on "Clear or apparent absence of a violation", including (a) "No appearance of arbitrariness or unfairness".

C. Arguments against

37. The following arguments have been advanced against the proposal:
- a. The proposal limits the right of individual petition, as enshrined in Article 34 of the Convention, and the judicial protection offered by the Court to applicants.
 - b. The proposal limits the substantive jurisdiction of the Court and its competence to address gaps in the effective protection of all Convention rights. It appears to be based on an inaccurate assumption that the Court largely oversteps its role.
 - c. The proposal would further encourage substantive examination of the complaint at the admissibility, rather than the merits stage. Issues pertaining to the interpretation and application of Convention rights should be dealt with at the merits stage, not at the admissibility stage.
 - d. Since this substantive examination would have to be conducted by the Court whenever it applied this new admissibility criterion, it would not decrease the Court's workload.
 - e. The new admissibility criterion puts more emphasis on the judicial protection offered on the domestic level. By limiting the scope of review to correction of manifest error, the criterion could jeopardise maintenance of uniform Convention interpretation, which could in turn threaten legal certainty. The level of implementation of Convention standards in domestic law in the various High Contracting Parties does not currently allow for the introduction of such a measure.
 - f. The relationship between the Court and the highest domestic courts could be harmed if the Court were to judge that the domestic court had made a "manifest error".
 - g. The proposal would involve generalisations concerning the overall quality of the domestic legal system, instead of a focus on the question of whether the domestic legal system has treated an individual case in a just manner.

D. Other issues raised

38. The question remains whether the aim of the proposal can only be met through introduction of a new admissibility criterion. It might be worthwhile also to explore additional ways of conveying the essence of the proposal, including e.g. further elaboration of the margin of appreciation doctrine or the application of the *de minimis* rule which might lead to similar results, without the above-mentioned disadvantages.

39. The notion of a "manifest error" and the delimitation between the two exceptions mentioned will undoubtedly lead to many questions of legal interpretation being brought before the Court, due to the inherent ambiguity of its meaning. Introduction of the new admissibility criterion will likewise lead to a new body of case-law on the relationship between this new criterion and the existing rule under the Convention that all (effective) domestic remedies have to be exhausted. The question was also raised how repetitive cases are to be dealt with under the proposed system.

40. Any introduction of the criterion would have to take account of the variety of national legal systems, in order to be applicable to all member States.

41. It has also been suggested that the proposal, combined with the so called *de minimis* rule, might in fact lead to a “pick-and-choose” model (see below).
42. The CDDH noted that the information concerning recent tendencies in the number of pending applications and the Court’s forecasts for future treatment of clearly inadmissible cases may have implications for an evaluation of the necessity of this proposal: see further paragraph 34 of the Final Report.

APPENDIX IV

CDDH Report on measures to address the number of applications pending before the Court

1. INCREASING THE COURT'S CAPACITY TO PROCESS APPLICATIONS

A. Introduction

I. Interlaken Declaration and the CDDH's ad hoc terms of reference

1. Paragraph 6.c.ii. of the Interlaken Declaration “recommends, with regard to filtering mechanisms, [...] to the Committee of Ministers to examine the setting up of a filtering mechanism within the Court going beyond the single judge procedure and the procedure provided for in i.” (emphasis added).⁵¹ Furthermore, paragraph 7.c.i. of the Interlaken Declaration “calls upon the Committee of Ministers to consider whether repetitive cases could be handled by judges responsible for filtering...”

2. The Steering Committee for Human Rights subsequently received terms of reference requiring it to “elaborate specific proposals for measures requiring amendment of the Convention, including proposals, with different options, for a filtering mechanism within the European Court of Human Rights [...]. This part of the terms of reference shall be executed through the presentation of a final report to the Committee of Ministers by 15 April 2012; an interim activity report shall be submitted by 15 April 2011”⁵² (emphasis added). These terms of reference were subsequently reiterated, following the İzmir Conference, and the deadline for submission of results brought forward to 31 March 2012.⁵³

3. At the 73rd CDDH meeting (6-9 December 2011), the Registry provided the CDDH with information on recent tendencies in the number of pending applications and the Court's forecasts for future treatment of clearly inadmissible cases. For the four successive months between 31 August 2011 and 31 December 2011, the total number of cases pending before a judicial formation fell, from 160,200 to 151,600. The predominant cause was a decrease in the number of cases pending before a Single Judge, which fell from 101,800 to 92,050.⁵⁴ The Registry considers this tendency to be sustainable in the long-term and now expects, subject to the provision of additional resources, to be able to resolve the backlog of clearly inadmissible cases by the end of 2015. This information, which will be examined in more detail below, clearly has profound implications for the CDDH's response to and interpretation of its terms of reference.

51. Sub-paragraph i. states that “[The Conference ... recommends, with regard to filtering mechanisms,] to the Court to put in place, in the short term, a mechanism within the existing bench likely to ensure effective filtering”.

52. See doc. CDDH(2010)001.

53. See doc. CM/Del/Dec(2011)1114/1.5.

54. The number of cases pending before a Chamber also fell but that of those before a Committee rose.

II. Where the emphasis of reforms should be placed

4. At the end of 2005 – the first year for which relevant figures are publicly available – **89,900** applications were pending, 45,500 applications having been lodged during that year and 28,565 decisions taken, of which 27,613 were to declare the application inadmissible or strike it out. Five years later, at the end of 2011 – the latest full year for which figures are available – **151,600**⁵⁵ applications were pending before a judicial formation, 64,500 applications having been allocated to a judicial formation during that year and 52,188 decisions taken, 50,677 of which were to declare the application inadmissible or to strike it out.⁵⁶

5. On the assumption that, at present, the 20 judges appointed by the Court President as Single Judges devote approximately 25 % of their time to work on Single Judge cases, it has been suggested that less than 11% of the Court's overall judicial working time is devoted to such cases.⁵⁷

6. As noted above, however, the Court's new structures and working methods for filtering, introduced following entry into force of Protocol No. 14 on 1 June 2010, have recently begun to have a far greater than expected – or hoped for – effect. On 31 August 2011, the number of cases pending before a Single Judge reached a record high of 101,800; 21,400 Single Judge decisions had been taken since the beginning of the year. Over the following four months, however, a further 25,530 Single Judge decisions were taken, and the number of cases pending fell to 92,050.⁵⁸ The Court considers that the growth in the number of decisions rendered, being largely within its own control, can be not only sustained but further increased.

7. The Court ascribes the growth in the number of decisions to restructuring the Registry, in particular by efficient cooperation between Single Judges and non-judicial rapporteurs; creating a filtering section dedicated to applications concerning the five countries against which the largest number of inadmissible

55. For the sake of clarity it should be noted that the number of pending applications cannot be assimilated to the “backlog”. Even in a desired state of equilibrium between incoming and disposed-of applications [see the Interlaken Declaration, point i)] there will inevitably be a non-negligible number of pending applications corresponding to a product of a number of incoming applications per year and the average length of proceedings. For illustrative purposes only it can be mentioned that assuming that the number of incoming applications remains more or less at the same level, i.e. 50,000 Single judge cases and 15,000 Committee and Chamber cases per year, and departing from a thesis that a desired reasonable length of proceedings would be one year for Single judge cases and two and a half years for Committee and Chamber cases, in the state of equilibrium there will nevertheless be 50,000 Single judge cases pending and 37,500 Committee and Chamber cases pending. Only the remainder of applications above these figures can be tagged as backlog.

56. See the Court's Analysis of statistics 2010, available on its website. It should be noted that the basis on which the Court publishes various statistics has changed over time. In particular, the previously used figures for “applications pending before a judicial formation” and “applications allocated to a judicial formation” would be slightly lower than those currently given for “applications pending” and “applications lodged,” respectively, for any given year; the figures for 2005 would thus have been lower had the current basis then been in use. The above data are therefore given for broad illustrative purposes only.

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

58. 2010 had already seen a record 25% increase in the number of filtering decisions; in 2011, however, there was a 37% increase in such decisions as compared with 2010.

applications are brought;⁵⁹ and improvements in working methods, pioneered in the filtering section. (It should also be noted that the filtering section has benefited from reinforcement by around forty secondments, including twenty from the Russian Federation.) The aim is to process *prima facie* clearly inadmissible cases quickly, simply and immediately, with as many stages of case-processing – including, for Single Judge cases, drafting of the decision – undertaken immediately upon initial consideration as possible.⁶⁰ The combined effect of these developments has far exceeded most expectations of the potential benefits of the Single Judge system: whereas the Court had previously estimated that the single judge system, as first implemented, had the potential to deliver 32,000 decisions per year, it in fact delivered 46,930 in 2011 and expects to deliver even more in 2012 and beyond.

8. On this basis, the Registry has projected the possibility of not only dealing with the majority of newly-arriving clearly inadmissible applications within a few months of receipt but, by extending the new working methods to the Registry as a whole, having the capacity also to resolve progressively, over the course of 2012-2015, all applications now pending before a Single Judge. This projection is posited upon an increase in the resources available to the Court's Registry. According to the Registry, the increase in the number of single judge decisions has been achieved without diverting judicial time from other tasks.

9. The CDDH's discussion of filtering had over the course of time also revealed a growing concern that a more important issue may in fact be the Court's increasing backlog of Committee and Chamber cases. Although it is undoubtedly important to ensure that clearly inadmissible cases receive a quick response, it was pointed out that a reform of the filtering mechanism cannot by itself free sufficient resources to tackle that part of the Court's case-load which is most important from the point of view both of respect for human rights and the time needed to process it. Indeed, while clearly inadmissible applications subject to filtering are the most numerous, but can be disposed of quickly, the heaviest part of the case-load consists of cases which cannot be declared inadmissible without further examination, require a more in-depth analysis and may lead to a finding of a violation of the Convention. It has furthermore been argued that the Court's prioritisation policy has, in effect, left low priority repetitive cases (34,000) and even many non-repetitive medium-priority cases (around 20,000) with little prospect of adjudication within a reasonable time. This concern has been heightened by the latest information from the Registry on filtering. The CDDH also recalls the Interlaken Declaration, in which the States Parties were "convinced ... that additional measures are indispensable and urgently required in order to ... enable the Court to reduce the backlog of cases and to adjudicate new cases within a reasonable time, particularly those concerning serious violations of human rights", and the İzmir Declaration, which considered that "proposals ... should also enable the Court to adjudicate repetitive cases within a reasonable time".

10. The recent decrease in the number of applications pending before a Single Judge and the considerable increase in the number of Single Judge decisions delivered are of course extremely welcome developments. Although it remains

59. Namely the Russian Federation, Turkey, Romania, Ukraine and Poland.

60. This approach has benefits also for the processing of Committee and Chamber cases, which upon preliminary identification as such are immediately communicated to the Respondent State.

to be seen whether the Registry's expectations will be realised, there seems a fair prospect that the Court will within the foreseeable future be able to manage the clearly inadmissible applications, even if the number arriving will probably remain very high. It is also unlikely that any new filtering mechanism, given that its introduction would require entry into force of an amending protocol to the Convention (see further below), could come into effect or, at least, have yet had any great impact by the envisaged date of 2015 for resolution of the backlog. The CDDH has therefore decided to reflect these circumstances by shifting the emphasis of the present report from possible measures to increase the Court's filtering capacity, to possible measures to increase the Court's capacity to process applications generally.

11. In accordance with the CDDH's terms of reference, the present report nevertheless retains a detailed analysis of and proposals for an alternative, new filtering mechanism, presented on the understanding that recent developments appeared to many to suggest that such proposals may not need to be given immediate effect. The CDDH instead considers that these proposals should be implemented as part of the current round of Court reform but on a contingency basis, in case the Registry's expectations are ultimately not fulfilled and it transpires that other approaches are required. In this respect, the CDDH foresees two situations in which it might be considered necessary to activate a new filtering mechanism: if the expected results are not achieved; or if, regardless of the effects of the Single Judge system and associated internal Court reforms, it is considered opportune to introduce a new system, for instance if the time taken by the Court to deal with other cases became too long. Some delegations consider that the second situation already prevails.

B. Increasing the Court's general decision-making capacity

12. The Court's overall backlog consists of applications pending before either Single Judges (decisions in clearly inadmissible applications), three-judge Committees (mainly judgments in repetitive cases) and Chambers (mainly judgments in non-repetitive cases). If efforts are to be made to increase the Court's capacity to deliver judgments, the question arises as to whether those efforts should be directed at Committees or Chambers, or both. There are three, non-mutually exclusive ways in which this capacity may be increased: increasing the capacity of the Registry; increasing the number of judges; and deploying the existing judges and Registry staff differently.

13. In this respect, the annual statistical data on the number of applications allocated to a Committee and to a Chamber and on the number of applications disposed of by a Committee and by a Chamber would be necessary in order to determine which part of the Court's decision-making capacity should be strengthened and, at least as a rough estimation, what level of growth in productivity would be necessary for achieving the equilibrium between the number of incoming and disposed-of applications.⁶¹

14. A further question is whether increasing the number of judges or just that of Registry staff alone would be an effective way of increasing the Court's general decision-making capacity. As noted above, the Court's expectations for dealing with the backlog of clearly inadmissible cases depend upon an increase in the

61. According to information recently provided by the Registry, in 2011, 9,250 applications were allocated to a Chamber and 7,950 to a Committee; during the same period, 3,000 were decided by a Chamber and 2,150 by a Committee (see doc. DH-GDR(2012)005 Addendum).

size of the Registry, just as the recent falls in the numbers of cases pending before Single Judges are, at least in part, due to reinforcement of the Registry through secondment of national judges. It should also be noted that the Court does not expect that the improved working methods pioneered in the Registry's filtering section could liberate judicial resources for other tasks at the same time as allowing resolution of all pending Single Judge cases by 2015.

15. Even before the Court's announcement, therefore, it had been suggested that a pool of temporary judges could be established, making it possible to strengthen the Court's general decision-making capacity when necessary. Such judges would:

- a. have to satisfy the criteria for office of Article 21 of the Convention;
- b. be nominated by the High Contracting Parties and, possibly, approved or elected to the pool by the Parliamentary Assembly;
- c. be appointed from the pool by the President of the Court for limited periods of time as and when needed to achieve a balance between incoming applications and disposal decisions (subject to the Court's budgetary envelope);
- d. when appointed, discharge most of the functions of regular judges, other than sitting on the Grand Chamber or Plenary Court;
- e. when appointed, be considered as elected in respect of the High Contracting Party that had nominated them.

16. An alternative proposal is to introduce a new category of judge (originally proposed as a new filtering mechanism, see paras. 34-36 below), which would deal exclusively with repetitive cases and – unless a new filtering mechanism is introduced – with single judge cases. This would enable the regular judges to devote more time to chamber cases. As with the proposal above, the number of judges would vary according to the Court's needs and their term of office would be considerably shorter than that of the regular judges. These judges would have to possess the qualifications required for appointment to judicial office and be subject to the same requirements as the regular judges with regard to independence and impartiality. However, since the essential nature of their work would not require that they “possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence,” as is required of regular judges by Article 21(1) of the Convention, they could be at an earlier stage in their career and their remuneration could be lower. The judges could be elected by the Parliamentary Assembly or by the Court itself from a list of candidates submitted by the Member States. Some States have argued that proportional representation of Member States would not be necessary for this category of judge, although others disagree. Besides, it was suggested that the Court should be involved in the process of selecting appropriate candidates. It would be in the Court's discretion how the three-judge committees will be composed, e.g. two regular judges sitting with one new judge or one regular judge sitting with two new judges.

17. It has been argued that both of these proposals may have the following advantages:

- a. they might make it possible to achieve a general balance between input and output of cases, enabling the Court to reduce the backlog and adjudicate new cases within a reasonable time;
- b. they would be flexible, as any additional judges would only be engaged if, when and to the extent necessary;

- c. they would have budgetary consequences only as and when activated and would only be activated if and to the extent that the Committee of Ministers provided necessary resources;
- d. additional judges, being employed for a fixed period of time, would constitute a valuable connection between the Convention and national legal systems.

18. In favour of the first proposal, it is argued that regular judges would probably still have far too little time to deal with lower-category Chamber cases, given the size of the backlog and the rate of arrival of new, *prima facie* admissible Chamber cases and even with responsibility for filtering being given to the Registry and/or to additional judges with competence to deal with filtering and repetitive cases. Furthermore, it has been suggested that it might prove difficult to recruit judges to deal solely with repetitive and possibly clearly inadmissible cases.

19. In favour of the second proposal, others have suggested that an increase in the Court's general decision-making capacity can be achieved through a new filtering mechanism (see further below) and/or the second proposal, and that it is thus not necessary to have temporary judges with general decision-making capacity. Furthermore, additional judges with a status comparable to that of the regular judges would be more costly.

20. Against both proposals, it has been argued that they would not correspond to the existing principle in the Convention of one judge per State party. Furthermore, were the proposals implemented, it could not be guaranteed that all applications heard by Chambers would involve adjudication by the judge elected with respect to the Respondent State.

21. The CDDH has not been able also to consider whether the Court's judicial and Registry resources could be deployed differently so as to allow an increase in its general decision-making capacity. This question may reward further examination in future, including, of course, by the Court itself.

22. One might also ask whether the increase in efficiency of working methods for filtering could not, at least in part, allow resources currently employed for filtering to be liberated for work on Committee and Chamber cases, rather than continuing to devote all of those resources to clearly inadmissible cases.

23. The CDDH reiterates that the issue of the Court's general decision-making capacity has only recently been given a primary emphasis in its work, due to the recency of the information concerning the Court's output of Single Judge decisions and the possibility of eliminating the backlog of clearly inadmissible applications. In this new context, certain important aspects of the proposals have not been resolved and would need further clarification. Equally, the proposals made do not necessarily exclude the possibility of alternative approaches, which may also merit examination.

C. A new filtering mechanism

24. As noted above, the CDDH has decided to maintain its proposals for a new filtering mechanism, on the understanding that whilst they no longer appear necessary in the immediate term, it may in future become necessary to reactivate them should the impact of the Court's new working methods fail to meet the Court's expectations.

I. What is filtering and why is it important?

25. Filtering is the task of finally disposing of applications that are clearly inadmissible, thereby eliminating them from the Court's docket and leaving only those applications that raise substantive issues. Filtering has traditionally been distinct from the task of triage, which is performed by the Registry and consists of an initial screening of applications and their provisional assignment to the different judicial formations (chamber, committee, single judge).

26. Filtering is an unavoidable part of the Court's work. It must be done in any system. Filtering is important because all applicants, also those whose applications are clearly inadmissible, have a legitimate expectation to have their case decided by the Court within a reasonable time. To receive a decision from the Court is an important element of the right of individual petition. For a large number of applicants, however, this expectation is not met, and the right of individual application is thus being undermined.

27. The aim of a new filtering mechanism, as proposed in this Section, would be to increase the Court's case-processing capacity, so as to allow it to deal more efficiently with its case-load; bearing in mind that inadmissible applications represent around 90% of applications decided by the Court and around 65% of pending applications.⁶²

28. For further information on how filtering is done in the present framework, see the earlier DH-GDR report at Appendix IV to the CDDH Interim Activity Report on measures requiring amendment of the Convention.⁶³

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

29. Various models have been proposed to deal with the problem of filtering. It can be noted from the outset that all of the options proposed are intended to present the following basic advantages:

- a. They would enhance the Court's capability to deal efficiently with clearly inadmissible applications and thus enable equilibrium between the rates of receipt and disposal of such applications to be achieved for all member States and the backlog to be reduced, whilst perhaps also allowing the regular judges to devote more attention to admissible cases.
- b. The existing, "regular" judges would be able to concentrate on more complex and substantive cases, notably *prima facie* admissible applications and development of the case-law.
- c. More time allocated by the judge to working on a case would significantly reduce the risk of divergent case-law.
- d. It has been suggested that freeing regular judges from work on inadmissible applications would make the post of judge more attractive, with a beneficial effect on the quality of candidates.

62. The former figure derives from the Court's statistics for recent years; the latter is the proportion of pending cases that have been provisionally identified by the Registry as inadmissible.

63. See doc. CDDH(2011)R72 Addendum I. It should be noted that the estimate of the potential output of decisions contained in this document is now superseded.

- e. Each model would allow some degree of flexibility in responding to the Court's needs at a given moment in time.
- 30. The following proposals on who should be responsible for filtering have been made.

a. The Registry

31. It has been suggested that experienced Registry lawyers should be authorised to take final decisions with regard to clearly inadmissible cases. More specifically, the existing non-judicial rapporteurs would be given the competence now held by single judges, that is to "*declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination. The decision shall be final. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further consideration*" (cf. Article 27). According to the explanatory report to Protocol No. 14, "*(t)his means that the judge will take such decisions only in clear-cut cases, where the inadmissibility of the application is manifest from the outset.*"⁶⁴

32. The President of the Court would appoint such "filtering officials" in the same way that non-judicial rapporteurs are appointed today. The role would usually be short-term and not necessarily full-time. They would function under the authority of the President of the Court and form part of the Registry, as set out in Article 24(2) of the Convention with regard to (non-judicial) rapporteurs. It would seem appropriate that these "filtering officials", when sitting as such, should not examine any application against his or her home state,⁶⁵ as is the case currently for single judges (see Article 26(3) of the Convention).

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

- a. Experienced Registry lawyers are impartial and independent of the parties and have the qualifications and experience necessary to take final decisions in clearly inadmissible cases, including a thorough knowledge of the Court's case-law, since they already oversee the preparation of inadmissibility decisions for submission to a single judge.
- b. Registry lawyers would be expected to be entirely operational straight away, which would not be the case for other options.
- c. Removing the extra decision-making level (the single judge) would reduce time and resources spent on clearly inadmissible cases. Single judges disagree with the non-judicial rapporteurs in less than 1% of the cases.⁶⁶
- d. There would not be any additional cost involved in the new filtering mechanism, for constant output (unless it is considered that "filtering officials" should be paid more than non-judicial rapporteurs). However, regardless of the filtering mechanism chosen, in order to increase the Court's overall output, the Court's Registry (i.e. the Court's preparatory capacity) will also have to be further strengthened (see also section D.I. below).
- e. A minimal part of the Court's resources would be spent on clearly inadmissible cases.
- f. In short, this approach would be the most flexible and cost-effective one.

64. Cf. para. 67 of the Explanatory Report.

65. Which state is to be considered the home state, would have to be defined.

66. This figure has been confirmed by the Registry.

34. It has been suggested that it would be a disadvantage that decisions on inadmissibility would no longer be taken by judges, which would represent a step backwards from the systematic judicialisation of decision-making by the Convention's control mechanism, as instituted by Protocol No. 11. With this option, the final decision on whether or not a particular case would receive judicial treatment would rest with the Registry.

b. A new type of judge

35. It has been suggested that filtering should be entrusted to a new category of judge (whose main function, however, would be to deal with repetitive cases, see paragraph 16 above).

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

- a. The Court's decisions should be taken by judges; non-judicial staff should only do preparatory work.
- b. As the inadmissibility decision taken by any filtering mechanism would be final and the last decision in the applicant's case, it is important for the applicant to have a judicial decision, which has higher external impact and would be far more acceptable than a decision by an administrative office responsible to a hierarchical superior.
- c. The introduction of a judicial filtering body would allow every applicant exercising his/ her right under Article 34 of the Convention to receive a judicial decision. The Convention system would thus demonstrate an equal approach to every application lodged.
- d. The Applicants, whose rights the system is supposed to serve, have a right to a certain degree of equal treatment with the High Contracting Parties. The final decision against a High Contracting Party in a case is judicial; Applicants should therefore be entitled to judicial decisions of inadmissibility.
- e. Nearly two-thirds of inadmissible applications – currently left to committees and single judges – are manifestly ill-founded; insofar as this may touch upon difficult, substantive issues of Convention rights, such applications would more appropriately be determined by a judicial mechanism.
- f. Maximum efficiency would be obtained by having persons with judicial experience undertaking filtering work, whereas Registry staff may have no, or no recent, experience of working in a national judicial system.
- g. Additional filtering judges, being employed as such for a fixed period of time, would subsequently constitute a valuable connection between the Convention system and national legal systems.
- h. The current system includes an element of dual control involving the Single Judge and the Non-judicial Rapporteur, which the proposed new system would preserve.

37. The following disadvantages have been suggested:

- a. A new category of judge would not be immediately operational.
- b. There may be a risk of diverging practice between the filtering judges and the regular judges.
- c. Concerns have been expressed about the budgetary consequences of this approach.
- d. It might prove difficult to recruit judges to deal solely with *prima facie* clearly inadmissible (and possibly repetitive) cases.

- e. The case files would not necessarily be in a language understood by the judge.

c. A combined option

38. This proposal would combine the options involving the Registry and a new category of judge. Specific members of the Registry would be given the competence to deal with applications that have been provisionally identified as clearly inadmissible for purely procedural reasons under Article 35(1) and (2) of the Convention. Only specifically designated members of the Registry would be allowed to deal with such cases and should be able to refer them to a judicial body at any time, should they consider it necessary. In addition, a new category of filtering judge would be created to deal with cases provisionally identified as inadmissible under Article 35(3) of the Convention, along with repetitive cases.

39. Arguments in favour of such a system include that it would preserve the principle of judicial decision-making for cases where some kind of opinion is needed on the substance of the application, but not for those which clearly do not fulfil even the most basic formal requirements for admissibility.

40. Possible disadvantages include those mentioned in paras. 33 and 36 above, with regard to the options involving either the Registry or a new category of judge outside the Registry. Some experts considered that clearly inadmissible cases should be dealt with in the same way regardless of the relevant admissibility criterion, the decisive factor being that these are “*clear-cut cases, where the inadmissibility of the application is manifest from the outset*.”⁶⁷

III. Other relevant issues

41. The competence of any new filtering mechanism would include at least that of single judges to declare applications inadmissible or strike them out of the Court’s list of cases, where such decision can be taken without further examination.

42. It is common ground that Registry staff should not decide on repetitive applications and issue judgements on the merits and that decisions on repetitive cases should continue to be taken by three-judge committees. Certain delegations felt that only judges with status equivalent to that of regular judges of the Court should be able to issue judgments, including in repetitive cases, whose underlying issues should not be wrongly allowed to appear relatively unimportant. There were differences of opinion on whether any reform was necessary: some feeling that the existing three-judge Committee procedure may suffice; others noting the substantial and growing backlog of repetitive cases.

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

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

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

67. Cf. para. 67 of the Explanatory Report for Protocol No. 14.

D. Final remarks

I. Budget

46. Any measure to increase the Court's capacity, whether for filtering or general case-processing, that involves either additional Registry staff, additional judges or both will obviously have budgetary consequences. The fact that the Court has recently been able to increase the number of decisions reached by Single Judges may be due to a (relatively) cost-free combination of internal reforms and reinforcement of the Registry by seconded staff. This does not mean, however, that such means will remain available in future, nor that they would necessarily be appropriate to increase the Court's general case-processing capacity. It should also be recalled that the Registry has already indicated that some additional resources would be required for the Court to be able to meet the target of 2015 for dealing with all cases currently pending before Single Judges.

47. It has been pointed out that if experienced Registry lawyers are given the competence to reject clearly inadmissible cases, as described in option a. under section C.II. above, that would not necessarily have any budgetary consequences. Unless the Registry were simultaneously reinforced (or resources shifted from other work, which would clearly be undesirable), however, it is unlikely that this approach would generate any significant increase in the number of Single Judge decisions.

48. As noted above, concerns have been expressed at the budgetary consequences of creating a new category of judge. It has been suggested, however, that if option b. or c. in section C.II. were chosen, the number of such filtering judges would be low compared to that of regular judges and as their remuneration would correspond to that of experienced Registry staff rather than to that of regular judges, the budgetary consequences of this approach would be limited.

49. In either case, there would be interest in exploring, on the basis of an analysis of the overall current resources, working methods and output of the Court, whether an increase in the staff of the Registry would contribute to alleviating the problem, since the Registry is already responsible for triage of applications and the preparation of draft decisions for single judges.

50. A proper assessment of the cost-effectiveness of each option, whether for increasing the Court's general case-processing capacity or for a new filtering mechanism, will be necessary at the appropriate time. This cannot, however, be undertaken at present, until the various options have been more clearly defined, but should form a precondition to any final decisions on which option or options to choose.

II. Legal basis

51. All the above proposals, whether for increasing the Court's general case-processing capacity or for a new filtering mechanism, would require amendment of the Convention.

2. INTRODUCTION OF A “SUNSET CLAUSE”

A. Introduction

52. Large numbers of applications spend many years pending before the Court without a substantive response. Following the introduction of the Court’s priority policy this is particularly the case in respect of applications which have the lowest priority.⁶⁸ A new procedural rule could be introduced to clarify the fate of such applications more quickly. In particular, an application would be automatically struck off the Court’s list of cases a set period of time after it was first made, unless during that period the Court had notified the case to the government and invited it to submit observations. The period in question might, for example, be 12 months, 18 months or 2 years; although it was suggested that this may be too short, given that the average length of time taken for *prima facie* admissible cases to be communicated is currently 37 months. It has additionally been suggested, in the interests of a certain flexibility, that this deadline could be periodically reviewed and adapted to the prevailing situation.

B. Arguments in favour

53. The following arguments have been advanced in favour of the proposal:
- a. Such a procedural rule would work in harmony with the prioritisation policy introduced by the Court. It would address the problem that, against the background of the backlog of cases, a prioritisation policy of the kind currently in place will inevitably mean that significant numbers of applications will remain pending indefinitely before the Court with no realistic prospect of being resolved either within a reasonable time or at all. This would provide a fairer and more open way of dealing with such cases.
 - b. The applications affected would include some of those that fall into the lowest priority categories of the Court’s priority policy, having been positively allocated to such categories as part of an initial consideration within the Court. The proposal would free the Court’s time to deal with more serious complaints.
 - c. Applicants would be informed of the outcome much more quickly than is the case at present. This would avoid an applicant whose case has no prospect of success being given the false hope that protracted inactivity at the Court tends to create. The proposal would thereby guarantee that all applications – even those in the lowest categories in the priority policy – are dealt with within a reasonable time.
 - d. Given the finite resources available to the Court, a reinforcement of the prioritisation policy in this way would optimise the use of the Court’s resources.

68. The Court’s categories of priority are as follows: I, urgent applications; II, applications raising questions capable of having an impact on the effectiveness of the Convention system or an important question of general interest; III, applications raising “core rights” (Articles 2, 3, 4 or 5(1) of the Convention); IV, potentially well-founded applications raising other rights; V, repetitive cases; VI, applications giving rise to problems of admissibility; and VII, manifestly inadmissible applications. See further at www.echr.coe.int/NR/rdonlyres/AA56DA0F-DEE5-4FB6-BDD3-A5B34123FFAE/0/2010__Priority_policy__Public_communication.pdf.

- e. Such a system could serve as a “laboratory” for the future introduction of a “pick-and-choose” model, should that be considered desirable.

C. Arguments against

- 54. The following arguments have been advanced against the proposal:
 - a. The proposal entails that certain applications will automatically be struck off the Court’s list of cases without any judicial examination of the complaint, which is arguably at odds with the rule of law and the right of individual petition as enshrined in Article 34 of the Convention. With the introduction of a sunset clause, the Registry will in fact determine which cases will be examined by the Court. Triage will sometimes be performed by more junior members of the Registry. There is no guarantee that the sunset clause will only apply to cases in the lowest categories of the priority policy; even well-founded repetitive cases may be affected. Introduction of a sunset clause means in fact that certain applicants are not entitled to a decision of a judge for reasons for which they are not responsible (i.e. a general lack in the Court’s capacity to deal with all complaints lodged).
 - b. Applicants would not all receive a reasoned decision of the Court. Informing, even succinctly, applicants of the reasons why their case is declared manifestly ill-founded can help deter other applications, and puts pressure on legal representatives to explain to their clients why they lodged a complaint with the Court when they ought to have known that the case would have very little chance of success.
 - c. The proposal would not help to alleviate the Registry’s workload, since it would still be responsible for triage, which under current working methods incorporates preparation of draft Single Judge decisions. Indeed, it has been suggested that should the proposal be implemented, the Court may consider it necessary to give responsibility for triage to the judges themselves, which would divert their attention from matters that in other circumstances would be considered more important.
 - d. Under this proposal, the final decision on the priority of a case would need to be taken by a judge. That being so, it is hard to see how preparation by the Registry of such decisions would require less work than preparation of single judge decisions under the current system.
 - e. Application of a sunset clause could harm the authority of the Court, especially if the public suspects that the Court uses the mechanism to avoid having to deal with certain politically or legally sensitive cases.
 - f. Introduction of a sunset clause could have adverse effects, in that it could induce the Court to devote more of its capacity to adjudicating less important cases, in order to ensure that the sunset clause is used as infrequently as possible. The proposal could thus have undesirable effects, leading the Court to communicate a greater number of cases, less well prepared.
 - g. The proposal does not seem to take into account that the introduction of single judges has led to substantial changes in the Court’s handling of applications falling in the lowest priority categories. With the introduction of

Single Judges, applications of this kind will not remain pending indefinitely before the Court with no realistic prospect of being resolved. They will be disposed of by the Court within a couple of months.

- h. Were the period of time before striking out under the sunset clause to be variable, this would be contrary to the principle of legal certainty. This could be mitigated, however, were such variations to be introduced following a certain notice period.
- i. The sunset clause would not only be a laboratory for a form of “pick-and-choose” system, it would in effect constitute such a system.

D. Other issues raised

55. The proposal is linked to the way in which clearly inadmissible applications are dealt with and thus to the debate on a new filtering mechanism. In fact, the current proposal puts a lot of emphasis on the triage of applications by the Registry, although it remains to be determined whether the Registry or the Single Judge would decide whether a particular application will remain inactive until the sunset clause strikes the case automatically from the list of cases. It has been suggested that the sunset clause would be primarily relevant for cases that the Registry qualified as low priority. There is therefore an intrinsic link between this proposal and the proposal put forward in the paper on a new filtering mechanism to empower certain members of the Registry to dispose of certain clearly inadmissible complaints, which could also inform applicants more quickly of the outcome of their case than is the case at present.

56. Furthermore, before such a sunset clause were to be applied, it should first be clearly defined who selects the cases that will be automatically struck out, and upon what criteria.

57. The impact of the proposal seems to depend largely on the length of the period chosen for a sunset clause. Should the period be sufficiently long (for example three years), the chances that an admissible case will be automatically struck off because of the sunset clause may be negligible. On the other hand, a longer period would mean that the arguments advanced in support of the proposal would become less convincing.

58. It remains unclear whether application of a sunset clause will result in a “decision” for the purposes of the (non-)applicability of relevant UN human rights treaties. The proposal could therefore increase the workload of the Human Rights Committee and other UN treaty bodies.

59. The CDDH noted that the information concerning recent tendencies in the number of pending applications and the Court’s forecasts for future treatment of clearly inadmissible cases may have implications for an evaluation of the necessity of this proposal: see further paragraph 34 of the Final Report.

3. CONFERRING ON THE COURT A DISCRETION TO DECIDE WHICH CASES TO CONSIDER

A. Introduction

60. The proposal entails conferring on the Court a discretion to decide which cases to consider, mirroring similar provisions in the highest national courts in certain Contracting Parties. Under such an approach, an application would not be considered unless the Court made a positive decision to deal with the case.

B. Arguments in favour

61. The following arguments have been advanced in favour of the proposal:
 - a. The introduction of a “pick and choose” model would make the Court’s judicial decision-making capacity more manageable. It would allow all applications to be processed to a conclusion in a reasonable, foreseeable time.
 - b. Such an approach would allow the Court to focus its work only on the highest priority cases. It would contribute to ensuring consistent case-law of the highest quality.
 - c. To a certain extent, the proposal formalises the existing practice of the Court’s priority policy. It is thus not as far reaching as it sounds. A “pick and choose” model, therefore, does not necessarily exclude the right of individual petition.
 - d. It is uncertain if other proposals will suffice to reach an equilibrium between applications received and those determined, and unlikely that they will suffice without substantial increases in the Court’s budget.

C. Arguments against

62. The following arguments have been advanced against the proposal:
 - a. The proposal would entail a radical change of the existing Convention mechanism, including a significant restriction of the right of individual petition.
 - b. The proposal primarily focuses on offering a solution for new applications, whereas it seems that other practices might suffice to reach an equilibrium between applications received and those determined. Instead, the proposal does not offer a solution for the existing backlog of cases that still need to be examined.
 - c. The proposal presupposes a high level of implementation at the national level, which is not currently achieved in all instances.
 - d. The proposal will not help to alleviate the Registry’s workload, since it will still be responsible for making a first analysis of the application. Since the judges will have the right to pick and choose their cases, they will still have to take note of all the information provided by the Registry.

D. Other issues raised

63. If the Court were given larger discretion to choose which cases to examine, the view was expressed that the criteria on which such decisions were based should be clearly stipulated (as it is regulated domestically for some highest national courts). It is important to guarantee that the selection of applications is done objectively and independently by the Court, in order to avoid any kind of politicising of the decisions.
64. The introduction of a pick and choose model could be accompanied by the elaboration of a mechanism, which would allow the Court to return cases to the domestic legal order for further examination in conformity with Convention standards if those cases were not chosen for examination by the Strasbourg Court.
65. Although possibly for implementation in the long-term, this proposal could be examined alongside others that imply significant amendments.

66. The CDDH noted that the information concerning recent tendencies in the number of pending applications and the Court's forecasts for future treatment of clearly inadmissible cases may have implications for an evaluation of the necessity of this proposal: see further paragraph 34 of the Final Report.

APPENDIX V

CDDH Report on measures to enhance relations between the Court and National Courts

Extending the Court's jurisdiction to give advisory opinions

A. INTRODUCTION

1. At the 4th meeting of the DH-S-GDR (28-30 January 2009), the Norwegian and Dutch experts submitted a proposal to extend the Court's jurisdiction to give advisory opinions.⁶⁹ This proposal was taken up in the CDDH's Opinion on the issues to be covered at the Interlaken Conference⁷⁰ but not subsequently mentioned in the Interlaken Declaration. It was, however, included in the İzmir Declaration, as a result of which the Deputies have invited the CDDH "to advise, setting out ... the main practical arguments for and against, on a system allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention, already being considered."⁷¹ It has been suggested that this proposal is also connected with the long-term strategic approach formulated in the İzmir Declaration and referred to in the Deputies' decisions on follow-up thereto.
2. The Norwegian/ Dutch proposal featured the following characteristics:
 - a. A request for an advisory opinion could only be made in cases revealing a potential systemic or structural problem.
 - b. A request could only be made by a national court against whose decision there is no judicial remedy under national law.
 - c. It should always be optional for the national court to make a request.
 - d. The Court should enjoy full discretion to refuse to deal with a request, without giving reasons.
 - e. All States Parties to the Convention should have the opportunity to submit written submissions to the Court on the relevant legal issues.
 - f. Requests should be given priority by the Court.
 - g. An advisory opinion should not be binding for the State Party whose national court has requested it.
 - h. The fact of the Court having given an advisory opinion on a matter should not in any way restrict the right of an individual to bring the same question before the Court under Article 34 of the Convention.
 - i. Extension of the Court's jurisdiction in this respect would be based in the Convention.

69. See doc. DH-S-GDR(2009)004.

70. See doc. CDDH(2009)019 Add. I.

71. See doc. CM/Del/Dec(2011)1114/1.5, "other" in this context meaning "other than a system of fees for applicants to the Court" (see doc. DH-GDR(2011)011 REV.).

B. ARGUMENTS IN FAVOUR OF THE PROPOSAL IN GENERAL

3. The following general arguments have been advanced in favour of the proposal to extend the Court's jurisdiction to give advisory opinions:
 - a. It could contribute to decreasing, in the medium- to long-term, the Court's workload, thereby increasing its effectiveness.
 - b. The Court would be provided with the possibility to give clear guidance on numerous potential cases bringing forward the same question, thus constituting an additional procedural tool in cases revealing potential systemic or structural problems and thereby contributing to the efficiency of the Court.
 - c. The procedure would allow for a clarification of the law at an earlier stage, increasing the chances of the issue being settling at national level and avoiding a large number of individual complaints arriving at the Court, thereby reducing the burden on the Court.
 - d. An advisory opinion would provide national courts with a solid base for deciding the case, especially where interpretation of the Convention appeared unclear, and would thus increase the likelihood of the decision being accepted by the parties; it may therefore enhance the authority of national courts and authorities in applying the Convention.
 - e. The potential to resolve a number of pending or potential applications raising the same issue, whether at national or European level, could justify the delay in the individual case
 - f. The continuing primary responsibility of the national court (the case remaining within the national system) to act on the Court's advisory opinion, in accordance with the legal, social and political context of the country concerned, may have the effect of enhancing the authority of the Court and its case-law in the member States whilst fostering dialogue between the Convention mechanism and domestic legal orders, thereby reinforcing the principle of subsidiarity.
 - g. The proposal could be pursued in parallel to and not instead of or in competition with work on, for example, filtering or fees. As with work on a simplified amendment procedure, it would be a case of planning for the long-term.
 - h. Implementation of the proposal should not imply excessive costs or administrative burdens and therefore would not in that sense cause any "harm."

C. ARGUMENTS AGAINST THE PROPOSAL IN GENERAL

4. The following general arguments have been advanced against the proposal to extend the Court's jurisdiction to give advisory opinions:
 - a. The purpose of the proposal is unclear and may not be suitable to the current state of the Convention system, which is in several ways distinct from other judicial systems that allow for the possibility of requesting advisory opinions.
 - b. It could increase, rather than decrease, the Court's case-load by creating a new group of cases that would otherwise not be presented.

- c. The Court is already over-loaded and could have difficulty in absorbing this new competence satisfactorily.
- d. The Court is already able to deal with many cases revealing potential systemic or structural problems and regularly does so.
- e. Implementing the proposal could also lead to additional work for national courts.
- f. It would introduce a delay into national proceedings whilst the national court awaited the Court's advisory opinion. This would be inevitable and would have to be taken into account by the national court when considering whether to make a request.
- g. The authority of the Court could be put in question if the national court did not follow the advisory opinion, if non-binding (see further paragraph 18 below).
- h. Implementation of a new system may create a risk of conflict of competence between national constitutional courts and the European Court of Human Rights, depending on the characteristics of the model chosen.

D. MAIN ASPECTS OF THE PROPOSAL – OPTIONS AND ARGUMENTS FOR AND AGAINST

5. The following are main aspects of a possible system extending the Court's jurisdiction to give advisory opinions, deriving from the Norwegian/ Dutch proposal. Presented first are those aspects on which there is broad agreement (assuming the proposal were adopted), followed by those on which views differ, with various options (which may be alternative or cumulative) for each and arguments that have been advanced in favour of and against them.⁷²

Aspects on which there is broad agreement

6. There was broad agreement that requests for advisory opinions should be limited by reference to the nature of the related case, in order to avoid a proliferation of requests overburdening the Court. Two main options have been suggested: cases revealing a potential systemic or structural problem (the original Norwegian/ Dutch proposal) and those concerning the compatibility with the Convention of legislation, a rule or an established interpretation of legislation by a court. These options may in fact not be mutually exclusive: indeed, the former may be simply a more restrictive version of the latter, or even the same basic idea expressed in different words.

7. On the question of which domestic authority/ies could request an advisory opinion, there was broad agreement that a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law should be able to, for the following reasons. Advisory opinions are of a legal nature and should only be requested by courts. Limiting the procedure to the highest national courts would introduce a form of exhaustion of domestic remedies. This would help avoid a proliferation of requests overburdening the Court. Allowing lower courts to request advisory opinions may interfere with the dia-

72. It should be observed that some experts expressed views on these issues whilst remaining opposed to or having reservations over any extension of the Court's jurisdiction to give advisory opinions, at least at this stage.

logue between national jurisdictions, which should be resolved before a case is brought to Strasbourg. It was also suggested that governments be able to request advisory opinions, since they may wish to be assured of the conformity of a draft law with the Convention (cf. the consultative competence under the American Convention on Human Rights);⁷³ on the other hand, it was argued that this would augment the risk of increasing the burden on the Court and may risk the transfer of legal disputes to Strasbourg for political reasons.

8. It was suggested that at least the government of the State of which a national court or tribunal had requested an advisory opinion should be able to intervene in the proceedings as that government should be able to present its own position on the subject-matter of the request. (See also paragraph 18 below.) The position of the parties to the domestic proceedings may also need consideration.

9. The relevant national authority may only request the Court's advisory opinion once the factual circumstances have been sufficiently examined by the national court (see further paragraph 15 below).

10. It was suggested that the relevant national authority should also provide the Strasbourg Court with an indication of its views on the question on which it has requested an advisory opinion.

11. It should be optional for the relevant national authority to request an advisory opinion. It would only be appropriate for relevant national authorities to request an advisory opinion when they have serious doubts about the compatibility of national law or case-law with the Convention. An individual concerned always has the possibility of bringing the case before the Court (see further paragraph 20 below), which would thus retain the possibility of pronouncing on the legal issue.

12. The Court could give priority to requests for advisory opinions, whether accepted or refused. This could ensure cases were promptly settled at national level and thereby avoid both delays in the national proceedings and large numbers of complaints being presented to the Court. Only if requests for advisory opinions did not relate to systemic or structural problems or essential cases relating to the interpretation or application of the Convention could they not be given priority; prioritisation would then depend upon the nature of the case.

13. The competence to deliver advisory opinions should be limited to the Grand Chamber, as is the case for advisory opinions given to the Committee of Ministers under Article 47 of the Convention. The authority of the advisory opinions would thus be reinforced.

14. Finally, it could be optional for States Parties to submit to an extension of the Court's jurisdiction to give advisory opinions. This would allow other States to see how the system operated and developed.

15. It was also noted that there would be a need to introduce procedural guarantees in line with the principle of legal certainty.

73. Under Article 64 of the American Convention on Human Rights, "the member states of the Organization may consult the [Inter-American Court of Human Rights] regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court".

Aspects on which different options have been proposed

16. There are differences over how far rendering advisory opinions would require the Court to take into account the factual circumstances which have given rise to the request for an advisory opinion. It is understood that, in any event, the Court itself should not undertake a factual assessment in place of a national court.

- a. On the one hand, it is desirable to avoid advisory opinions that are too abstract in nature and which might have unintended consequences and be difficult to apply effectively at national level.
- b. On the other hand, some degree of generality is implied by the concept of advisory opinions, and the authority of the advisory opinion would only be undermined if the Court drafted it in too general terms.

17. Different views were put forward on whether the Court should have discretion to refuse requests for advisory opinions.

- a. Arguments expressed in favour were that the Court should have a full discretion to refuse, making the system as flexible as possible and helping to ensure that the Court did not become over-burdened with the preparation of advisory opinions. The requirement that only cases revealing a potential systemic or structural problem may be subject of a request for an advisory opinion, along with the procedure for dealing with them, however, should ensure that, above all in the medium- to long-term, there should be no increase in the net work-load of the Court.
- b. Arguments against included that where a superior national court had duly considered it appropriate to request an advisory opinion, the Court should not have a discretion to refuse, as this would undermine dialogue between the two jurisdictions. Furthermore, in the delicate situation of divergent case-law between Court sections, a request for an advisory opinion would allow harmonisation of the Court's case-law (this argument also being of potential general relevance). The existence of a pending application relating to the same issue would not be an obstacle to the Court giving an advisory opinion, and could indeed accelerate resolution of the pending case.

18. Views also differed on whether the Court should be required to give reasons for a refusal to accept a request for an advisory opinion.

- a. On the one hand, it was argued that the relevant national authority has a right to know why an advisory opinion is not being given. Some explanation of the refusal would help foster judicial dialogue. Reasons for refusals would guide national courts when considering whether to make a request, in particular the national court whose request has been refused; this could decrease the number of requests likely to be refused. Even the Court of Justice of the European Union gives brief reasons for not formally responding to a request for a preliminary ruling.
- b. On the other hand, requiring the Court to give reasons for refusals would increase its work-load; it should at most be optional for the Court to give reasons: this should be especially the case for a flexible, optional system. The Court is not required to give reasons for refusals to refer to the Grand Chamber and so should not be so for refusals to give advisory opinions.

19. There were also differing views on whether other interested actors, including other States Parties to the Convention, should be able to intervene in advisory opinion proceedings.

- a. In favour, it was argued that Advisory opinions relate to the interpretation of an international treaty and so potentially affect all States Parties, although an underlying systemic problem may be based on specific national circumstances. Interventions by States would enhance knowledge of the Court's case-law in the States Parties generally and would widen the impact of the Court's guidance on a specific legal issue. They would help the Court frame the legal question and provide broader understanding of the situation in the States Parties. They would enhance the authority of the opinion and the case-law in general, by having it preceded by a sufficiently wide legal debate. Non-state entities should also be able request leave to intervene. (As a practical matter, the Court would have to notify national governments of pending advisory opinion cases or, alternatively, publish such cases on its web-site. Also, interventions in this context should be subject to short time-limits so as to avoid delaying proceedings.)
- b. Against the idea, it was noted that allowing other States Parties to intervene could risk creating a certain asymmetry, since requests for advisory opinions would come from national courts, whereas any interventions would not. Allowing for such interventions would delay the procedure, thus further delaying proceedings at national level.

20. A particular point of difference concerned the question of the effects the advisory opinion should have in the relationship between the European Court of Human Rights, rendering the advisory opinion, and the national authority requesting it.

- a. Arguments in favour of opinions being binding included that the Court is the central authority for ensuring uniform application of the Convention. Should the request come from a court and the opinion be merely optional, this would lead to loss of the potential gain expected from the procedure, since the applicant would probably subsequently apply to the Court, which would have acknowledged his rights in the context of the advisory opinion procedure: a binding advisory opinion would offer finality. The extent to which the advisory opinion would be binding could depend on the nature of the case: if in relation to a specific systemic/ structural problem, then the advisory opinion would be binding for the requesting authority; if on interpretation of the Convention, then a general binding effect for all States Parties. It is difficult to envisage a non-binding advisory opinion when it is optional to make the request: this would imply that the domestic authority could apply a solution contrary to that indicated by the Court, following which the individual would almost certainly make an application to Strasbourg; this would run contrary to the purpose of the system. The non-binding nature of advisory opinions under the existing procedure may be justified by the political nature of the final decision, taken by the Committee of Ministers, in which legal issues were only one consideration.

- b. It may be unnecessary to make the advisory opinion formally binding, since the authority of the advisory opinion within the domestic legal order would derive from the legal status of the consequent decision of the body that had requested it. Should the advisory opinion concern application of the Convention to the specific facts of the case before the national court, it may perhaps not automatically be applicable to other cases. The Court would be advising on a Convention issue, not deciding on the case before the national court. The “sanction” for non-compliance with an advisory opinion would be the finding of a violation in a subsequent individual application. Since it would be optional for the national court to request an advisory opinion, however, it seems unlikely that a national court would delay proceedings in order to request one and then not follow it. Advisory opinions of most international courts are not legally binding.
21. There were also differences over whether there should be restrictions on the right of individuals to bring the same legal issue before the Court under Article 34 ECHR.
- a. Arguments in favour included that the Court’s advisory opinion should not be challenged in substance by individual applications concerning the same question. The right of individual petition could be restricted where the advisory opinion is followed by the requesting authority. Maintaining an unrestricted right of individual petition following an advisory opinion relating to the same case would undermine the purpose of the system, namely to reduce the number of future individual applications.
 - b. Those against included that the right of individual petition should not be restricted as it was at the core of the Convention system. If its advisory opinion concerns interpretation of the Convention, the Court should not be prevented from assessing individual applications concerning concrete situations. If the advisory opinion is not followed by the requesting authority, the individual must retain the right to bring the case to Strasbourg.

CDDH CONTRIBUTION TO THE MINISTERIAL CONFERENCE ORGANISED BY THE UNITED KINGDOM CHAIRMANSHIP OF THE COMMITTEE OF MINISTERS

Adopted by the CDDH on 10 February 2012

A. INTRODUCTION

I. The role of the Steering Committee for Human Rights

1. The United Kingdom Chairmanship of the Committee of Ministers is organising a Ministerial Conference on reform of the European Court of Human Rights (“the Court”) in Brighton, United Kingdom on 18-20 April 2012. The conference is expected to agree on a package of reform measures by means of a Declaration. The Declaration will provide the basis for decisions of the Committee of Ministers, to be adopted at its Ministerial Session on 14 May 2012. These measures are expected to include proposals for reform which will require amendments of the Convention.
2. The Steering Committee for Human Rights (“the CDDH”) has been asked to provide a written contribution to this Ministerial Conference.
3. The CDDH has been closely involved in the process of reform of the European Convention on Human Rights (“the Convention”) and the Court for many years, notably since the 2000 Rome Conference. In December 2009, it gave an Opinion on the issues to be covered by the Interlaken Conference.¹ Subsequently, it has contributed to the process initiated by the Interlaken Conference and continued by the İzmir Conference, by adopting a series of reports on reform issues, including a Final Report on measures that do not require amendment of the Convention.² As part of this Interlaken Process, it has, most recently and alongside the present document, adopted a Final Report on specific proposals for measures requiring amendment of the Convention.³ For the overall picture of the CDDH’s position on reform of the Court and Convention system, the present document should be read alongside these two Final Reports.

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

4. This Contribution should be understood in the context of the CDDH’s vision of the purpose of the Convention system. The Convention exists to protect human rights. It is the shared responsibility of States and the Court to

1. See doc. CDDH(2009)019 Addendum I.
2. See doc. CDDH(2012)R74 Addendum II.
3. See doc. CDDH(2012)R74 Addendum I.

give full effect to the Convention in respect of the principle of subsidiarity. To this end, States must fulfil their obligations to respect the rights guaranteed by the Convention, and effectively resolve violations at national level; when the Court has found a violation, States must implement the Court's judgment fully and rapidly. The function of the Court is to act as a safeguard for violations that have not been remedied at national level, in accordance with its subsidiary jurisdiction to interpret and apply the Convention. It should be able to give its response within a reasonable time and must take a clear and consistent interpretative line.

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

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

In addition, the United Kingdom Chairmanship intends to provide the Court with political support from the Committee of Ministers for the measures it is already taking to prioritise and better manage its workload, and to provide a wide margin of appreciation to member States' authorities in its judgments.⁴

The contents of this Contribution take account of the Declarations adopted at the High-level Interlaken and İzmir Conferences. They are also informed by the earlier CDDH reports mentioned in paragraph 3 above, and the documents and sources cited therein,⁵ along with the report of the Wilton Park Conference "2020 Vision for the European Court of Human Rights", held under the United Kingdom Chairmanship on 17-19 November 2011.

4. See the "Priorities of the United Kingdom Chairmanship" at <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1955617&SecMode=1&DocId=1809496&Usage=2>.

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

6. This Contribution also deals with general issues affecting the scope of reform proposals, such as the right of individual petition and budgetary issues. Together with the five themes mentioned in paragraph 5 above, the contribution covers all reform measures already contained in the Interlaken and İzmir Declarations and also introduces several new ones, which the CDDH has not yet examined in detail. To avoid unnecessary repetition of the two Final Reports, the contribution deals with some measures in less detail, while others are examined more extensively (e.g. national implementation of the Convention and execution of the Court's judgments, the long-term future of the Court and the right of individual petition). The respective lengths of chapters in this contribution should not be seen as reflecting a CDDH position on the relative importance or weight to be attached to the five themes of the eventual Declaration or the reform process as a whole. Decisions will have to be taken at the political level. The Contribution also reflects a desire to bear in mind a long-term vision for the Court and Convention system when examining short- and medium-term proposals.

B. PROPOSALS RELATING TO THE CONFERENCE THEMES

7. The CDDH's Final Report on specific proposals for measures requiring amendment of the Convention ("the Final Report") sets out proposals for reform measures that would require amendment of the Convention. This section of the Contribution presents those measures, along with other proposals, in relation to the five themes identified for the Ministerial Conference. The United Kingdom Ministerial Conference should further examine and, as appropriate, endorse those proposals, along with additional elements from amongst the other measures outlined below.

1. National implementation of the Convention and execution of Court judgments⁶

8. The follow-up to the Interlaken and İzmir Declarations has devoted much attention to the Convention's Strasbourg-based control mechanism. Effective implementation of the Convention at national level remains a significant challenge for the system. Apart from being a legal obligation incumbent on all States Parties to the Convention and fundamental to the principle of subsidiarity, stronger national implementation would contribute greatly to relieving the Court's case-load, including notably of repetitive cases. Between 2000 and 2010, the Committee of Ministers addressed seven recommendations to member States on national implementation.⁷ These recommendations are also sources of inspiration for the execution of Court's judgments.

6. See also sections B, D and F of the Interlaken Declaration Action Plan and sections B, E and H of the İzmir Declaration Follow-up Plan.

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

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

- i. increasing national authorities' awareness of Convention standards and ensuring their application;⁸
- ii. ensuring that training for public officials involved in the judicial system and law enforcement includes information on the Convention and the Court's case-law;⁹
- iii. ensuring the existence of national human rights institutions,¹⁰ which can play a role in legal education and public information campaigns – also a responsibility of governments – as well as monitoring and reporting on national compliance with Court judgments;
- iv. improving the provision of information on the Convention – notably the scope of its protection, the jurisdiction of the Court and the admissibility criteria – to potential applicants;¹¹
- v. introducing systematic review of the Convention-compatibility of draft legislation, with reasoned government certification.¹² In this connection, the CDDH takes note of the Parliamentary Assembly's recommendation that national parliaments carefully examine whether draft legislation is compatible with Convention requirements;¹³
- vi. introducing new domestic legal remedies, whether of specific or general nature.¹⁴ The recent proposal for a general domestic remedy¹⁵ as well as the possibility of drawing up non-binding Committee of Ministers' instruments in relation to specific areas in which existing domestic remedies are ineffective, as mentioned in the Final Report on non-amendment measures, should be further examined in the near future, notably on the basis of the CDDH's forthcoming review of national implementation of relevant parts of the Interlaken and İzmir Declarations;
- vii. ensuring review of the implementation of recommendations adopted by the Committee of Ministers to help States Parties to fulfil their obligations,¹⁶ with this review also being potentially relevant to the pursuit of other of these proposals;

8. See also para. B.4.a. of the Interlaken Declaration Action Plan.

9. See also para. B.1.c. of the İzmir Declaration Follow-up Plan.

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

11. See also para. C.6.a. of the Interlaken Declaration Action Plan and, further, the Secretary General's report, doc. SG/Inf(2010)23final.

12. See also para. B.4.a. of the Interlaken Declaration Action Plan.

13. See Parliamentary Assembly Resolution 1856(2012) on guaranteeing the authority and effectiveness of the European Convention on Human Rights, para. 3.

14. See also para. B.1.b. of the İzmir Declaration Follow-up Plan.

15. See doc. DH-GDR(2011)028. The Committee of experts on the reform of the Court (DH-GDR) decided that the proposal did not fall to be examined in detail in the context of its Final Report, since it did not imply amendment of the Convention.

16. See also para. B.4.f. of the Interlaken Declaration Action Plan.

- viii. ensuring full and rapid execution of Court judgments (see further below);
- ix. taking into account the Court's developing case-law with minimal formality, with a view to considering the conclusions to be drawn from Court judgments finding violations of the Convention by another State Party;¹⁷
- x. contributing to translation into the national language(s) of the Court's judgments and Practical Guide on Admissibility Criteria;¹⁸
- xi. contributing to the Human Rights Trust Fund.¹⁹

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

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

- i. increased funding;
- ii. improved targeting and co-ordination of other existing Council of Europe mechanisms, activities and programmes;²⁰
- iii. closer co-operation between the Council of Europe and the European Union in defining priorities for and implementing joint programmes;
- iv. a more country-specific approach, linking specific programmes to the execution of Court judgments (including notably pilot or other judgments revealing structural or systemic problems);
- v. considering making co-operation programmes obligatory in certain circumstances (e.g. in connection with the execution of specific Court judgments).

12. Under Articles 46 and 39 of the Convention respectively, the Committee of Ministers supervises the execution of judgments and that of friendly settlements, in accordance with the principle of subsidiarity. The Committee of Ministers has recently reformed its procedures through introduction of a new "twin-track" approach, in order to improve the prioritisation of cases subject to its supervision.²¹ Further developments in the Committee of Ministers' supervision activities relate to the introduction of effective domestic remedies; the prompt presentation, where required, of action plans on the execution of specific judgments; and targeted assistance activities including legal advice, training and information sharing.

13. The Conference could invite the Committee of Ministers to consider the following proposals that have been made in different contexts²² to enhance further its authority and competence, including:

17. See also para. B.4.c. of the Interlaken Declaration Action Plan.

18. See also para. B.1.d. of the İzmir Declaration Follow-up Plan.

19. See also para. B.1.e. of the İzmir Declaration Follow-up Plan. For further details of the Human Rights Trust Fund, see www.coe.int/t/dghl/humanrightstrustfund/default_en.asp.

20. See also para. B.5 of the Interlaken Declaration Action Plan.

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

22. Including at the Wilton Park Conference.

- i. more discussion of strategic/ systemic issues;
 - ii. accelerating the execution of pilot judgments;
 - iii. inviting the relevant minister to participate in the Committee of Ministers when supervising the execution of specific judgments;
 - iv. greater application of pressure, including possibly in the form of sanctions, on States that do not execute judgments, including notably those relating to repetitive cases and serious violations of the Convention;
 - v. a co-operative approach involving all relevant parts of the Council of Europe in order to present possible options to a State Party required to remedy a structural problem revealed by a Court judgment;
 - vi. continuing to increase transparency of the process, to facilitate exchange of information with national human rights institutions and civil society in relation to structural problems and general measures aimed at ensuring non-repetition of violations;
 - vii. the Committee of Ministers making full use of its political role in developing human rights standards and procedures, in order to create stronger relations with the Court.
14. Other proposals relating to execution of Court judgments which the Conference could consider addressing include:
- i. encouraging effective parliamentary oversight of execution of judgments;²³
 - ii. closer involvement of the Parliamentary Assembly, including notably through its direct relations with the Committee of Ministers, its immediate contacts with national parliaments responsible for passing relevant legislation and, on its own account or through its relations with national parliaments, in calling specific governments to account on fulfilment of their responsibilities concerning execution of Court judgments;
 - iii. closer involvement of the Commissioner for Human Rights;
 - iv. greater involvement of other Council of Europe monitoring mechanisms (e.g. Commission for the Prevention of Torture, possibly amongst others) in supporting the Committee of Ministers' supervisory activities;
 - v. government consultation of national human rights institutions and civil society in relation to action plans on general measures;
 - vi. setting up a body or office to assist member States in implementing the Convention and finding relevant technical assistance, including in relation to execution of judgments.
15. Finally, the CDDH's terms of reference for the 2012-2013 biennium require it to prepare a draft report for the Committee of Ministers containing (a) an analysis of the responses given by member States in their national reports on measures taken to implement relevant parts of the Interlaken Declaration, and (b) rec-

23. See Parliamentary Assembly Resolution 1823 (2011) on national parliaments: guarantors of human rights in Europe, para. 6.5; also Resolution 1856 (2012) on guaranteeing the authority and effectiveness of the ECHR, para. 4.

ommendations for follow-up. Work pursuant to these terms of reference will also contribute to enhancing implementation of the Convention at national level.

*II. The role of the Court and its relations with national authorities*²⁴

16. The Interlaken Declaration invited the Court to “take fully into account its subsidiary role in the interpretation and application of the Convention”. In response, the Jurisconsult of the Court, with the approval of the Court itself, issued a Note on the Principle of Subsidiarity.²⁵ The CDDH has adopted a Collective Response to the Jurisconsult’s Note, which was sent to the Court’s Registrar. This Collective Response may also usefully inform preparations for the United Kingdom Ministerial Conference and is therefore appended to the present Contribution.²⁶

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

- i. allowing the Court to give advisory opinions on request by the highest national courts in cases revealing potential systemic or structural problems, or concerning the compatibility of domestic law with the Convention. For further details of this proposal and the CDDH’s position thereon, see the Final Report;²⁷
- ii. introducing a new admissibility criterion, relating to cases properly considered by national courts. Again, for further details of this proposal and the CDDH’s analysis thereof, see the Final Report;²⁸
- iii. introducing a procedure whereby the Court would send back to the relevant national court cases that were well-founded but had not been properly examined by national courts. The CDDH has not examined this proposal in detail;
- iv. introducing provisions into the Court’s rules that would allow respondent governments to ask for a separate decision on admissibility whenever they can demonstrate a particular interest in having the Court rule on the effectiveness of a given domestic remedy, especially in order to avoid the risk of repetitive cases;²⁹
- v. the Court developing its case-law to require that Convention rights have been raised formally in domestic proceedings, particularly when the applicant was at that stage legally represented;³⁰
- vi. that the Court in principle should not take into account subsequent developments that were not within the subject matter of the national proceedings.

24. See also section E of the Interlaken Declaration Action Plan.

25. See doc. # 3188076, 8 July 2010.

26. See the Appendix.

27. See doc. CDDH(2012)R74 Addendum I and its Appendix V.

28. See doc. CDDH(2012)R74 Addendum I and its Appendix III section 5.

29. See doc. DH-GDR(2012)003, “French views on enhancing the subsidiarity principle”.

30. *Ibid.*

18. Another issue raised in the İzmir Declaration was that of indications of interim measures made by the Court to States under Rule 39 of the Rules of Court.³¹ The İzmir Declaration recalled that the Court was “not an immigration appeals tribunal or a court of fourth instance” and emphasised that “the treatment of requests for interim measures must take place in full conformity with the principle of subsidiarity”. It went on to stress “the importance of States Parties providing national remedies, where necessary with suspensive effect, which operate effectively and fairly and provide a proper and timely examination of the issue of risk in accordance with the Convention and in light of the Court’s case-law”. The CDDH expects to examine this latter aspect further on the basis of the national reports on implementation of relevant parts of the Interlaken and İzmir Declarations.

19. The İzmir Declaration also expressed the “expectation that the implementation of the approach outlined [therein] would lead to a significant reduction in the number of interim measures granted by the Court, and to the speedy resolution of those applications in which they are, exceptionally, applied, with progress achieved within one year [i.e. by April 2012]. The Committee of Ministers is invited to revert to the question in one year’s time”. The latest figures from the Court show that between 2010 and 2011, there was a very large decrease in the number of requests granted, from 1,440 to 342. Information has not been available, however, concerning the length of proceedings in cases in which the Court applied interim measures, although the Court Registrar has recently provided information that the number of applications pending in which Rule 39 has been applied had fallen from 1,553 in August 2011 to 702 in January 2012.³²

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

21. The CDDH considers that the Government Agents are a very important element in the Convention system. They not only participate in proceedings before the Court but also, in some States, are responsible for co-ordinating the process of implementation of the Court’s judgments or play a central role in transferring and adapting Convention standards into domestic law and practice. They are also key interlocutors in the dialogue between the Court and national authorities. In this respect, the CDDH welcomes the Court’s recent involvement of Government Agents in the process of drafting new Rules of Court.

*III. The clarity and consistency of judgments and nomination of candidates for judge*³³

22. The Interlaken Declaration “stress[ed] the importance of ensuring the clarity and consistency of the Court’s case-law” and invited the Court to “apply uniformly and rigorously the criteria concerning admissibility and jurisdiction”. In response, the Jurisconsult of the Court, with the approval of the Court itself, issued a Note on Clarity and Consistency of the Court’s Case-law.³⁴ The CDDH’s

31. See also the İzmir Declaration Follow-up Plan, section A.

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

33. See also Paragraph (4) of the Interlaken Declaration, section E of the Interlaken Declaration Action Plan and section F of the İzmir Declaration Follow-up Plan.

34. See doc. # 3197955, 8 July 2010.

Collective Response, mentioned in paragraph 16 above, may usefully inform preparations for the United Kingdom Ministerial Conference and is therefore appended to the present Contribution.³⁵

23. The clarity and consistency of judgments is of primary importance also for their efficient execution, in particular in cases relating to important structural problems.

24. The authority and credibility of the Court depend in large part on the quality of its judges, which in turn depends primarily on the quality of the candidates that are presented by States Parties to the Parliamentary Assembly for election. The CDDH has prepared a draft non-binding Committee of Ministers' instrument on the selection of candidates for the post of judge at the Court, accompanied by an explanatory memorandum containing examples of good practice.³⁶ This draft now falls to be examined and, if appropriate, adopted by the Committee of Ministers. The CDDH invites the Conference to call upon member States to take account of the Guidelines on the selection of candidates for the post of judge at the Court, once these are adopted by the Committee of Ministers.

25. The CDDH notes that the Committee of Ministers has already decided to review the functioning of the Advisory Panel after an initial three-year period.³⁷ It might also invite the Parliamentary Assembly to discuss how the work of the Panel can best interact with the Parliamentary Assembly's procedures.

*IV. The efficiency and effectiveness of the Court*³⁸

26. The Court is, and has for several years been, confronted with an enormous workload. This has resulted in very large numbers of cases pending before all of the Court's primary judicial formations³⁹ and, for certain categories of case, very long periods of time spent waiting for final determination. This is mainly due, on the one hand, to the very large number of applications made, and on the other, to budgetary, structural and procedural factors affecting the Court's handling of those applications, as well as to its working methods. The Final Report proposes measures both to obtain a reduction in the number of clearly inadmissible applications and to improve the effectiveness of the Court's treatment of applications. In this regard, the CDDH welcomes the recent, significant improvement achieved by the Court concerning clearly inadmissible applications.

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

28. The Final Report considers various proposals intended to regulate access to the Court. These include:

- i. introducing a system of fees for applicants to the Court;

35. See the Appendix.

36. See doc. CDDH(2012)R74 Addendum IV.

37. See doc. CM/Del/Dec(2010)1097bis/1.2bE.

38. See also sections A, C, D and E of the Interlaken Declaration Action Plan and sections A and C of the İzmir Declaration Follow-up Plan.

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

- ii. making legal representation compulsory for applicants from the outset of proceedings;
- iii. introducing a sanction in futile, abusive cases;
- iv. amending the “significant disadvantage” admissibility criterion, which would increase the number of cases to be declared inadmissible under Article 35 (3) (b) of the Convention;
- v. introducing a new admissibility criterion relating to cases properly considered by national courts.⁴⁰

29. The Final Report also considers various proposals intended to address in various ways the very large numbers of applications pending before the Court. These include:

- i. introducing a new filtering mechanism which would increase the Court’s case-processing capacity, either by giving certain Registry lawyers competence to make decisions in clearly inadmissible cases or recruiting a new category of judge within the Court to deal with them, or a combination of both; with, in the case of the options involving a new category of judge, such judges also being competent to sit on Committees;
- ii. establishing a pool of temporary judges who could be appointed for relatively short periods and would help discharge most of the functions of regular judges;
- iii. introducing a “sunset clause” for applications not addressed within a reasonable time;
- iv. conferring on the Court a discretion to decide which cases to consider.

30. For details of all these proposals and the CDDH’s analysis thereof, see the Final Report.⁴¹

31. An important contributing factor to the relative period of time a case may spend pending before a judicial formation is the priority category to which it is allocated by the Registry under the Court’s recently introduced priority policy.⁴²

The priority policy has done much to allow the Court to focus on the most important and serious cases (i.e. categories I, II and III), but with the effect of increasing numbers of cases pending in categories IV (lowest category Chamber cases: potentially well-founded applications based on Articles other than 2, 3, 4 or 5 (1) of the Convention) and, especially, V (repetitive, Committee cases). The proposals mentioned in paragraph 29 above would seek to redress this effect.

32. The question of collective complaints or class actions has been mentioned in the past, notably at the 2009 Bled Round Table.⁴³ The issue has not, however, since been examined by the CDDH, even to the extent of being clearly defined.

40. See also para. 17(ii) above.

41. See doc. CDDH(2012)R74 Addendum I and its Appendices III and IV, respectively.

42. For further details of the Court’s Priority Policy, see www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf.

43. “The right to trial within a reasonable time and short-term reform of the European Court of Human Rights”, Round table organised by the Slovenian chairmanship of the Committee of Ministers, Bled, Slovenia, 21-22 September 2009. The issue also arose more recently at the Wilton Park Conference.

The CDDH also notes that the Court, in addition to the pilot judgment procedure, has in some recent cases collected related complaints together for the purpose of treating them all in a single judgment.⁴⁴ It considers that this practice may merit further study. The Court's recent approach to an influx of several thousand similar individual applications against one State party is also of interest. The Court, noting the need for presentation of applications to be co-ordinated at national level by a limited number of representatives and therefore encouraging the relevant trade unions to re-submit grouped applications, has stated its intention to register only applications lodged through one of the trade unions concerned and then to identify one or more applications to be examined as a matter of priority as leading cases.⁴⁵

33. It is necessary to distinguish between, on the one hand, measures intended to achieve a balance between the number of new, incoming applications and the numbers of decisions delivered by the Court and, on the other, measures to deal with the existing backlog of cases, that is cases which have not been decided upon within a reasonable time. As far as the existing backlog is concerned, particular measures should be considered as soon as possible. In this context, the Committee of Ministers could engage with the Court on how to deal with this situation.

*V. Long-term thinking on the Court and the Convention*⁴⁶

34. Even if there is no clear vision at this stage of the future nature and role of the Court, it should be dealing with a far smaller case-load and delivering fewer judgments. One view is that this can be achieved without changing the role of the Court, notably by significantly improving national implementation of the Convention. Another proposal for achieving it would be for the Court in future to focus its efforts on serious or widespread violations, systemic and structural problems and important questions of interpretation and application of the Convention. The term "constitutional" has in the past been used to describe such a court, but may not be appropriate and would in any case need further clarification in this context; however that may be, the term clearly points towards something whose functioning would be radically different from that of the current Court.

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

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

45. See the press release issued by the Registrar of the Court, doc. ECHR 009 (2011), 11 January 2012.

46. See also sections A and G of the Interlaken Declaration Action Plan and section G of the Izmir Declaration Follow-up Plan and para. 5. of its "Implementation" section.

- i. giving the Court discretion to choose which cases to consider, with the result that an application would not be considered unless the Court made a positive decision to do so (see further in the Final Report):⁴⁷ although possibly for implementation in the longer-term, this idea could also be examined alongside others that imply significant amendments;
- ii. the Court no longer awarding just satisfaction;
- iii. a Court with fewer judges than High Contracting Parties, elected not on behalf of a certain State, but exclusively on the basis of their professional competencies, and perhaps with the introduction of Advocates General.

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

37. Nevertheless, whilst fundamental reform of the Court may be for the longer-term, it is important to begin reflecting already now upon the process for arriving at the necessary decisions. The Ministerial Conference could take decisions to this effect.

38. Reflections towards a long-term vision of the control system should also address the issue of a simplified procedure for amending certain provisions of the Convention relating to organisational issues.⁴⁸ Work on a simplified amendment procedure has included examination of the possibility of introducing a Statute for the Court, as one means of introducing a simplified amendment procedure. The CDDH's relevant committee of experts is considering, amongst other things, the constitutional implications of the proposals. The committee of experts' terms of reference will terminate on 31 May 2012, following which the CDDH will report on the issue to the Committee of Ministers.

39. In this context, the CDDH has addressed questions relating to the balance of law-making powers between Convention organs, with many in the subordinate committee expressing interest in a wide-ranging examination of the normative status of the Rules of Court. The CDDH has, however, concluded that this latter task could not be successfully accomplished under current time and budgetary constraints. It has therefore been proposed that further, detailed examination of these issues would have to take place in future in a separate body with appropriate terms of reference.

47. See doc. CDDH(2012)R74 Addendum I and its Appendix IV section 3.

48. See also section G of the Interlaken Declaration Action Plan and section G of the İzmir Declaration Follow-up Plan.

C. ACCESSION OF THE EUROPEAN UNION TO THE CONVENTION⁴⁹

40. The future role of the Court cannot be considered in isolation. Accession by the EU to the Convention will enhance coherent application of human rights all over Europe, as consistently called for by the CDDH since the 2000 Rome Conference, ensure full legal protection for all individuals and foster a harmonious development of the case-law of the Courts in Luxembourg and Strasbourg.

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

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

D. GENERAL ISSUES AFFECTING THE SCOPE OF REFORM PROPOSALS

I. The right of individual petition and requirement that all decisions be made by a judge⁵⁰

43. During its examination of the various proposals requiring amendment of the Convention, the CDDH has repeatedly been confronted with certain principles that appear to set limits to their scope, notably the right of individual petition (or application) and the requirement that all decisions be of a judge.⁵¹

44. The right of individual petition, as enshrined in Article 34 of the Convention, gives the right to bring an application before the Court to every person, non-governmental organisation or group of individuals claiming to be a victim of a violation of the Convention, regardless of the substantive merits or procedural propriety of that application.⁵² The Court has described the right of individual petition as “a key component of the machinery for protecting the rights” set forth in the Convention,⁵³ which was recognised also in the Interlaken and İzmir Declarations. It has been suggested that extreme caution should be exercised in proposing limitations to the right of individual petition.

45. The requirement that all decisions be made by a judge is often considered an integral part of the right of individual petition. Whether this requirement is in itself a right under the Convention or not, it is a feature of the current Con-

49. See also section I of the İzmir Declaration Follow-up Plan.

50. See also section A of the Interlaken Declaration Action Plan and of the İzmir Declaration Follow-up Plan.

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

52. The figure of 800 million, being the combined population of all States Parties to the Convention, is often cited as representing the number of individuals who could bring applications.

53. *Mamatkulov & Askarov v. Turkey*, App. Nos. 46827/99 & 46951/99, Grand Chamber judgment of 4 February 2005.

vention system, deriving from Articles 27 to 29 of the Convention, which foresee the decision of a judge for every application. However that may be, the Convention's requirement that such a decision be made is not in practice always realised.

46. At the same time, the right of individual petition and the requirement that all decisions be made by a judge are relevant to the Court's case-load and to its capacity to deal with incoming cases within a reasonable time. Only a minimum of practical requirements (essentially, completion of an application form and its submission, along with supporting documents) is placed upon the making of an application, which must in turn lead to determination by a judge of the Court. This has the effect that the Court can be made aware of human rights violations affecting a large number of victims and given the opportunity, in accordance with its subsidiary role, to provide a remedy. The other side of the coin is that, along with other factors, it has resulted in a very large number of applications being made, the majority of which prove clearly inadmissible, whilst at the same time the number of non-urgent, potentially well-founded cases that have been awaiting a decision for many years continues to increase.

47. The Court is obliged to render a decision of a judge on each and every one of these applications, even those with no substantive connection to Convention rights or which fail to satisfy the basic admissibility requirements of timeliness and exhaustion of domestic remedies. The Single Judge procedure introduced by Protocol No. 14 and other developments in the Court's internal structure and working methods have allowed considerable increases in the Court's capacity to issue decisions on clearly inadmissible applications, with the Court expecting to resolve the backlog of such cases by 2015.

48. The requirement for a judicial decision in every case is also relevant to repetitive cases, which fall to be decided by three-judge Committees applying well-established case-law of the Court. In most such cases, the requirements for resolving or remedying the violation are clear, on the basis of earlier judgments. With the Court consequently giving low priority to such cases, there were, as of 31 January 2012, 14,550 (an increase of 10,450, or 255%, since the beginning of 2011) of them pending before it.

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

50. The primary responsibility for implementation of the Convention falls to the States, including by establishing effective remedies at national level that allow the finding of a violation and, if necessary, its redress. The Court's priority should thus be to deal rapidly and efficiently with admissible cases that raise new or serious Convention issues. Inadmissible and repetitive cases should be handled in a way that has minimum impact on the Court's time and resources. On the other hand, it has been argued that the correct response to the Court's case-load is not to introduce restrictions on the right of individual petition and/or the requirement that all decisions be made by a judge, but to reinforce further national implementation of the Convention, including effective execution of judgments, and to increase the Court's case-processing capacity, including through the provision of additional resources.

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

II. Budgetary issues

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

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

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

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

III. Final remarks on the right of individual petition and budgetary issues

56. In the current circumstances, it should be noted that the Court has real difficulties in doing everything that the Convention requires of it. Improved implementation of the Convention at national level, increasingly effective procedures and working methods within the Court and the full effects of Protocol No. 14 will significantly alleviate these difficulties. Beyond these measures, the CDDH notes that most currently foreseen reform proposals requiring amendment of the Convention would appear to have budgetary consequences and/ or consequences for the role and nature of the Court.

APPENDIX

CDDH Collective Response to the Court's Jurisconsult's notes on the principle of subsidiarity and on the clarity and consistency of the Court's case-law

1. The CDDH thanks the Jurisconsult of the Court for his initiative in drawing up the two notes on the principle of subsidiarity and on the clarity and consistency of the Court's case-law. The quality of the notes was high and they underlined the importance of the principle of subsidiarity and the necessity of a clear and consistent case-law for the reform process.
2. The CDDH welcomes the dialogue with the Court which is enabled by the notes and presents the following comments as a contribution at a technical level to this ongoing dialogue, which it hopes will be continued in the future.

I. Comment on subsidiarity

3. The CDDH welcomes the internal reflection by the Court on its response as to how it can give full effect to the principle of subsidiarity. The CDDH recalls that the principle of subsidiarity implies the sharing of responsibility for the protection of human rights between national authorities and the Court. The primary responsibility falls upon the national authorities to implement the Convention fully, with the Court playing a subsidiary role to intervene only when States have failed properly to discharge this responsibility.
4. Subsidiarity must operate so that the Court can strike a balance in its workload and focus on those essential applications that relate to the implementation of the Convention. This is all the more important given the Court's backlog of cases. Effective application of the subsidiarity principle is clearly one way of dealing with the growing number of petitions submitted to the Court. However, the significance and importance of the principle of subsidiarity extends beyond considerations of practical efficiency.
5. The CDDH invites the Court to reflect on giving full weight to the appreciation that all Convention rights must be applied in the domestic context; and that national authorities, including national courts, are in principle in the best position to assess how this should be achieved. This is in keeping with the letter and spirit of the Convention: that the States Parties and their national courts remain the guarantors of respect for the rights that derive from it.
6. As such, case-law the CDDH takes the view that the Court, in ensuring that the Convention is applied, should focus on its role of overall review in the light of the Convention, verifying that the domestic court has taken a decision within the bounds of proper interpretation of the Convention.
7. In particular, the CDDH does not see the role of the jurisprudence of the Court as an instrument of judicial harmonisation of the way the Convention is applied in Contracting Parties.
8. The Court should focus on reviewing whether the domestic judgment itself falls within the (often broad) acceptable bounds of legitimate interpretation and application of the Convention.

9. The Court should not substitute its own assessment for that of national authorities, made within the proper margin of appreciation. The margin of appreciation is an important tool through which the Court gives effect to the principle of subsidiarity. It implies, among other things, that the Court should give full weight to the considered views of national courts as well as of other national authorities, particularly national parliaments.

10. The assessment of facts made by national courts should not be questioned by the Court except where there has been an obvious error, and only in those cases where that error is essential to the application of the Convention. Neither should the Court in principle take into account subsequent developments that were not within the subject matter of the national proceedings.

11. Whilst the Court is competent to verify the compatibility of national law with the provisions of the Convention, it should not in principle interpret national law.

12. Furthermore, subsidiarity requires, and the Convention stipulates, that all domestic remedies must have been exhausted before the Court declares an application admissible; this ought to be the case even where several remedies co-exist and a strict interpretation of exhaustion of domestic remedies ought to be applied by the Court to enable the national courts to deal with the matter first.

13. The jurisdiction of the Court is closely linked to its subsidiary role and stems from the international treaty character of the Convention; it should therefore be interpreted in accordance with the 1969 Vienna Convention on the Law of Treaties. As stated in the İzmir Declaration, adopted on 27 April 2011, the Court should apply fully, consistently and foreseeably all admissibility criteria and the rules regarding the scope of its jurisdiction, *ratione temporis*, *ratione loci*, *ratione personae* and *ratione materiae*. A strict application of these criteria will also have a positive effect on reducing the caseload of the Court by deterring applications which are outside of the scope of its jurisdiction.

14. The full functioning of subsidiarity necessarily implies a tolerance of (and even welcome for) the fact that Convention rights can be implemented differently by different Contracting Parties, in keeping with their distinct national conditions, provided that they are in fact implemented. This is of obvious importance for those guarantees of the Convention requiring a consideration of interests (Articles 8, 9, 10 and 14); but applies to all the rights guaranteed by the Convention and goes to the heart of the relationship between the Court and the Contracting Parties.

II. Comment on the clarity and consistency of the Court's case-law

15. The CDDH encourages the Court to give great weight in its judgments to the need for legal certainty. Clarity and consistency of the Court's case-law are essential for the full assumption by Contracting Parties and national courts of their role as guarantors of human rights and for the effectiveness of the subsidiarity principle.

16. It is important that applicants and national authorities can understand the precise scope of the rights set out in the Convention. Clarity and consistency enables applicants to better assess the chances of success of a possible application; and for national authorities, including courts, which have the primary responsibility for applying Convention rights in concrete cases, to deal with

issues first. This implies that the Court should be particularly cautious in departing from its existing case-law. Principles established in previous judgments should be followed by the Court in subsequent cases. National authorities, including courts, and applicants should be able to have confidence that the principles established in the Court's case-law will be consistently applied by the Court in future cases and will be departed from only in exceptional circumstances.

17. Judgments should set out clearly how the relevant principles are being applied to the present circumstances and, in those rare cases where the Court decides it is necessary to depart from or develop such principles, the judgment should explain clearly how the principles set out in earlier case-law are affected. The clearer and more consistent the case-law is, the easier it is for Contracting Parties to consider the conclusions to be drawn from a judgment, even where it does not involve them directly, and the greater the impact of the Court's case-law will be.

18. The need for clarity and consistency in the Court's case-law does not of course imply any requirement for uniformity in the way the Convention is implemented in each Contracting Party. In accordance with the principle of subsidiarity, the Convention allows the Contracting Parties a large degree of autonomy as to the way that they implement the Convention within their national systems. A consistent and clear approach to issues of principle within the Court's case-law will help Contracting Parties in this task.

19. The Court might consider more efficient means of internal consultation, in order to minimise the risk of inconsistency in its case-law.

20. As a reflection of the need for clarity, the CDDH encourages the Court to publish its range-based guidance on its practices relating to just satisfaction. This would assist applicants, who often make claims that are out of all proportion to the amounts that they can legitimately expect should their application be successful.

21. If the Court's case-law is clear and consistent, national courts can apply the principles found therein to their cases more effectively. This will facilitate the Court taking an approach of overall review that will enable it better to give effect to the principle of subsidiarity.

22. Finally, it is necessary also to ensure, by way of appropriate and accessible instruments whether in the Rules of Court or through expression of the practice followed in the Court's case-law, the clarity and consistency of the application of rules concerning the Court's procedure, which are an integral part of Convention law.

CDDH FINAL REPORT ON A SIMPLIFIED PROCEDURE FOR AMENDMENT OF CERTAIN PROVISIONS OF THE CONVENTION

Adopted by the CDDH on 22 June 2012

In summary, whilst there is a considerable degree of agreement on the potential advantages of introducing a simplified amendment procedure and on many key legal and technical aspects, the CDDH has come to the conclusion that in the present circumstances, it would not be opportune to proceed now to the elaboration of a draft protocol introducing such a procedure.

It therefore proposes to return to the issue in future, once it has completed work on the priority issues set out in the Committee of Ministers' decisions for the current biennium, with a view to resolving any outstanding matters and requesting any necessary decisions of the Committee of Ministers, as appropriate.

I. INTRODUCTION

1. In the context of the CDDH's ad hoc terms of reference to consider relevant parts of the Interlaken Declaration, one of its subordinate bodies, the Committee of experts on a simplified procedure for amendment of certain provisions of the European Convention on Human Rights (DH-PS), has had specific terms of reference, under the authority of the CDDH, to "examine in depth proposals for making it possible to simplify amendment of the Convention's provisions, with such a procedure to be introduced by means of an amending Protocol to the Convention" (for the full terms of reference, see Appendix I). The DH-PS' terms of reference, adopted by the Committee of Ministers on 7 July 2010 and extended on 7 December 2011, expired on 31 May 2012. The present document constitutes the CDDH's final report on its activities regarding this issue.¹

2. The basis of current discussion of the proposal to introduce a simplified procedure can be found in the report of the Group of Wise Persons to the Committee of Ministers.² The Wise Persons had concluded that it was "essential

1. See doc. CDDH(2010)002, "Decisions of the Committee of Ministers on the action to be taken following the Interlaken Declaration and Terms of Reference of the CDDH and subordinate bodies involved in follow-up work to the Declaration." These terms of reference have since been amended to bring forward the date of completion of the final report on all issues other than the simplified amendment procedure; see the CDDH Final Report on measures requiring amendment of the ECHR, doc. CDDH(2012)R74 Addendum I, para. 3 and footnote 2.

2. See doc. CM(2006)203.

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... 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. [T]his method cannot[, however,] 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." The Wise Persons concluded that all provisions of section II of the Convention could be made subject to a simplified amendment procedure, apart from a list of those 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". Their report exhaustively listed those provisions that should be explicitly excluded from a simplified amendment procedure; such provisions could either remain in the Convention or be transferred to the Statute. The Wise Persons' proposal was considered, prior to the Interlaken Conference, by the former Reflection Group (DH-S-GDR), which welcomed and supported it, recommending that it be examined further.³

3. In the course of its work, the CDDH has had the benefit of the constant participation of the Registry of the Court, including an early exchange of views with its Registrar, who presented the Court's document on "Interlaken Follow-up: Simplified Procedure for Amending the Convention (Idea of a Court Statute)"⁴; and of the Opinion of the Committee of Legal Advisers on International Law (CAHDI) concerning the introduction of a simplified procedure for amendment of certain provisions of the ECHR.⁵ It took account of a letter dated 12 June 2012 from the President of the Court, Sir Nicolas Bratza, to the Chairperson of the CDDH, setting out the Court's position on the proposal that a future Statute include provisions addressing matters currently found in the Rules of Court (see further below). It took note of the call in the Brighton Declaration for a swift and successful conclusion to its consideration of whether a simplified procedure for amending provisions of the Convention relating to organisation matters could be introduced, taking full account of the constitutional arrangements of the States Parties. It has also conducted a survey of whether member States' domestic law, notably constitutional provisions, would allow a Statute with the status of an international treaty to be amended by a simplified procedure, in particular one not involving ratification by national parliaments (see further at section E below).⁶ The list of documents referred to by the CDDH in the course of its work appear at Appendix II.

4. On this basis, the CDDH has:

- ▶ Examined which provisions of section II of the Convention should be subject to a simplified amendment procedure and which not;

3. See doc. DH-S-GDR(2008)012 Appendix III.

4. See doc. #3272054_v.1

5. See doc. DH-PS(2011)006.

6. See doc. DH-PS(2011)001, "Compatibility of a possible simplified amendment procedure with domestic law: compilation of information provided by member States".

- ▶ In the context of the possible introduction of a simplified amendment procedure, considered the possible treatment of provisions or matters not found in the Convention, notably interim measures under Rule 39 of the Rules of Court, the pilot judgment procedure as set out in Rule 61 of the Rules of Court and unilateral declarations (which will be the subject of a specific rule of Court due to enter into force on 1 September 2012);
- ▶ Considered the possible procedure for simplified amendment, including the respective roles of bodies mentioned in the Convention (the Court, Committee of Ministers, Assembly) and of civil society;
- ▶ Considered the modality for introduction of a simplified amendment procedure and elaborated three possible illustrative models;
- ▶ Considered the possible legal status of a Statute, should that be the preferred modality for introducing a simplified amendment procedure;
- ▶ Examined possible national and/ or international law problems affecting certain possible modalities for the introduction of a simplified amendment procedure;
- ▶ Recalling the original arguments in favour of introducing a simplified amendment procedure and in the light notably of the aforementioned possible legal problems and other potential difficulties, taken position on whether and how to continue work on the issue.

These aspects are addressed in detail in section II below.

II. CONSIDERATIONS RELEVANT TO INTRODUCING A SIMPLIFIED AMENDMENT PROCEDURE

A. Selection of provisions of section II of the Convention that should be subject to a simplified amendment procedure or not

5. On the basis of an analysis of views expressed by experts, amongst other sources, the CDDH has further elaborated upon the essential criteria for identifying provisions of section II of the Convention that could be subject to a simplified amendment procedure, as follows:⁷

- a. Only provisions of a purely institutional,⁸ procedural or organisational⁹ nature should be subject to a simplified amendment procedure.
- b. Further to a. above, the following categories of provision should be excluded from the possible scope of a simplified amendment procedure:
 - i. Provisions regulating basic principles (including the Court's jurisdiction);¹⁰
 - ii. Provisions whose amendment would amend, restrict or expand Convention rights and freedoms;¹¹

7. See in particular doc. DH-PS(2011)005, "Limitations on the scope of a possible simplified amendment procedure: extract from information provided by member States concerning the compatibility of a simplified amendment procedure with domestic law".

8. See doc. DH-PS(2011)005.

9. The description "organisational" has been used notably in the Interlaken and İzmir Declarations, the DH-PS' terms of reference and the CAHDI Opinion.

10. See the report of the 72nd CDDH meeting, doc. CDDH(2011)R72, para. 8.

11. Confirmed by the CAHDI in its Opinion.

- iii. Provisions recognising rights of or imposing fundamental obligations on States Parties;¹²
 - iv. Provisions that would create pecuniary obligations for States Parties;
 - v. Provisions affecting applicants' or respondent States' legal positions, including in proceedings before the Court.
 - c. The final choice of provisions that could be subject to a simplified amendment procedure would depend also on the procedure itself (see section C below).¹³
 - d. The list of provisions currently found in the Convention that would be made subject to a simplified amendment procedure must be exhaustive.¹⁴
6. Furthermore, some experts considered that it may be necessary to include detailed specification of possible amendments. In this connection, it was noted that Article 26(2) of the Convention, as amended by Protocol No. 14, sets a precise limit on the scope of possible amendment by the Committee of Ministers of the size of Chambers of the Court.¹⁵ Specifying in advance, for all relevant provisions, the scope of possible amendments that could be made by a simplified procedure would appear an extremely challenging task, given the inherent difficulty in imagining every possible change that might be considered necessary in future. This problem could perhaps be avoided, however, if it were instead in some way specified that no amendment might be adopted under the simplified procedure that would have the effect of changing the nature of the affected provisions. In this case, it could also be stated in the appropriate legal instrument (Convention or Statute) that the provisions subject to a simplified amendment procedure were of a purely institutional, procedural or organisational nature.
7. The CDDH has carefully applied the criteria of paragraph 5 above to the provisions of section II of the Convention, so as to identify those which should be subject to a simplified amendment procedure and those that should not. It may be noted that the CDDH's position would exclude a larger number of provisions from the scope of a simplified amendment procedure than would the Wise Persons' proposal. This result, including preliminary arguments relating to the various conclusions and other relevant comments, can be found in the table at Appendix III.

B. Possible treatment of provisions or matters not found in the Convention

8. The DH-PS' terms of reference cover not only examination of proposals for making it possible to simplify amendment of the Convention's provisions on organisational issues, but also consideration of the treatment of certain provisions found in the Rules of Court, and other matters.
9. The CDDH considers that Rule 39 of the Rules of Court on interim measures, Rule 61 on the pilot judgment procedure, and unilateral declarations may be suitable for "upgrading" (enhancement of their normative status) to a Statute

12. Confirmed by the CAHDI in its Opinion.

13. See the CDDH Interim Activity Report on specific proposals for measures requiring amendment of the Convention, doc. CDDH(2011)R72 Addendum I, para. 27.

14. Confirmed by the CAHDI in its Opinion.

15. Article 26(2) reads as follows: "At the request of the Plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce [from seven] to five the number of judges of the Chambers."

or the Convention but that further consideration of possible inclusion of additional provisions of the Rules of Court could not feasibly be undertaken at present.¹⁶ Although it would be possible for provisions on interim measures, the pilot judgment procedure and unilateral declarations to be “upgraded” directly into the Convention,¹⁷ most experts would prefer to include such provisions in a Statute. Almost all experts considered that the essential principles relating to these matters should not be subject to a simplified amendment procedure. Only a Statute with some substantive provisions subject to a simplified amendment procedure and others not would respond to these preferences. For further details of the CDDH’s discussions, see Appendix IV.

10. Many experts expressed their interest in also considering other Rules of Court under future terms of reference, once any Statute may have been established.¹⁸ For these experts, it would be preferable to have a Statute with some substantive provisions subject to a simplified amendment procedure and others not, should it in future be considered desirable to upgrade additional provisions from the Rules of Court or elsewhere. This would avoid dividing relevant provisions between the Convention and a Statute according to whether or not they would thereafter be subject to a simplified amendment procedure. Instead, all issues relating to the Court would be reflected in the Statute, which would thus remain a comprehensive text, thereby ensuring clarity and accessibility.

11. The CDDH underlines that the aim of its proposals would be to ensure clarification of the legal basis of any obligations on States Parties that may be contained in provisions of the Rules of Court, without diminishing the Court’s independence to adopt rules governing procedure. Clarification in a Statute or the Convention of the legal basis for certain matters would not preclude more detailed regulation of procedural aspects of those matters by the Court in its Rules, which would continue to be adopted and developed independently by the Court, in accordance with Article 25 of the Convention.

C. Possible procedure for simplified amendment

12. The CDDH discussed the possible procedure for simplified amendment of certain provisions of the Convention, coming to the following conclusions:

- a. Proposals to make amendments by the simplified procedure should come from High Contracting Parties or from the Court.
- b. The decision to pursue such proposals should be taken by the Committee of Ministers by qualified majority vote in the sense of Article 20(d) of the Statute of the Council of Europe.¹⁹
- c. There should be formal provision for consultation of the Parliamentary Assembly, the Court (on proposals made by High Contracting Parties) and, possibly, the Commissioner for Human Rights.

16. See the CDDH’s Interim Activity Report to the Committee of Ministers, doc. CDDH(2011)R72 Addendum I, para. 29.

17. See doc. CDDH(2011)R72 Add. I, para. 29.

18. See also the report of the 2nd DH-PS meeting, doc. DH-PS(2011)R2, para. 17.

19. “[A] two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee.”

- d. Civil society should be given an opportunity to express its views effectively, without formal provision to that effect.
- e. Draft amendments should be adopted by the Committee of Ministers by unanimity in the sense of Article 20(a) of the Statute of the Council of Europe.²⁰

13. In addition, the procedure could include a period between adoption and entry into force during which any objection could be raised; an objection lodged would prevent the entry into force of the amendments. This would be primarily intended to provide a solution to any national law problems of certain member States that had otherwise remained insurmountable (see section F below). It was appreciated that such an approach could delay and complicate the simplified amendment procedure. This may be an inevitable price to pay for reaching compromise. In this context, it was noted that any such period should not be too short, otherwise it might incite the government to refuse to adopt an amendment, for fear that there would be insufficient time to consult the national parliament effectively; a period of nine months was considered sufficient. Alternatively, it might be possible to devise a procedure whereby States be required explicitly to request a period for possible objections, the length of that period being fixed in the procedure for all cases; those States that had requested the objection period could express their definitive position at any time during the period (whilst being encouraged to do so as quickly as possible), with failure to do so by the end of the period amounting to tacit consent. Such a procedure, whilst still a compromise, could prove less costly than the alternative in terms of cumulative delay over time.

D. Possible modality for introduction of a simplified amendment procedure

14. The DH-PS' terms of reference suggest two possible modalities for introducing a simplified amendment procedure: (i) inclusion of relevant issues in a Statute of the Court, with a new provision in the Convention establishing the Statute and its amendment procedure; or (ii) (a) new provision(s) in the Convention allowing certain other provisions of the Convention to be amended by a simplified procedure. The CDDH has also considered two subsidiarity questions which would arise should a Statute be preferred: the disposition of provisions of section II of the Convention between the Statute and the Convention itself; and the choice of legal instrument in which the Statute should be contained (see section E below).

15. A majority of experts would prefer to introduce a simplified amendment procedure by way of a Statute for the Court. Some experts would prefer to introduce a simplified amendment procedure by way of a provision in the Convention.

16. Should there be a Statute, some experts would prefer that it contain all of section II of the Convention, in which case not all of its provisions would be subject to the simplified amendment procedure. Other experts would prefer

20. "[T]he unanimous vote of the representatives casting a vote, and of a majority of the representatives entitled to sit on the Committee."

dividing section II, by selecting provisions appropriate to a simplified amendment procedure and moving them to the Statute, with all other provisions remaining in the Convention.

17. Illustrative models for the different modalities can be found at Appendix V.

18. The CDDH would underline that these illustrative models are intended only to give an impression of how the texts involved in different modalities for introducing a simplified amendment procedure would appear. The three models should not in any way be considered exclusive or final. In particular, there may be a fourth approach, not represented amongst the three models, involving the transfer of most of section II of the Convention to a Statute, some of whose provisions would be subject to a simplified amendment procedure and others not; certain key issues (e.g. the right of individual application, the binding force and execution of judgments) would remain in the Convention and, potentially, be addressed also in a Statute.

E. Legal status of a Statute as possible modality for introducing a simplified amendment procedure

19. Opinions differed on the question of the appropriate legal status for a Statute, should that be the preferred modality for introducing a simplified amendment procedure. The options considered were either a resolution of the Committee of Ministers or a treaty.

20. Most experts were in favour of a Statute with the status of a treaty. This would allow inclusion in the Statute of either all of section II of the Convention, including those provisions that concerned, for example, rights and obligations of States and applicants; or only part of section II, with the rest remaining in the Convention.

21. Some experts were in favour of a Statute contained in an instrument with the legal status of a resolution of the Committee of Ministers;²¹ if so, the simplified amendment procedure for its provisions should be laid down in the Convention. Some experts indicated that such an approach could be one way of resolving or avoiding potential difficulties under constitutional law (see section F below). This approach would only be possible, however, if section II of the Convention were divided between the Convention and the Statute; a Statute that contained all of section II of the Convention should have treaty status, since it would contain also provisions imposing obligations on States. Indeed, it was noted that should a Statute contain provisions imposing obligations on States, the domestic law of some member States would oblige them to consider it as having the status of a treaty, regardless of its formal categorisation at international level. Some experts indicated, however, that they could not accept the transfer of provisions from a treaty to a resolution, the latter having lesser legal status and being inappropriate to contain rules legally binding on the Court, and thus could not accept a Statute with the status of a resolution.

21. The possibility of such a resolution being adopted by a conference of the parties to the Convention was also mentioned.

F. Possible national and/ or international law problems affecting certain possible modalities for the introduction or application of a simplified amendment procedure

22. As noted in paragraph 3 above, the CDDH has conducted a survey of possible legal problems relating to introduction and application of a simplified amendment procedure and has examined the question repeatedly in detail. During these discussions, several experts had indicated certain potential problems, which can be summarised as follows:

- a. As recognised from the outset, a simplified amendment procedure could only be introduced by an amending protocol, whose entry into force would require ratification for most, if not all States. Since this is the standard procedure for amendment of the Convention, it would not pose any legal problems under either national or international law.
- b. Many States' national law requires that in general, amendments to treaties (including the Convention) be ratified in the same way as the treaty itself, i.e. following parliamentary approval. For most such States, however, parliamentary approval would in any case not be needed for the type of amendment permitted to provisions of the nature foreseen. Otherwise, the parliamentary bill to ratify the protocol introducing the simplified amendment procedure could contain an enabling clause that would authorise the government to agree, without further parliamentary approval, to future amendments made by that procedure.
- c. Certain States' national law would not, however, allow for the above possibility. Two possible solutions were found to this problem. One would be to give the legal status of a resolution of the Committee of Ministers to a future Statute by which a simplified amendment procedure would be introduced. As noted in section E above, however, various objections have been raised to this approach. The other possible solution, for a Statute with treaty status, would be to allow a period for objection between adoption and entry into force of amendments made by a simplified procedure; where necessary, national parliaments' approval could be sought during this period (see section C above).²²
- d. In certain States, the Convention in its entirety (i.e. including all of its section II) has constitutional status or has been incorporated into national human rights legislation. This would mean that introduction, at least, of a simplified amendment procedure would require either constitutional or legislative amendment. It was noted that this would also be the case for amendment of the Convention by the usual procedure of ratified protocol. This problem was therefore considered to be surmountable in practice.
- e. No problems under international law were identified concerning application of a simplified amendment procedure.

23. It was noted that potential complications under national law could in most cases be overcome if the scope of provisions subject to a simplified amendment

22. It should be noted that three experts reserved their position on whether or not this approach would resolve their constitutional problem with application of a simplified amendment procedure.

procedure were clearly and exhaustively determined in advance and if only those of strictly organisational or procedural nature, not touching upon rights or obligations of States or applicants, were included (see section A above). A conclusive determination of whether problems might exist under national law could, however, only be made on the basis of final draft text concerning provisions subject to a simplified amendment procedure.

G. Whether and how to continue work on the issue of a simplified amendment procedure

24. The CDDH fully agrees with the Group of Wise Persons' argument that introduction of a simplified amendment procedure for certain provisions of the Convention "could prove effective in the long term as a tool for making the Convention system more flexible and capable of adapting to new circumstances" (see paragraph 2 above). Although the list of provisions from section II of the Convention that could be made subject to such a procedure, as preliminarily identified by the CDDH, is shorter than that proposed by the Group of Wise Persons (see section A above), the CDDH still considers that there would be significant value in introducing it.

25. Many experts considered that introducing a simplified amendment procedure by way of a Statute, in particular one with some provisions subject to a simplified amendment procedure and some not, would allow for further potential advantages in future. Subject to the CDDH being given appropriate terms of reference, additional Rules of Court or other matters could have their normative status enhanced through "upgrading" into such a Statute (see further at section B above), which would thereby develop and be enriched over time; indeed, this should be considered an essential characteristic of any Statute. If so, further consideration should be given to a procedure for introducing into a Statute such additional provisions (whose amendment would thereafter be subject to a simplified procedure), in order to maximise this potential advantage. Since provisions that would be subject to a simplified amendment procedure must be of the nature defined in section A above, it was suggested that their transfer from the Rules of Court or elsewhere (other than the Convention) to a Statute could itself be by way of a simplified procedure.

26. It is recalled that, although certain national legal problems may exist, none of them are said to be insurmountable (see section F).

27. On the other hand, several experts considered that whilst the original rationale of the exercise, as suggested by the Group of Wise Persons, had been simplification, the current proposals appeared complicated. This was especially so in relation to the transfer of provisions from the Rules of Court to a Statute or the Convention, where they would be subject to a far more complex and lengthy modification procedure than at present.

28. Some experts have suggested that a simplified amendment procedure might well never be used and have thus questioned its true potential to increase the flexibility of the Convention system. In this connection, reference was made to Article 26(2) of the Convention (concerning possible reduction in the size of Chambers of the Court), which has not been applied since the entry into force of Protocol No. 14.

29. In addition, certain experts feared that their national parliaments may be reluctant to ratify a Protocol introducing a simplified amendment procedure that would in future exclude their role in amendment of certain provisions currently found in the Convention. It was recalled, however, that the procedure would be designed in such a way as to minimise this risk.

30. Finally, the CDDH recalled the decisions taken at the 122nd Session of the Committee of Ministers (23 May 2012), by which the CDDH was instructed to engage in a lengthy series of activities according to challenging deadlines over the course of the 2012-2013 biennium, including the preparation of two draft protocols to the Convention.²³ Against this background and given that many considered the simplified amendment procedure to be a proposal whose practical benefits would not in any case be manifest in the short term, the CDDH concluded that these other activities should be given priority. It also felt that it would not be appropriate to include the more potentially controversial issue of the simplified amendment procedure in the envisaged Protocol No. 15.²⁴

H. Other considerations

31. As noted above, some experts have shown great interest in “upgrading” into a Statute a number of provisions now contained in the Rules of the Court, such that the Court would no longer have the autonomy to amend these rules itself; instead, all amendments to them would have to be approved by the Committee of Ministers. The CDDH came, however, to the conclusion that it would not be feasible, given the time and budgetary constraints, to undertake such a process satisfactorily under the current terms of reference. It therefore concluded that such work could take place in future in a separate body with appropriate terms of reference.

III. CONCLUSIONS

32. On the basis of the above, the CDDH draws the following conclusions:
- a. The Convention system would benefit from the introduction of a simplified amendment procedure for certain provisions of the Convention.
 - b. Such a procedure should be introduced, despite the various problems and counter-arguments mentioned above.
 - c. A majority of experts would prefer such a procedure to be introduced by way of a Statute of the Court. Most would prefer that a Statute contain provisions relating to all of the issues found in section II of the Convention, although the Convention could retain provisions relating to certain key issues currently found in section II; some of the provisions of such a Statute would be subject to a simplified amendment procedure, others not.
 - d. Some experts would prefer such a procedure to be introduced by way of a new provision in the Convention. Most of these experts could, however, also accept introduction by way of a Statute, for some on condition that it have the legal status of a treaty.

23. See doc. CDDH(2012)008, “the Committee of Ministers’ decisions”.

24. See doc. CDDH(2012)009REV.

- e. Certain other matters – namely interim measures under Rule 39 of the Rules of Court, the pilot judgment procedure under Rule 61, and unilateral declarations – should have their normative status enhanced by “upgrading” either into the Convention or, preferably, a Statute. Almost all considered that the resulting provisions should not be subject to a simplified amendment procedure.
 - f. Many experts also see potential future advantage in introducing a Statute that could develop and be enriched through transfer to it of additional provisions currently found in the Rules of Court or elsewhere.
 - g. There is agreement on the modalities of the simplified amendment procedure itself.
33. Despite this considerable degree of agreement on many key legal and technical aspects, the CDDH has come to the conclusion that it would not at present be opportune for it to be given terms of reference to proceed to the elaboration of a draft protocol introducing a simplified amendment procedure, for the following reasons:
- ▶ although the procedure of amendment itself would be simplified, the current proposals taken as a whole involve a considerable degree of complexity;
 - ▶ although a mechanism has been proposed that should allow time for necessary national procedures to be completed, it is not definitively excluded that some States may have constitutional difficulties in applying a simplified amendment procedure;
 - ▶ although the aforementioned mechanism may address some difficulties, certain experts considered that their national parliaments may be reluctant to ratify a Protocol introducing a simplified amendment procedure;
 - ▶ against this background, other issues concerning reform of the Court and the Convention system, notably those mentioned in the Committee of Ministers’ decisions, are more urgent and should be given priority.
34. The CDDH therefore proposes to return to the issue in future, once it has completed work on the priority issues set out in the Committee of Ministers’ decisions for the current biennium, with a view to resolving any outstanding matters and requesting any necessary decisions of the Committee of Ministers, as appropriate.

APPENDIX I

Terms of reference of the DH-PS²⁵

1. Name of Committee

Committee of Experts on a simplified procedure for amendment of certain provisions of the European Convention on Human Rights (DH-PS)

2. Type of Committee

Committee of Experts

3. Source of terms of reference:

The Committee of Ministers on the proposal of the Steering Committee for Human Rights (CDDH)

4. Terms of reference

Having regard to:

- ▶ Resolution Res(2005)47 on committees and subordinate bodies, their terms of reference and working methods;
- ▶ the Declaration and Action Plan adopted at the High-level Conference on the future of the European Court of Human Rights (Interlaken, 18-19 February 2010), as endorsed by the Committee of Ministers at their 120th Session (Strasbourg, 11 May 2010);
- ▶ the Declaration and the Action Plan adopted at the Third Summit of Heads of State and Government of the Council of Europe member states (Warsaw, 16-17 May 2005; CM(2005)80 final, 17 May 2005), in particular chapter I.1. “Ensuring the continued effectiveness of the European Convention on Human Rights”;
- ▶ the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5) and Protocol No. 14 to the ECHR, amending the control system of the Convention (2004, CETS No. 194).

Under the authority of the Steering Committee for Human Rights (CDDH) and in relation with the implementation of the project 2008/DGHL/1403 “Enhancing the control system of the European Court of Human Rights” of the Programme of Activities, the Committee is instructed to:

- i. examine in depth proposals for making it possible to simplify amendment of the Convention’s provisions, with such a procedure to be introduced by means of an amending Protocol to the Convention;

25. Adopted on 9 July 2010 (see doc. CM/Del/Dec(2010)1090/1.10/appendix8E) and extended on 7 December 2011 (see doc. CM/Del/Dec(2011)1129/4.6aE), by the Committee of Ministers.

- ii. consider in particular including the following elements within a possible Statute and/or new Convention provisions:
 - ▶ certain provisions contained in section II of the European Convention on Human Rights, with revision where necessary;
 - ▶ certain provisions found in the Rules of the Court, with modification where necessary;
 - ▶ other matters, including certain provisions found in other relevant treaties;
- iii. consider which bodies should be involved in the procedure, including in particular the possible roles of the Committee of Ministers, the European Court of Human Rights and the Parliamentary Assembly (see also further below);
- iv. consider the most appropriate modality for the introduction of such a procedure, whether by (i) inclusion of relevant issues in a Statute of the Court, with a new provision in the Convention establishing the Statute and its amendment procedure and/or (ii) (a) new provision(s) in the Convention allowing certain other provisions of the Convention to be amended by a simplified procedure;
- v. consider the precise operation of the new procedure, including the questions of:
 - ▶ which body or bodies should have the right to propose amendments;
 - ▶ which body or bodies approval should be required to adopt amendments;
 - ▶ whether any decisions on adoption of amendments in the Committee of Ministers should be by majority, and if so whether simple or qualified, by unanimity or by a “non-opposition” procedure of implied consent;
- vi. take into account relevant elements of the Wise Persons’ report, as well as of the contributions made on it by the Parliamentary Assembly, the Court, the Secretary General, the Commissioner for Human Rights and civil society, in reply to the invitation given at the 984th meeting of the Ministers’ Deputies (17 January 2007);
- vii. in addition to the Interlaken Conference, take into account also the results of the Colloquy on the future developments of the European Court of Human Rights in the light of the Wise Persons’ report (San Marino, 22-23 March 2007) and the results of other activities and initiatives relating to the reform of the ECHR system, including those undertaken by Sweden, Norway and Poland.

5. Composition of the Committee

A. Members

- ▶ Governments of member states are entitled to appoint representatives with the relevant qualifications concerning procedures in the framework of international human rights protection instruments, in particular the European Convention on Human Rights.
- ▶ The Council of Europe budget will bear the travel and subsistence expenses of 14 members appointed by the following member states: Iceland (Chair), Armenia, Austria, Bulgaria, Czech Republic, Estonia, Finland, France, Greece, Poland, Russian Federation, Sweden, Switzerland and United Kingdom.

- ▶ The above-mentioned states may send (an) additional representative(s) to meetings of the Committee at their own expense.
- ▶ Members appointed by the following states will have their travel and subsistence expenses borne by their national authorities: Belgium, Germany, the Netherlands, Norway.
- ▶ Representatives appointed by other member states may participate in the meetings of the Committee at the expense of these states.
- ▶ Each member state participating in the meetings of the Committee has the right to vote in procedural matters.

B. Participants

- i. The following committees may each send a representative to meetings of the Committee, without the right to vote and at the expense of the corresponding Council of Europe budgetary article:
 - ▶ the European Commission for the Efficiency of Justice (CEPEJ);
 - ▶ the European Commission for Democracy through Law (“Venice Commission”).
- ii. The Parliamentary Assembly may send (a) representative(s) to meetings of the Committee, without the right to vote and at the expense of its administrative budget.
- iii. The Council of Europe Commissioner for Human Rights may send (a) representative(s) to meetings of the Committee, without the right to vote and at the expense of its administrative budget.
- iv. The Registry of the European Court of Human Rights may send (a) representative(s) to meetings of the Committee, without the right to vote and at the expense of its administrative budget.
- v. The Conference of INGOs of the Council of Europe may send (a) representative(s) to meetings of the Committee, without the right to vote and at the expense of the body that (s)he (they) represent(s).

C. Other participants

- i. The European Commission and the Council of the European Union may send (a) representative(s) to meetings of the Committee, without the right to vote or defrayal of expenses.
- ii. States with observer status of the Council of Europe (Canada, Holy See, Japan, Mexico, United States of America) may send (a) representative(s) to meetings of the Committee, without the right to vote or defrayal of expenses.
- iii. The following bodies and intergovernmental organisations may send (a) representative(s) to meetings of the Committee, without the right to vote or defrayal of expenses:
 - ▶ Organisation for Security and Co-operation in Europe (OSCE) / Office for Democratic Institutions and Human Rights (ODIHR);
 - ▶ Office of the United Nations High Commissioner for Human Rights.

D. Observers

The following non member state:

- ▶ Belarus;
and the following non-governmental organisations and other bodies:
 - ▶ Amnesty International;
 - ▶ International Commission of Jurists (ICJ);
 - ▶ International Federation of Human Rights (FIDH);
 - ▶ European Roma and Travellers Forum;
 - ▶ European Group of National Institutions for the Promotion and Protection of Human Rights
- may send (a) representative(s) to meetings of the Committee, without the right to vote or defrayal of expenses.

6. Working methods and structures

In order to fulfil its tasks, the Committee:

- ▶ may authorise the participation of other participants and/or observers, without the right to vote or defrayal of expenses;
- ▶ is authorised to seek, as appropriate and within its budgetary appropriations, the advice of experts, to have recourse to studies prepared by consultants and to consult relevant non-governmental organisations and other members of civil society.

Bearing in mind the specific nature of this work, it would in the first place be for the Committee of Experts for the improvement of procedures for the protection of human rights (DH-PR) to give appropriate directions to this Committee of experts of restricted composition. The Committee will report on its activities to the DH-PR. The DH-PR will then report to the CDDH.

It should be noted that the research, negotiation and drafting work on this issue will take a relatively long time.

7. Duration

These terms of reference will expire on 15 April 2012.

APPENDIX II

List of documents

Title	Reference
▶ Compilation of documents relevant to the discussion of a simplified procedure for amendment of certain provisions of the Convention (Document prepared by the Secretariat)	DH-PS(2010)001
▶ Compilation of participants' written contributions to discussions at the first meeting (Document prepared by the Secretariat)	DH-PS(2010)002
▶ Interlaken Follow-up: Simplified Procedure for Amending the Convention (Idea of a Court Statute) (document submitted by the Court)	#3272054_v1
▶ Proposal for a Draft Statute of the European Court of Human Rights, by Professor Helen Keller, Daniela Kühne & Andreas Fischer, University of Zurich (English only)	DH-PS(2010)003
▶ Compatibility of a possible simplified amendment procedure with domestic law: Compilation of information provided by member States (document prepared by the Secretariat)	DH-PS(2011)001
▶ Modalities for the introduction of a simplified amendment procedure: Possible illustrative models (document prepared by the Secretariat)	DH-PS(2011)002 (+ REV.1, REV.2 & REV.3)
▶ Internal Council of Europe procedure for preparation and adoption of international treaties (document prepared by the Secretariat)	DH-PS(2011)003
▶ Compatibility of a possible simplified amendment procedure with domestic law: Limitations of the scope of a possible simplified amendment procedure – Extract from the information provided by member States (prepared by the Secretariat)	DH-PS(2011)005
▶ Opinion of the Committee of legal advisers on public international law (CAHDI) concerning the introduction of a simplified amendment procedure for amendment of certain provisions of the ECHR	DH-PS(2011)006

Title	Reference
▶ Submission of the European Group of National Human Rights Institutions on Reform of the European Court of Human Rights to the Committee of experts on a simplified procedure for amendment of certain provisions of the European Convention on human rights (English only)	DH-PS(2011)007
▶ Comments of the International Commission of Jurists, Amnesty International, Liberty, JUSTICE, AIRE Centre and Interights (English only)	DH-PS(2011)008
▶ Letter from the President of the Court to the Chairperson of the CDDH, 12 June 2012	

APPENDIX III

*The scope of provisions that could be subject to a simplified amendment procedure –
outcome of the Committee’s discussions*

PART I: Provisions on which there is provisional consensus that they should be subject to amendment by a simplified procedure²⁶

Provision	Content	Position of the Group of Wise Persons ^a	Preliminary arguments in favour of subjection to SAP ^b	Preliminary arguments against subjection to SAP	Other comments
Article 24(2) – Registry and rapporteurs	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.	Not subject to a SAP	This provision is not fundamental to the institution of the Court.		It could also be transferred to the Rules of Court.

26. Any re-drafting of provisions on this table is for illustrative purposes only and is not intended as a proposal for amendment of those provisions.

Provision	Content	Position of the Group of Wise Persons ^a	Preliminary arguments <u>in favour</u> of subjection to SAP ^b	Preliminary arguments <u>against</u> subjection to SAP	Other comments
Article 26(1) bis – Single-judge formation, Committees, Chambers and Grand Chamber	1. bis Committees shall consist of three judges, Chambers of seven judges and the Grand Chamber of seventeen judges.	Subject to a SAP	Flexible reform of the judicial formations would facilitate future enhancement of the Court's productivity. The size of certain judicial formations should be subject to a SAP.		Article 26(1) could be divided into parts, some subject to a SAP, others not (see also under Part II below).
Article 26(2) & (5) – Single-judge formation, Committees, Chambers and Grand Chamber	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. [...] 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.	Subject to a SAP	Paragraph (2) already reflects a SAP. Paragraph (5) is not fundamental to the institution of the Court.		

Provision	Content	Position of the Group of Wise Persons ^a	Preliminary arguments <u>in favour</u> of <u>subjection to SAP</u> ^b	Preliminary arguments <u>against</u> <u>subjection to SAP</u>	Other comments
<p>Article 27 – Competence of single judges</p>	<p>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.</p>	<p>Subject to a SAP</p>	<p>This article contains essentially organisational/ procedural matters.</p>	<p>Application of the principle of judicial decision-making should not be subject to a SAP.</p>	<p>The principle of judicial decision-making should not be subject to a SAP; other elements of Article 27 could be subject to it. The DH-GDR is discussing the possibility of giving non-judicial officials (e.g. senior registry staff) the authority to exercise powers currently exercised by single judges.</p>

Provision	Content	Position of the Group of Wise Persons ^a	Preliminary arguments <u>in favour</u> of <u>subjecting to SAP</u> ^b	Preliminary arguments <u>against</u> <u>subjecting to SAP</u>	Other comments
<p>Article 28 – Competence of Committees</p>	<p>1. In respect of an application sub-mitted 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.</p> <p>2. Decisions and judgments under paragraph 1 shall be final</p> <p>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).</p>	<p>Subject to a SAP</p>	<p>This article contains essentially organisational/ procedural matters.</p>	<p>Application of the principle of judicial decision-making should not be subject to a SAP.</p>	<p>The principle of judicial decision-making should not be subject to a SAP; other elements of Article 28 could be subject to it.</p>

Provision	Content	Position of the Group of Wise Persons ^a	Preliminary arguments <u>in favour</u> of subjection to SAP ^b	Preliminary arguments <u>against</u> subjection to SAP	Other comments
<p>Article 29 – Decisions by Chambers on admissibility and merits</p>	<p>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.</p>	<p>Subject to a SAP^b</p>	<p>This article is essentially procedural.</p>	<p>The principle of judicial decision-making should not be subject to a SAP; it should be contained in a treaty.</p>	<p>The principle of judicial decision-making should not be subject to a SAP; other elements of Article 29 could be subject to it. A Statute could provide a treaty basis for the principle.</p>
<p>Article 30 – Relinquishment of jurisdiction to the Grand Chamber</p>	<p>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.</p>	<p>Subject to a SAP^b</p>	<p>This article is essentially procedural.</p>		

Provision	Content	Position of the Group of Wise Persons ^a	Preliminary arguments <u>in favour</u> of submission to SAP ^b	Preliminary arguments <u>against</u> submission to SAP	Other comments
<p><u>Article 31</u> – Powers of the Grand Chamber</p>	<p>The Grand Chamber shall</p> <ol style="list-style-type: none"> (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 § 4; and (c) consider requests for advisory opinions submitted under Article 47. 	<p>Subject to a SAP</p>	<p>Article 31 relates to Article 30.</p>		
<p><u>Article 39(2)-(4)</u> – Friendly settlements</p>	<ol style="list-style-type: none"> 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. 	<p>Subject to a SAP</p>	<p>Friendly settlements are an important tool (the principal as such (Article 39(1)) should therefore not be subject to a SAP) but could be developed and more widely used.</p>		

Provision	Content	Position of the Group of Wise Persons ^a	Preliminary arguments in favour of submission to SAP ^b	Preliminary arguments against submission to SAP	Other comments
Article 43(2) & (3) – Referral to the Grand Chamber	2. A panel of five judges of the Grand Chamber shall decide whether to accept the request 3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.	Subject to a SAP	Paragraphs (2) and (3) are organisational/ procedural. A SAP would be useful were it considered desirable to change the Grand Chamber's jurisdiction or its relations with the Chambers.		The principal as such should not be subject to a SAP, while its modality could.
Article 47(3) – Advisory opinions	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.	Not subject to a SAP	Paragraph (3) is essentially procedural.		This provision concerns Committee of Ministers' procedures, not those of the Court.
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.	Subject to a SAP	This article contains procedural elaboration of Article 47.		

- a. The criterion governing the Group of Wise Persons' approach was "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" (see doc. CM(2006)203, "Report of the Group of Wise Persons to the Committee of Ministers," 15 November 2006).
- b. "SAP" = simplified amendment procedure.
- c. [Opinions differed on whether this provision should be subject to a SAP, with the majority considering that it should.]
- d. [Opinions differed on whether this provision should be subject to a SAP, with the majority considering that it should.]

PART II: Provisions on which there is provisional consensus that they should not be subject to amendment by a simplified procedure²⁷

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against subjection to SAP	Preliminary arguments in favour of subjection to SAP	Other comments
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. The Court shall consist of a number of judges equal to that of the High Contracting Parties.	Not subject to a SAP	This is a fundamental provision which establishes the very existence of the Court.		The Court’s essential role should be clarified.
Article 20 – Number of judges		Not subject to a SAP	This contains the fundamental principle that a judge is elected in respect of each High Contracting Party (see also Article 22).		This provision may be reconsidered depending on the outcome of DH-GDR consideration of the suggestion that a new filtering mechanism be composed of ad hoc judges.

27. Any re-drafting of provisions on this table is for illustrative purposes only and is not intended as a proposal for amendment of those provisions.

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments <u>against</u> subjection to SAP	Preliminary arguments in <u>favour</u> of subjection to SAP	Other comments
Article 21 – Criteria for office	<p>1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurists of recognised competence.</p> <p>2. The judges shall sit on the Court in their individual capacity.</p> <p>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.</p>	Not subject to a SAP	This contains a fundamental principle ensuring the quality of judges and the standing of the Court.		There may in future be a need to add to the criteria for office to include e.g. gender balance and linguistic competence.
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.	Not subject to a SAP	This is a fundamental provision contributing to judicial independence.		

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments <u>against</u> subjection to SAP	Preliminary arguments in <u>favour</u> of subjection to SAP	Other comments
Article 23 – Terms of office and dismissal	<ol style="list-style-type: none"> 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. 	Not subject to a SAP	This is a fundamental principle contributing to judicial independence.		
Article 24(1) – Registry and rapporteurs	<ol style="list-style-type: none"> 1. The Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court. 	Not subject to a SAP			

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against <u>subjection to SAP</u>	Preliminary arguments in <u>favour of subjection to SAP</u>	Other comments
Article 25 (a)-(c) & (e)-(f) – Plenary Court	The plenary Court shall (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; [...] (e) elect the Registrar and one or more Deputy Registrars; (f) make any request under Article 26 § 2.	Subject to a SAP			The provisions of Article 25 could be revised but should remain in the Convention.
Article 25(d) – Plenary Court	The plenary Court shall [...] (d) adopt the rules of the Court;	Subject to a SAP	The Court's power to adopt its own Rule of Court is fundamental to its operational independence.		
Article 26(1) – 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, in Chambers and in a Grand Chamber. The Court's Chambers shall set up Committees for a fixed period of time.	Subject to a SAP	The various judicial formations define the Court's functioning.		Article 26(1) could be divided into parts, some subject to a SAP, others not (see also under Part I above).

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against <u>subjection to SAP</u>	Preliminary arguments in <u>favour of subjection to SAP</u>	Other comments
Article 26(3) – Single-judge formation, Committees, Chambers and Grand Chamber	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.	Subject to a SAP	This reflects the important consideration of actual and apparent impartiality underlying the introduction of the single-judge procedure.	There is a need for flexible amendment should in the future the single-judge formation be considered no longer necessary.	
Article 26(4) – Single-judge formation, Committees, Chambers and Grand Chamber	4. There shall sit as an <i>ex officio</i> 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.	Subject to a SAP	The presence of the “national judge” is important to the judicial functioning of the Court.	Underlying related provisions may be subject to a SAP.	
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.	Not subject to a SAP			

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments <u>against</u> subjection to SAP	Preliminary arguments in <u>favour of</u> subjection to SAP	Other comments
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.	Not subject to a SAP			
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.	Not subject to a SAP			

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments <u>against</u> subjection to SAP	Preliminary arguments in <u>favour of</u> subjection to SAP	Other comments
Article 35 – Admissibility criteria	<p>1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of inter-national law, and within a period of six months from the date on which the final decision was taken.</p> <p>2. The Court shall not deal with any application submitted under Article 34 that</p> <ul style="list-style-type: none"> (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. <p>3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:</p>	<p>Not subject to a SAP</p>	<p>The Court does not apply any hierarchy to the admissibility criteria; all are fundamental to the right of individual petition.</p> <p>The admissibility criteria are very sensitive issues; to make them subject to a SAP would greatly complicate later discussions on modalities of adoption and the simplified procedure itself.</p>	<p>Paragraphs (2) & (3) are less fundamental than (1) and could be subject to a SAP, allowing greater flexibility in future.</p>	

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments <u>against</u> submission to SAP	Preliminary arguments in <u>favour</u> of submission to SAP	Other comments
	<p>(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</p> <p>(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.</p> <p>4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.</p>				

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against <u>subjection to SAP</u>	Preliminary arguments in <u>favour of subjection to SAP</u>	Other comments
<p>Article 36 – Third party intervention.</p>	<p>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.</p> <p>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.</p> <p>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.</p>	<p>Subject to a SAP</p>	<p>This is not a provision concerning organisation and is not a purely procedural provision.</p> <p>Paragraph (1) contains a right; paragraph (2) contains a prerogative.</p> <p>Third party interventions play an important role in the Court's proceedings.</p> <p>Certain conceivable amendments could have significant effects.</p> <p>There is no obvious need to increase the flexibility of the current provision; the Rules of Court and the Court's practice allow for all reasonable requirements.</p>	<p>Third party interventions are not fundamental to the Court as an institution.</p> <p>Any possible amendment would not be so radical as to exclude a SAP.</p>	<p>Some situations are not adequately covered by existing provisions, e.g. third party interventions by non-States parties.</p>

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against <u>subjection to SAP</u>	Preliminary arguments in <u>favour of</u> <u>subjection to SAP</u>	Other comments
<p>Article 37 – Striking out applications</p>	<p>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</p> <p>(a) the applicant does not intend to pursue his application; or</p> <p>(b) the matter has been resolved; or</p> <p>(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.</p> <p>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.</p> <p>2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.</p>	<p>Subject to a SAP</p>	<p>Striking out is an important part of the Court's exercise of judicial authority; it is linked to Article 19.</p> <p>Power to strike out is of crucial significance to the right of individual petition, it is linked to Articles 34 & 35.</p> <p>The "respect for human rights" and restoration clauses are necessary to preserving the Court's essential role and protecting the situation of applicants.</p> <p>Article 37 already allows the Court sufficient flexibility.</p>		<p>Article 37 is not clear, e.g. the term "for any other reason" gives the Court too much interpretative margin.</p> <p>The Court should give clearer reasons for strike-out decisions.</p>

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against submission to SAP	Preliminary arguments in favour of submission to SAP	Other comments
<p>Article 38 – Examination of the case</p>	<p>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.</p>	<p>Subject to a SAP</p>	<p>This is a fundamental provision for the Court's functioning.</p> <p>Its second part is neither organisational nor procedural.</p> <p>The Court has referred to States' non-compliance with Article 38 in its judgments; amendment by ratified protocol would therefore be preferable to that by the Committee of Ministers.</p> <p>It already allows for all necessary flexibility.</p>	<p>Article 38 is not fundamental to the Court as an institution.</p>	
<p>Article 39(1) – Friendly settlements</p>	<p>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. [...]</p>	<p>Subject to a SAP</p>	<p>Friendly settlements are an important tool; the principal as such should therefore not be subject to a SAP.</p>		

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against <u>subjection to SAP</u>	Preliminary arguments in <u>favour of</u> <u>subjection to SAP</u>	Other comments
<p><u>Article 40</u> – Public hearings and access to documents</p>	<p>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.</p>	<p>Subject to a SAP</p>	<p>Open justice is a fundamental principle. There is no conceivable need for change and no need for greater flexibility.</p>		<p>This is related to Article 45 (reasons for decisions and judgments). The Rules of Court do not fully reflect the principle of public access to documents.</p>
<p><u>Article 41</u> – Just satisfaction</p>	<p>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.</p>	<p>Subject to a SAP</p>	<p>The Court's competence to award just satisfaction is fundamental to its essential role in protecting human rights. Article 41 is not an operational or procedural provision. Article 41 already allows the Court all necessary flexibility.</p>		<p>The Court's interpretation of Article 41, in particular the term "if necessary," is too wide. The Court's practice of awarding just satisfaction lacks transparency and contributes to unrealistic expectations on the part of applicants.</p>
<p><u>Article 42</u> – Judgments of Chambers</p>	<p>Judgments of Chambers shall become final in accordance with the provisions of Article 44 § 2.</p>	<p>Subject to a SAP</p>			<p>Article 42 serves no apparent purpose in the light of Article 44(2).</p>

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against <u>subjection to SAP</u>	Preliminary arguments in <u>favour of</u> <u>subjection to SAP</u>	Other comments
Article 43(1) – 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.	Subject to a SAP	Article 43(1) has connections to the right of individual petition.	The existence of the Grand Chamber is a vestige of the pre-Protocol No. 11 system and is not fundamental to the Court's functioning.	
Article 43(2) bis – Referral to the Grand Chamber	2.bis The panel 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.	Subject to a SAP	This provision defines the jurisdiction of a panel to refer cases to the Grand Chamber.		

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against <u>subjection to SAP</u>	Preliminary arguments in <u>favour of</u> <u>subjection to SAP</u>	Other comments
Article 44 – Final judgments	<p>1. The judgment of the Grand Chamber shall be final.</p> <p>2. The judgment of a Chamber shall become final</p> <p>(a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or</p> <p>(b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or</p> <p>(c) when the panel of the Grand Chamber rejects the request to refer under Article 43.</p> <p>3. The final judgment shall be published.</p>	Subject to a SAP	<p>Paragraph (1) reflects the principle of legal certainty (finality of judgments).</p> <p>Paragraph (3) is fundamental to the principle of open justice.</p>		
Article 45 – Reasons for judgments and decisions	<p>1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.</p> <p>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.</p>	Subject to a SAP	<p>Paragraph (1) is fundamental to open justice.</p> <p>Paragraph (2) contributes to the development of the case-law and understanding of the Convention and is very highly valued by the Court as providing for judicial freedom of expression.</p>		<p>The Court does not in practice give reasons for decisions that are accessible to applicants, paragraph (1) should therefore be clarified.</p>

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments <u>against</u> submission to SAP	Preliminary arguments in <u>favour of</u> submission to SAP	Other comments
<p>Article 46(1) & (2) – Binding force and execution of judgments</p>	<p>1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.</p> <p>2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.</p>	<p>Not subject to a SAP</p>	<p>Paragraphs (1) and (2) contain fundamental principles governing the status of the Court and the institutional role of the Committee of Ministers.</p> <p>They have existed since the inception of the Convention system and there has never been any need to increase their flexibility or otherwise amend them.</p>		

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against <u>subjection to SAP</u>	Preliminary arguments in <u>favour of</u> <u>subjection to SAP</u>	Other comments
<p>Article 46(3), (4) & (5) – Binding force and execution of judgments</p>	<p>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.</p> <p>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.</p>	<p>Not subject to a SAP</p>	<p>Paragraphs (3) and (4) were added recently in order to create flexibility in ascertaining the correct interpretation of judgments and responding to refusal to abide by a final judgment respectively.</p> <p>Discussions on paragraphs (3)-(5) were a very difficult part of the negotiation of Protocol No. 14.</p>	<p>Paragraphs (3)-(5) are essentially procedural, creating <i>lex specialis</i> for paragraphs (1)-(2). They were added relatively recently by Protocol No. 14 and there is little if any experience of their operation in practice; they may need to be adapted in future in the light of experience.</p>	<p>If transferred to a Statute, paragraphs (3)-(5) could be accompanied by relevant Committee of Ministers' rules of procedure for the supervision of the execution of judgments, since both the Committee of Ministers and the Court now play certain roles with respect to execution and its supervision.</p>

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against <u>subjection to SAP</u>	Preliminary arguments in <u>favour of</u> <u>subjection to SAP</u>	Other comments
	<p>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.</p>				
<p><u>Article 47(1)</u> – Advisory opinions</p>	<p>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.</p>	<p>Not subject to a SAP</p>	<p>Paragraph (1) is an important part of the definition of the Court's jurisdiction.</p>		
<p><u>Article 47(2)</u> – Advisory opinions</p>	<p>2. Such opinions [on legal questions concerning the interpretation of the Convention and the Protocols thereto – para. (1)] 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.</p>	<p>Not subject to a SAP</p>	<p>Paragraph (2) is closely related to paragraph (1) and contributes to defining the Court's jurisdiction.</p>		<p>Paragraph (2) may need to be amended in response to developments concerning advisory opinions, e.g. allowing superior national courts to request them.</p>

Provision	Content	Position of the Group of Wise Persons	Preliminary arguments against <u>subjection to SAP</u>	Preliminary arguments in <u>favour of subjection to SAP</u>	Other comments
Article 49 – Reasons for advisory opinions	<p>1. Reasons shall be given for advisory opinions of the Court.</p> <p>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.</p> <p>3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.</p>	<p>Subject to a SAP</p>	<p>Article 49 is the equivalent for advisory opinions of Article 45 for judgments and decisions.</p>	<p>This article contains procedural elaboration of Article 47.</p>	
Article 50 – Expenditure on the Court	<p>The expenditure on the Court shall be borne by the Council of Europe.</p>	<p>Subject to a SAP</p>	<p>The Court's budget is a very important and politically sensitive matter.</p>	<p>This is not a key, fundamental provision.</p> <p>It could be subject to a SAP involving unanimity on the part of the Committee of Ministers.</p>	<p>It should be recalled that the forthcoming accession of the EU (not a CE member State) to the ECHR and the possible introduction of fees for applicants may be relevant considerations in future.</p>
Article 51 – Privileges and immunities of judges	<p>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.</p>	<p>Not subject to a SAP</p>	<p>The privileges and immunities of international functionaries are a core principle of international law.</p>		<p>This provision could also be included in a possible Statute.</p>

APPENDIX IV

Possible treatment of provisions or matters not found in the Convention

Further details of the CDDH's discussions

As regards the three specific issues that may be suitable for “upgrading” (enhancement of their normative status) to a Statute or the Convention, the result of discussions in the CDDH was as follows:

- a. **Interim measures.** The great majority agreed that the Statute should contain the essential principle underpinning the Court’s competence to indicate interim measures and States’ obligation to abide by them and that all aspects of the issue should be addressed in a single, separate article, for clarity and visibility. Such an article should be placed in proximity to a provision on individual applications. Many experts felt that the relevant Statute provision should also clarify the circumstances in which the Court could exercise its competence. It was suggested that the Court’s own case-law could provide relevant material, notably the judgment in the case of *Al-Saadoon & Mufdhi v. the United Kingdom*, in which the Court stated that it would make an indication of interim measures under Rule 39 “only if there is an imminent risk of irreparable damage”;²⁸ alternatively, the American Convention on Human Rights could provide inspiration,²⁹ although some felt that this might be overly restrictive and that the Court’s freedom to respond to different situations should not be restricted. It was also suggested that a reasonableness criterion be included, referring notably to situations where action was interdicted when already underway. It was observed that the Court’s current practice³⁰ and revised Practice Direction should already avoid most such situations. Some felt that any attempt at regulating the Court’s ability to exercise this competence would run contrary to the aim of increasing its ability to react flexibly.
- b. **Pilot judgment procedure.** Again, the great majority agreed that the essential principle underpinning the Court’s competence to operate the pilot judgment procedure and deliver a pilot judgment should be “upgraded,” either into the Statute (Model III) or the Convention itself (Model I or, because all of its Statute’s provisions would be subject to the simplified amendment procedure, Model II). All aspects should be addressed in a single, separate article, for clarity and visibility. Such an article should be

28. App. No. 61498/08, judgment of 02/03/10, para. 160.

29. Article 63(2) of the ACHR states that “In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration.” The suggestion made in the DH-PS would replace the word “and” with “or.”

30. See, for example, the Court’s judgment in the case of *Al-Saadoon & Mufdhi v. the United Kingdom*, op. cit., para. 161.

placed in proximity to a provision on the binding force and execution of judgments. Many felt that more than just the text of Rule 61(1) was needed, although to include all of Rule 61 would be excessive, unbalanced and inappropriate; paragraphs (2) (in its first sentence), (3) and (4), however, contained important points and could be considered for inclusion. Others observed that the more of Rule 61 were transferred to a Statute, the greater would be the reduction in simplicity and flexibility, notably in the future evolution of the pilot judgment procedure.

- c. **Unilateral declarations.** Again, the great majority agreed that the Statute should contain the essential principle underpinning the use of unilateral declarations and that all aspects should be addressed in a single, separate article, for clarity and visibility. Many felt that the relevant article should refer to the need for a prior attempt to resolve the case through a friendly settlement, which should generally be preferred due to the greater involvement of the applicant. It was noted, however, that unilateral declarations were preferable in some situations, such as where a State wished to resolve a large number of similar applications at once. The relevant article could also contain a provision excluding the possibility of the Court partially accepting a State's unilateral declaration and proceeding to give judgment on the issues covered by parts it had not accepted; unilateral declarations should be accepted either in their entirety or not at all. Many felt that reference to the Court's ability to restore a case to its list was unnecessary, since such a competence would already exist under Article 19(2) of the Statute.³¹ It was suggested that a Statute provision should address the question of confidentiality, namely the possible reference that could be made in subsequent proceedings to unilateral declarations not accepted by the Court. Most were against unilateral declarations being transmitted to the Committee of Ministers for supervision of execution, since this would further over-load the latter.

31. I.e. Article 37(2) ECHR.

APPENDIX V

Modalities for the introduction of a simplified amendment procedure: Possible illustrative models

Introduction

The present document contains three illustrative models for the introduction of a simplified amendment procedure.

- ▶ **Model I** would subject certain provisions of section II of the Convention to a simplified amendment procedure, established by a new Convention provision. The list of provisions set out in the “new Article x” reflects the provisional determination of which provisions should be subject to a simplified amendment procedure and which not, as reflected in the report of the 2nd meeting.³² The model also includes possible text for new Convention provisions on interim measures, the pilot judgment procedure and unilateral declarations, *i.e.* matters not currently found in the Convention. It leaves open the question of whether or not these new provisions would be subject to the simplified amendment procedure (they are not included in the list of provisions that may be subject to the simplified amendment procedure).
- ▶ **Model II** is a Statute-based approach. It includes possible text for new Convention provisions establishing a Statute and defining the procedure for its amendment; in this model, this latter provision is included in the Convention, although it could equally well be included the Statute itself (see Model III), should the latter have the legal status of a treaty. It also includes possible text for the Statute, on the basis that all of its substantive provisions would be subject to the simplified amendment procedure. In addition, it includes text (that used in Model I) in relation to interim measures, the pilot judgment procedure and unilateral declarations as the basis for provisions introducing these matters into the Convention.

For illustrative purposes, Model II is followed in this document by section II of the Convention, as it would appear with the relevant provisions removed to a Statute.

- ▶ **Model III** is also a Statute-based approach. It suggests transferring all of section II of the Convention to a Statute, along with the possible text for provisions on interim measures, the pilot judgment procedure and unilateral declarations, and finishes with a provision setting out a simplified amendment procedure and specifying those provisions to which this procedure could apply.

32. See doc. DH-PS(2011)R2 Appendix III.

Model I

A provision in the Convention concerning provisions relating to organisational matters as well as other issues not currently found in the Convention.

New Article x of the European Convention on Human Rights

1. Amendments to the following articles of section II of this Convention may be proposed to the Committee of Ministers by any High Contracting Party or by the Court:

- ▶ Art. 24(2), concerning [non-judicial] rapporteurs assisting single judges;
- ▶ Art. 26(1), insofar as it concerns the size of non-singular judicial formations, but excluding their type;
- ▶ Art. 26(2), concerning reduction in the size of Chambers;
- ▶ Art. 26(5), concerning the composition of the Grand Chamber;
- ▶ Art. 27, insofar as it concerns the competence of single judges but excluding the principle of judicial decision-making;
- ▶ Art. 28, insofar as it concerns the competence of Committees but excluding the principle of judicial decision-making;
- ▶ [Art. 29, insofar as it concerns decisions by Chambers on admissibility and merits but excluding the principle of judicial decision-making;]
- ▶ [Art. 30 concerning relinquishment of jurisdiction to the Grand Chamber;]
- ▶ Art. 31 concerning powers of the Grand Chamber;
- ▶ Art. 39(2)-(4) concerning friendly settlements but excluding the essential principle;
- ▶ Art 43(2) & (3) concerning referral to the Grand Chamber but excluding the grounds on which the panel of five judges shall accept requests for referral;
- ▶ Art. 47(3) concerning Committee of Ministers' procedure for requesting advisory opinions;
- ▶ Art. 48 concerning the Court's advisory jurisdiction.

2. The Committee of Ministers may decide to pursue a proposal made in accordance with paragraph 1 of this article by the majority provided before in Article 20.d of the Statute of the Council of Europe.

3. After having consulted the Parliamentary Assembly, [the Commissioner for Human Rights] and, in the case of an amendment proposed by a High Contracting Party, after having also consulted the Court, the Committee of Ministers may adopt an amendment proposed in accordance with paragraph 1 of this Article by the majority provided for in Article 20.a of the Statute of the Council of Europe.

4. The Secretary General of the Council of Europe shall communicate any amendments thus adopted to the High Contracting Parties.

5. [Any amendment adopted in accordance with the above paragraph shall enter into force following the expiry of a period of [nine] months after the date on which it has been communicated by the Secretary General to the High Contracting Parties, unless, during that period, any High Contracting Party notifies the Secretary General of its objection to the entry into force of the amendment.]

Interim measures

Article 34bis – Interim measures

1 [Where there is an imminent risk of irreparable damage,]³³ a Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.³⁴

2 The High Contracting Parties undertake to abide by any interim measure indicated to them by the Court under paragraph 1.³⁵

Pilot judgment procedure

Article 45bis – Pilot judgment procedure

1 The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting State concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.

2 Before initiating a pilot-judgment procedure, the Court shall first seek the views of the parties on whether the application under examination results from the existence of such a problem or dysfunction in the Contracting State concerned and on the suitability of processing the application in accordance with that procedure.

3 The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting State concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.

4 The Court may direct in the operative provisions of the pilot judgment that the remedial measures referred to in paragraph 3 above be adopted within a specified time, bearing in mind the nature of the measures required and the speed with which the problem which it has identified can be remedied at the domestic level.

Unilateral declarations

Article 39bis – Unilateral declarations

1 [If a friendly settlement under Article 22 cannot be effected,] a High Contracting Party may make a unilateral declaration with a view to resolving the issue raised by the case.³⁶

33. See *Al-Saadoon & Mufdhi v. the United Kingdom*, App. No. 61498/08, judgment of 02/03/10, para. 160. Alternatively, this paragraph could begin with the qualification “In cases of extreme gravity and urgency or when necessary to avoid irreparable damage”, inspired by Article 63(2) of the American Convention on Human Rights.

34. Text taken from Rule 39, para. 1 of the Rules of Court.

35. Based on Article 46(1) ECHR.

36. Text partially based on Article 39(1) ECHR.

1bis The fact of a High Contracting Party having made a unilateral declaration under paragraph 1 shall be confidential.

2 If the unilateral declaration offers a sufficient basis for the Court to find that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue its examination of the case, the Court shall strike the case out of its list by means of a decision that shall be confined to a brief statement of the facts and of the undertakings given in the unilateral declaration made by the High Contracting Party.

Model II

A Statute containing provisions relating to organisational matters and other issues not currently found in the Convention (interim measures, the pilot judgment procedure and unilateral declarations).

New Article x of the European Convention on Human Rights

There shall be a Statute of the European Court of Human Rights. The Statute shall be laid down in a [Protocol to the Convention] / [Resolution that the Committee of Ministers is hereby empowered to adopt].

New Article (x+1) of the European Convention on Human Rights³⁷

1 Proposals for the amendment of the Statute may be made to the Committee of Ministers of the Council of Europe by any High Contracting Party or by the European Court of Human Rights.

2 The Committee of Ministers may decide to pursue a proposal made in accordance with paragraph 1 of this article by the majority provided before in Article 20.d of the Statute of the Council of Europe.

3 After having consulted the Parliamentary Assembly[, the Commissioner for Human Rights] and, and in the case of an amendment proposed by a High Contracting Party, after having also consulted the Court, the Committee of Ministers may adopt an amendment proposed in accordance with paragraph 1 of this Article by the majority provided for in Article 20.a of the Statute of the Council of Europe.

4 The Secretary General of the Council of Europe shall communicate any amendments thus adopted to the High Contracting Parties.

5 [Any amendment adopted in accordance with the above paragraphs shall enter into force following the expiry of a period of [nine] months after the date on which it has been communicated by the Secretary General to the High Contracting Parties, unless, during that period, any High Contracting Party notifies the Secretary General of its objection to the entry into force of the amendment.]

37. N.b. this is the same procedure as for Model I.

Interim measures

Article 34bis – Interim measures

1 [Where there is an imminent risk of irreparable damage,]³⁸ a Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.³⁹

2 The High Contracting Parties undertake to abide by any interim measure indicated to them by the Court under paragraph 1.⁴⁰

Pilot judgment procedure

Article 45bis – Pilot judgment procedure

1 The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting State concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.

[2 Before initiating a pilot-judgment procedure, the Court shall first seek the views of the parties on whether the application under examination results from the existence of such a problem or dysfunction in the Contracting State concerned and on the suitability of processing the application in accordance with that procedure.

3 The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting State concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.

4 The Court may direct in the operative provisions of the pilot judgment that the remedial measures referred to in paragraph 3 above be adopted within a specified time, bearing in mind the nature of the measures required and the speed with which the problem which it has identified can be remedied at domestic level.

Unilateral declarations

Article 39bis – Unilateral declarations

1 [If a friendly settlement under Article 22 cannot be effected,] a High Contracting Party may make a unilateral declaration with a view to resolving the issue raised by the case.⁴¹

38. See *Al-Saadoon & Mufdhi v. the United Kingdom*, App. No. 61498/08, judgment of 02/03/10, para. 160. Alternatively, this paragraph could begin with the qualification “In cases of extreme gravity and urgency or when necessary to avoid irreparable damage”, inspired by Article 63(2) of the American Convention on Human Rights.

39. Text taken from Rule 39, para. 1 of the Rules of Court.

40. Based on Article 46(1) ECHR

41. Text partially based on Article 39(1) ECHR.

1bis The fact of a High Contracting Party having made a unilateral declaration under paragraph 1 shall be confidential.

2 If the unilateral declaration offers a sufficient basis for the Court to find that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue its examination of the case, the Court shall strike the case out of its list by means of a decision that shall be confined to a brief statement of the facts and of the undertakings given in the unilateral declaration made by the High Contracting Party.

STATUTE OF THE EUROPEAN COURT OF HUMAN RIGHTS⁴²

Article 1 (24 ECHR)⁴³ – Registry and rapporteurs

1 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 2 (26(1)⁴⁴ and 26(2) & (5) ECHR) – Single-judge formation, committees, Chambers and Grand Chamber

1 Committees shall consist of three judges, Chambers of seven judges and the Grand Chamber of seventeen judges.

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 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 12 (43 ECHR), 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 3 (27 ECHR) – 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 29 of the Convention,⁴⁵ where such a decision can be taken without further examination.

42. This illustrative model Statute comprises the text of section II of the Convention, including only those provisions provisionally identified by the DH-PS as suitable for a simplified amendment procedure and with the addition of provisions concerning interim measures, the pilot judgment procedure and unilateral declarations.

43. The numbers in italics between brackets that follow the numbers of articles of the Statute relate to articles of the Convention as it currently reads.

44. Only the part of Art. 26(1) of the Convention concerning the size of non-singular judicial formations should be subject to a simplified amendment procedure.

45. For the purposes of this model Statute, the numbering of Convention articles relates to the Convention as it would read if amended by removal of certain provisions to the Statute (see the second part of Model II).

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 4 (28 ECHR) – Competence of committees

1 In respect of an application submitted under Article 29 of the Convention, 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 5 (29 ECHR) – Competence of Chambers

1 If no decision is taken under Article 3 or 4 (27 or 28 ECHR), or no judgment rendered under Article 4 (28 ECHR), a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 29 of the Convention. 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 28 of the Convention. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.]

[Article 6 (30 ECHR) – 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 7 (31 ECHR) – Powers of the Grand Chamber

The Grand Chamber shall

a determine applications submitted either under Article 28 or Article 29 of the Convention when a Chamber has relinquished jurisdiction under Article 6 (30 ECHR) or when the case has been referred to it under Article 11 (43 ECHR);

- b decide on issues referred to the Court by the Committee of Ministers in accordance with Article 40, paragraph 4 of the Convention; and
- c consider requests for advisory opinions submitted under Article 41 of the Convention.

Article 9 (39 ECHR) – Friendly settlements

- 1 Proceedings conducted under Article 34 of the Convention shall be confidential.
- 2 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.
- 3 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 12 (43 ECHR) – Referral to the Grand Chamber

- 1 A panel of five judges of the Grand Chamber shall accept a request made under Article 37 paragraph 1 of the Convention 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.
- 2 If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Article 15 (47 ECHR) - Advisory opinions

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 16 (48 ECHR) – 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 41 of the Convention.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Section II

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.

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.

Article 25

Plenary Court

The plenary Court shall

- 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;
- e elect the Registrar and one or more Deputy Registrars;
- f make any request under Article 2 of the Statute of the Court.

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, in Chambers and in a Grand Chamber. The Court's Chambers shall set up Committees for a fixed period of time.

2 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.

3 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.

Article 27

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 28, 29, 40 and 41.

2 In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 28

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 29

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 30

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 inter-national 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 29 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 29 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 31

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.

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 32

Striking out applications

1 The Court may at any stage of the proceedings decide to strike an applica-tion 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 33

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 34

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.

Article 35

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.

Article 36

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 37

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.

Article 38

Final judgments

- 1 The judgment of the Grand Chamber shall be final.
- 2 The final judgment shall be published.

Article 39

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 40

Binding force and execution of judgments

- 1 The High Contracting Parties under-take 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 41

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.

Article 42

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 43

Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 44

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.

Model III

A Statute containing the provisions currently found in section II of the Convention and other issues not currently found in the Convention (namely interim measures, the pilot judgment procedure and unilateral declarations).

New Article 19 of the European Convention on Human Rights

There shall be a European Court of Human Rights, hereinafter referred to as “the Court”. The Statute of the Court shall be laid down in a [Protocol to the Convention] / [Resolution that the Committee of Ministers is hereby empowered to adopt].

Statute of the European Court of Human Rights⁴⁶

Article 1 (19 ECHR) – Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto and in this Statute, there shall be set up a European Court of Human Rights, hereinafter referred to as “the Court.” It shall function on a permanent basis.

46. This illustrative model Statute comprises the text of section II of the Convention, with the addition (in italics) of the illustrative text concerning interim measures, the pilot judgment procedure and unilateral declarations as set out in Model II. Where new article numbering has been adopted, the numbers in brackets refer to the relevant articles of the Convention.

Article 2 (20 ECHR) – Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 3 (21 ECHR) – 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 4 (22 ECHR) – 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 5 (23 ECHR) – 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 6 (24 ECHR) – 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 7 (25 ECHR) – Plenary Court

The plenary Court shall

- 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;
- e elect the Registrar and one or more Deputy Registrars;
- f make any request under Article 8, paragraph 2.

Article 8 (26 ECHR) – 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 27, 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 9 (27 ECHR) – 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 16, 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 10 (28 ECHR) – Competence of committees

1 In respect of an application submitted under Article 16, 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 proceed-

ings 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 11 (29 ECHR) – Competence of Chambers

1 If no decision is taken under Article 9 or 10, or no judgment rendered under Article 10, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 16. 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 15. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Article 12 (30 ECHR) – 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 13 (31 ECHR) – Powers of the Grand Chamber

The Grand Chamber shall

- a determine applications submitted either under Article 15 or Article 16 when a Chamber has relinquished jurisdiction under Article 12 or when the case has been referred to it under Article 27;
- b decide on issues referred to the Court by the Committee of Ministers in accordance with Article 31, paragraph 4; and
- c consider requests for advisory opinions submitted under Article 32.

Article 14 (32 ECHR) – 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 15, 16, 31 and 32.

2 In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 15 (33 ECHR) – 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 16 (34 ECHR) – 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 17 – Interim measures

1 [Where there is an imminent risk of irreparable damage,]⁴⁷ a Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.⁴⁸

2 The High Contracting Parties undertake to abide by any interim measure indicated to them by the Court under paragraph 1.⁴⁹

Article 18 (35 ECHR) – 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 16 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 16 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.

47. See *Al-Saadoon & Mufdhi v. the United Kingdom*, App. No. 61498/08, judgment of 02/03/10, para. 160. Alternatively, this paragraph could begin with the qualification “In cases of extreme gravity and urgency or when necessary to avoid irreparable damage”, inspired by Article 63(2) of the American Convention on Human Rights.

48. Text taken from Rule 39, para. 1 of the Rules of Court.

49. Based on Article 46(1) ECHR

Article 19 (36 ECHR) – 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.

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 20 (37 ECHR) – 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 21 (38 ECHR) – 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 22 (39 ECHR) – 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 23 – Unilateral declarations

1 [If a friendly settlement under Article 22 cannot be effected,] a High Contracting Party may make a unilateral declaration with a view to resolving the issue raised by the case.⁵⁰

1bis The fact of a High Contracting Party having made a unilateral declaration under paragraph 1 shall be confidential.

2 If the unilateral declaration offers a sufficient basis for the Court to find that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue its examination of the case, the Court shall strike the case out of its list by means of a decision that shall be confined to a brief statement of the facts and of the undertakings given in the unilateral declaration made by the High Contracting Party.

Article 24 (40 ECHR) – 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.

Article 25 (41 ECHR) – 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 26 (42 ECHR) – Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 28, paragraph 2.

Article 27 (43 ECHR) – 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 28 (44 ECHR) – Final judgments

1 The judgment of the Grand Chamber shall be final.

2 The judgment of a Chamber shall become final

50. Text partially based on Article 39(1) ECHR.

- 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 27.
- 3 The final judgment shall be published.

Article 29 (45 ECHR) – 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 30 – Pilot judgment procedure

- 1 The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting State concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.
- 2 Before initiating a pilot-judgment procedure, the Court shall first seek the views of the parties on whether the application under examination results from the existence of such a problem or dysfunction in the Contracting State concerned and on the suitability of processing the application in accordance with that procedure.
- 3 The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting State concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.
- 4 The Court may direct in the operative provisions of the pilot judgment that the remedial measures referred to in paragraph 3 above be adopted within a specified time, bearing in mind the nature of the measures required and the speed with which the problem which it has identified can be remedied at the domestic level.

Article 31 (46 ECHR) – 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 32 (47 ECHR) – 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 33 (48 ECHR) – 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 32.

Article 34 (49 ECHR) – 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 35 (50 ECHR) – Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 36 (51 ECHR) – 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.

Article 37 – Amendment of the Statute

1 Amendments to the following articles of this Statute may be proposed to the Committee of Ministers by any State Party or by the Court:

- ▶ Art. 6(2), concerning [non-judicial] rapporteurs assisting single judges;
- ▶ Art. 8(1), insofar as it concerns the size of non-singular judicial formations, but excluding their type;
- ▶ Art. 8(2), concerning reduction in the size of Chambers;
- ▶ Art. 8(5), concerning the composition of the Grand Chamber;
- ▶ Art. 9, insofar as it concerns the competence of single judges but excluding the principle of judicial decision-making;
- ▶ Art. 10, insofar as it concerns the competence of Committees but excluding the principle of judicial decision-making;
- ▶ [Art. 11, insofar as it concerns decisions by Chambers on admissibility and merits but excluding the principle of judicial decision-making, the competence to initiate a pilot judgment procedure and adopt a pilot judgment, and the competence to indicate interim measures;]
- ▶ [Art. 12 concerning relinquishment of jurisdiction to the Grand Chamber;]
- ▶ Art. 13 concerning powers of the Grand Chamber;
- ▶ Art. 22(2)-(4) concerning friendly settlements but excluding the essential principle;
- ▶ [Article 23 concerning unilateral declarations but excluding the essential principle]
- ▶ Art 27(2) & (3) concerning referral to the Grand Chamber but excluding the grounds on which the panel of five judges shall accept requests for referral;
- ▶ Art. 32(3) concerning Committee of Ministers' procedure for requesting advisory opinions;
- ▶ Art. 33 concerning the Court's advisory jurisdiction.

2 The Committee of Ministers may decide to pursue a proposal made in accordance with paragraph 1 of this article by the majority provided before in Article 20.d of the Statute of the Council of Europe.

3 After having consulted the Parliamentary Assembly[, the Commissioner for Human Rights] and, in the case of an amendment proposed by a State Party, after having also consulted the Court, the Committee of Ministers may adopt an amendment proposed in accordance with paragraph 1 of this Article by the majority provided for in Article 20.a of the Statute of the Council of Europe.

4 The Secretary General of the Council of Europe shall communicate any amendments thus adopted to the States Parties.

5 [Any amendment adopted in accordance with the above paragraph shall enter into force following the expiry of a period of [nine] months after the date on which it has been communicated by the Secretary General to the States Parties, unless, during that period, any State Party notifies the Secretary General of its objection to the entry into force of the amendment.]

CDDH REPORT ON MEASURES TAKEN BY THE MEMBER STATES TO IMPLEMENT RELEVANT PARTS OF THE INTERLAKEN AND İZMIR DECLARATIONS

Adopted by the CDDH on 30 November 2012

1. GENERAL INTRODUCTION

A. Background

1. The Declaration adopted at the conclusion of the High Level Conference on the Future of the European Court of Human Rights, organised by the Swiss Chairmanship of the Committee of Ministers in Interlaken, Switzerland on 18-19 February 2010 called upon the States Parties to the European Convention on Human Rights (“the Convention”) “to inform the Committee of Ministers, before the end of 2011, of the measures taken to implement the relevant parts of this Declaration”. The Declaration adopted at the conclusion of the High Level Conference on the Future of the European Court of Human Rights, organised by the Turkish Chairmanship of the Committee of Ministers in İzmir, Turkey on 26-27 April 2011 reminded the States Parties of their commitment “to implement the relevant parts of the Interlaken Declaration and the present Declaration”.

2. Further to the Interlaken Conference, the Steering Committee for Human Rights (CDDH) elaborated a draft structure for the national reports to be submitted by States Parties to the Committee of Ministers on measures taken to implement the relevant parts of the Interlaken Declaration.¹ The Committee of Ministers subsequently endorsed this structure for the national reports and invited all member States to submit their reports as soon as possible and no later than 31 December 2011.²

3. The CDDH’s terms of reference for the biennium 2012-2013 require it, through its subordinate body the Committee of experts on the reform of the Court (DH-GDR), *inter alia* to prepare a report for the Committee of Ministers “containing (a) an analysis of the responses given by member States in their national reports submitted by 31 December 2011 on measures taken to implement the relevant parts of the Interlaken Declaration, and (b) recommendations for follow-up”. The DH-GDR in turn conferred the initial preparation of the draft report on its drafting group A (GT-GDR-A).

1. See the report of the 72nd CDDH meeting, doc. CDDH(2011)R72, Appendix IV.

2. See the Deputies’ Decisions on Follow-up to the 121st Session of the Committee of Ministers (Istanbul, 10-11 May 2011), doc. CM/Del/Dec(2011)1114/1.5, 25 May 2011.

4. The present document constitutes the report required under the CDDH's terms of reference.

B. The reporting process and its results

5. By the time of the second and final GT-GDR-A meeting (5-7 September 2012), national reports had been received from 46 of the 47 Council of Europe member States. 45 of these followed the structure endorsed by the Committee of Ministers. The CDDH has taken account of all information received in good time before the second GT-GDR-A meeting.

6. As is to be expected, the nature of the national reports varied to a considerable extent. Most States responded to all or most of the questions put in the endorsed structure, although some States concentrated information into responses to only some of those questions. Equally, the level of detail varied between national reports.

7. Perhaps more significantly, many national reports contained extensive information relating to measures taken prior to the Interlaken Conference (February 2010). Whilst the endorsed structure invited States to mention relevant measures taken prior to the Interlaken Conference as a possible reason why it had not been considered necessary to take action on certain matters, information on such earlier measures was very often included elsewhere in the national report.

8. Considering that the over-arching aim of the exercise is to review recent progress in national implementation of the Convention, however, the CDDH has for the purposes of the present report decided to take a wider range of relevant information into account – whilst remaining true to the specificity of the exercise by giving a certain emphasis to the most recent, post-Interlaken Conference developments – for the following reasons.

9. Many of the provisions of the Interlaken and İzmir Declarations – indeed, it might be said, as regards measures to be taken by member States, the most important ones – concern implementation of the Convention at national level. The Interlaken and İzmir Declarations, however, were not the only incentives to States to take such measures, although as high-level political commitments they were clearly significant ones: the Convention itself establishes a legal obligation to take such measures; in addition, there were binding judgments of the Court against particular States Parties, as well as the series of relevant recommendations made by the Committee of Ministers' to member States between 2000 and 2010, and also other Council of Europe co-operation and assistance activities. It would thus be artificial either to assume that all such measures taken after April 2010 were in response only to the Interlaken and/ or İzmir Declarations (and practically impossible to isolate any such measures that were), or to exclude relevant information concerning important developments in the preceding period.

10. Furthermore, insofar as the current exercise is intended to lead to recommendations for the future, and given that it is not intended as a monitoring exercise in the generally established sense, it is clearly worthwhile to have available a wider range of examples of recent good practice than would be the case were the scope limited to measures introduced after the Interlaken Conference. Indeed, such a limitation would exclude much of the material made available through the national reports.

C. CDDH working methods

11. Given the range of issues addressed in the structure for national reports and the volume of material received, the GT-GDR-A, at its first meeting (14-16 March 2012), decided to focus its attention on certain priority issues and to appoint rapporteurs to prepare draft chapters dealing with them. The priority issues were: increasing the awareness of national authorities of Convention standards and ensuring their application (Interlaken Declaration Action Plan element 1);³ the execution of Court judgments, including pilot judgments (Interlaken Declaration Action Plan elements 2 and 9 respectively);⁴ taking into account the Court's developing case-law, including judgments against other States (Interlaken Declaration Action Plan element 3);⁵ and ensuring the availability of effective domestic remedies (Interlaken Declaration Action Plan element 4).⁶ At the same time, the GT-GDR-A also decided to address other issues in more summary form. The CDDH endorsed these working methods at its 75th meeting (19-22 June 2012). Finally, it should be underlined that the present report is not intended to present a compilation of national practices but rather an analysis of the national reports illustrated with selected examples of good practice.⁷ The fact that a State is not mentioned with respect to a certain issue does not necessarily mean that its national practice is deficient or cannot be considered good. For the sake of brevity and clarity, however, it was necessary to be selective.

2. ANALYSIS OF THE NATIONAL REPORTS

I. Please indicate whether a specific domestic structure has been established to implement or overview the implementation of the Interlaken declaration at national level.

12. Few member States indicated that a specific national structure had been created to implement or to give an overview of the implementation of the Interlaken Declaration at national level.⁸

13. In Croatia, for example, a Working Group was specifically created in October 2011 to determine to what extent Convention standards are applied and to propose to the Government measures to raise the awareness of public authorities; it is composed of representatives of the institutions responsible for training the judicial and executive bodies, as well as institutions responsible for promoting human and minority rights. In Liechtenstein, an informal Working Group was created after the Interlaken Conference, bringing together representatives of the Ministries of Justice and Foreign Affairs. In Romania, at the initiative of and coordinated by the Government Agent, a Reflection Group was constituted in 2011, composed of representatives of the main institutions with attributes in

3. Rapporteur: Ms Irina CĂMBREA (Romania).

4. Rapporteur: Ms Isik BATMAZ (Turkey).

5. Rapporteur: Ms Brigitte OHMS (Austria).

6. Rapporteur: Mr Jakub WOLASIEWICZ (Poland).

7. Compilations of the information received in the national reports with respect to each issue and question can be found in the documents GT-GDR-A(2012)003 REV. – 016 REV., supplemented by documents GT-GDR-A(2012)017, 018 and 065 (the reports of Turkey, Greece and the Netherlands).

8. As in, for example, Croatia, Liechtenstein, Romania, Serbia. Armenia and Georgia indicated that creation of a specific national structure was foreseen.

the areas relevant to implementation of the Interlaken Declaration. The objective of this Group is to analyse each aspect of the Action Plan, to summarise all the relevant actions that had already been taken at national level, as well as to identify, plan and organise actions in the area of reform of the Court. For its part, Serbia established, in October 2011, an informal inter-governmental body to supervise implementation of the Declaration, composed of members of the Ministry of Justice, the Ministry of Foreign Affairs, the Superior Judicial Council and the Constitutional Court.

14. Many member States have indicated that a pre-existing structure had been specifically charged with implementation of the Interlaken Declaration. For example, the Representative of the Federal Government for questions concerning human rights, within the Federal Ministry of Justice, in Germany; and the Inter-ministerial Committee for matters concerning the European Court of Human Rights, in Poland. Several member States brought up the importance of the role of the Government Agent in the implementation of the Interlaken Declaration at national level.⁹

15. If the creation of a specific structure for the implementation of the Interlaken Declaration provides evidence of the importance that this issue carries for national authorities, it should be noted that the attribution of this issue to a pre-existing structure may nevertheless be sufficient, if this latter is clearly mandated to undertake or co-ordinate work at national level.

II. Please indicate whether any national priorities have been identified with respect to the implementation of the Action Plan and if so, what.

16. Several member States indicated that they had identified national priorities. Amongst these, full execution of Court judgments was the national priority most often evoked.¹⁰ Next came awareness-raising on Convention standards,¹¹ the institution and consolidation of effective domestic remedies,¹² provision of information to potential applicants¹³ and the national procedure for the selection of candidates for the post of judge at the Court.¹⁴ Also mentioned as national priorities were, notably, the establishment of a system of statistical data covering all levels of magistrates, in order better to understand structural or specific reasons at the origin of delays in proceedings before national courts,¹⁵ the secondment of national judges to the Court's Registry,¹⁶ follow-up to the implementation of Committee of Ministers' Recommendations or promoting the conclusion of friendly settlements of unilateral declarations.¹⁷ In Armenia and Croatia, the Working Groups on implementation of the Interlaken Declaration will be charged with identifying national priorities.

9. As in, for example, Azerbaijan, Belgium, Czech Republic, France, Finland, Hungary, Switzerland, Ukraine.

10. As in, for example, Austria, Belgium, Denmark, France, Georgia, Germany, Italy, Liechtenstein, Lithuania, Norway, Romania, Russian Federation, Serbia, Ukraine.

11. As in, for example, Austria, Denmark, Estonia, Germany, Liechtenstein, Lithuania, Romania, Russian Federation, Serbia, Spain.

12. As in, for example, Germany, Romania, Russian Federation.

13. As in, for example, Denmark, Norway.

14. As in, for example, Liechtenstein, Lithuania.

15. As in, for example, Luxembourg.

16. As in, for example, Romania.

17. As in, for example, Serbia.

17. For certain member States, all the provisions of the Action Plan are considered important without priority being given to one or the other of them. Thus in Azerbaijan, all provisions of the Interlaken Declaration Action Plan have been transcribed into the National Programme for action in the field of human rights.

Measures taken to implement relevant elements of the Interlaken Declaration

1. Continue to increase, where appropriate in co-operation with national human rights institutions or other relevant bodies, national authorities' awareness of the Convention standards and to ensure their application.

A. Introduction

18. The question of raising the national authorities' awareness of the Convention standards was already addressed, some years ago, by the CDDH as part of the review of implementation of Committee of Ministers Recommendations Rec(2002)13 on the publication and dissemination in the member States of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights and Rec(2004)4 on the European Convention on Human Rights in university education and professional training.¹⁸ The Interlaken Declaration called on member States to increase this awareness-raising, and this call was recently reiterated in the Brighton Declaration.¹⁹

19. A considerable amount of information has been collected regarding this element of the Interlaken Declaration Action Plan. This can be explained partly by the fact that this question covers a variety of aspects, namely: who is responsible for this awareness-raising, what is the nature of their co-operation with national human rights institutions and other relevant bodies, how should this awareness-raising be carried out and who are the intended recipients? On the other hand, the large amount of information demonstrates recognition of the importance of awareness-raising and member States' concerns about this aspect.

20. It should from the outset be noted that awareness-raising is closely related to other issues addressed in this report, including execution of Court judgments and drawing conclusions from judgments against other States. This relationship is one of mutual reinforcement: enhancing general awareness of Convention standards and obligations may facilitate more specific Convention-related activities, just as those activities generate a lasting effect of enhancing awareness of the Convention.

B. Issues

i. Who is responsible for awareness-raising?

21. In many States,²⁰ the Ministry of Justice is responsible for raising the national authorities' awareness of the Convention standards. This task may also

18. See document CDDH(2006)008 Addendum I.

19. See the Declaration adopted at the high-level conference held in Brighton, United Kingdom, on 19 and 20 April 2012, part A.

20. Notably in Armenia, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Germany, Hungary, Italy, Lithuania, Poland, Slovakia, Spain, "the former Yugoslav Republic of Macedonia", Ukraine, and the United Kingdom.

fall to the Ministry of the Interior,²¹ the Ministry of Foreign Affairs²² or a specialist ministry such as the Ministry of Human Rights and Refugees in Bosnia and Herzegovina. Considerable emphasis is placed on the role of the government agent within the ministry to which he or she is attached²³ whether regarding analysis and dissemination of the Court's case-law or his or her contribution to training activities.

22. Some States have instituted a system comprising officials responsible for this task in several ministries. In Austria, co-ordinators for human rights issues have been introduced in the various ministries and provincial governments. They play a central role and are a contact point for all human rights-related questions for other authorities and in the dialogue with non-governmental organisations. In Finland, it was also decided to set up a network of contact persons comprising representatives from all ministries, co-ordinated by the Ministry of Justice and the Ministry of Foreign Affairs, with the aim of ensuring more effective transmission of information between the various administrative branches. In Croatia, the Working Group for implementation of the Interlaken Declaration Action Plan includes representatives from different bodies and its remit includes preparing training courses for civil servants.

23. Some States also mentioned the role of the judicial authorities and, in particular, their supreme courts. For example, in Lithuania, two consultants in the Supreme Court are responsible for publishing and disseminating extracts of Court judgments relevant to the practice of the domestic courts. In Estonia, since 2010, the Ministry of Justice, when drafting input regarding a newly communicated application, has involved the Council for the Administration of the Courts, which includes representatives from the Supreme Court, the courts of first instance and the appeal courts, the Bar Association, the prosecutor's office and the Minister of Justice. Such roles help ensure that the courts are informed as soon as possible of any problems and may then prevent them from reoccurring in the future.

ii. Co-operation with national human rights institutions or other relevant bodies

24. Many States have stated that awareness-raising is carried out in co-operation with national human rights institutions or other relevant bodies. In Finland, the national human rights institution now comprises three bodies: an independent Human Rights Centre, whose role is to promote information, training, education and research relating to human rights, the Office of the Parliamentary Ombudsman and a Human Rights Delegation that is attached to the latter and became operational in March 2012 and which serves as a national co-operation body. In the United Kingdom, several national human rights institutions also carry out awareness-raising activities. These are the Equality and Human Rights Commission, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission.

25. Several States, including Austria, Bulgaria, Bosnia and Herzegovina and Cyprus, mentioned the role of the Ombudsman. In France, enhanced co-operation is brought about via a new independent institution, the "défenseur des droits", which has taken over the role of the former Médiateur de la République,

21. As in, for example, Bulgaria and Croatia.

22. As in, for example, Estonia and Sweden.

23. Particularly in Albania, Austria, Bosnia and Herzegovina, Croatia, Greece, Hungary, Lithuania, Malta, Montenegro, Romania, Serbia, Slovak Republic and Sweden.

the Children's Ombudsman, the Equal Opportunities and Anti-Discrimination Commission and the National Commission for Police Ethics. Anyone who believes his or her rights have been violated may refer the matter to this independent institution, which has investigative powers. In Armenia, legislation provides for the involvement of the Human Rights Ombudsman, who may attend the meetings of the government and the sessions of parliament where they concern matters relating to human rights and fundamental freedoms, and, where applicable, raise issues relating to human rights violations.

26. Belgium is the only State to have said that it was currently investigating the possibility of setting up a national human rights institution, whose role it would be to help raise national authorities' awareness of the Convention standards.

27. Some States also mentioned co-operation agreements. For example, in April 2011 in Romania, the government agent, the Judicial Services Commission and the Romanian European Institute concluded a co-operation agreement for the translation and dissemination of the Court's case-law. The purpose of assigning the translation of the Court's judgments to the Romanian European Institute was to ensure top quality translations, reviewed by lawyers. In October 2011, the government agent also concluded a co-operation agreement with a legal research institute and two judges' associations, with the aim of carrying out joint activities to analyse developments in the case-law of the national courts and the way in which the courts applied the Convention and the Court's case-law. This co-operation also included debates and training courses and the setting up of a case-law database. In addition, the Romanian and French Judicial Services Commissions initiated a project in 2010 involving four member States, which includes the organisation of study visits.

28. Many States highlighted the importance of co-operation with civil society, universities and the Bar. The Swiss Human Rights Centre, set up in May 2011, is a network comprising various universities and training centres and a human rights association. Its role is to strengthen and develop the necessary competences for implementing mandatory international norms at all levels of the State apparatus, within civil society and in the economy, and to encourage public debate. In Finland, the Human Rights Delegation attached to the Office of the Parliamentary Ombudsman comprises representatives of non-governmental organisations and researchers. Latvia referred to seminars organised in 2011 by non-governmental organisations on specific subjects such as juvenile justice. In Slovakia, the Government Agent in cooperation with association Euroiuris and Judicial Academy play a key role in the dissemination of the judgments. Some States mentioned their co-operation with the Secretariat of the Council of Europe and the European Court of Human Rights, in particular with regard to the organisation of training courses and seminars.

29. The role of the Council of Europe Commissioner for Human Rights is also relevant in this regard. The Commissioner's visits, recommendations and views – along with those of other high-level Council of Europe office holders – often engage the highest political levels in the member States and are thus a very effective means of awareness-raising, including on issues specific to a particular State, and even of changing or developing attitudes, generating a top-down approach. Effective domestic follow-up to such activities is essential to their practical impact.

iii. The means employed

30. The prime means of raising the national authorities' awareness of the Convention standards is the publication and dissemination of the Court's case-law, treatises, handbooks or other types of publication (reports, bulletins, circulars, best practice guides). The most recent initiatives include the publication in Poland in 2011 of a compendium comprising analyses of the most significant judgments relating to Poland, which was widely disseminated to the courts and prosecutors' offices, and a publication in Portugal in 2012 concerning the judgments delivered concerning that country.

31. It is now current practice in most States to disseminate the Court' case-law regarding the country in question, with publication on the internet well developed and the relevant websites offering a search facility. For example, Bulgaria has introduced an information exchange platform within the judicial system via a website containing the most relevant judgments, once they have been translated. Databases with a search facility have been developed, notably in Greece, Romania and Italy. In Romania, a case-law newsletter will in future be distributed in electronic form so as to expand the number of recipients. In the publication field, several States, such as Denmark and Germany, have said that they work together with publishers in the private sector.

32. Mention was also made of the involvement of the media (radio in Bosnia and Herzegovina, press releases in Croatia), and exchanges of best practice between member States (Bulgaria).

33. Training, whether basic or in-service, is a further significant way of raising awareness. Bulgaria said that training was aimed not only at raising officials' awareness of their responsibilities, but also at improving their practical skills and their ability to handle crisis situations, to quickly identify events which could lead to human rights violations and to take the necessary preventative steps. In the field of in-service training, many States, such as Bosnia and Herzegovina, Latvia, Liechtenstein, Montenegro and Romania, mentioned an increase in the number of seminars, round table discussions and other professional events.

34. Some countries, such as Austria, also said that the fact that the Convention had been incorporated into their constitution was a means of raising the awareness of the authorities, particularly the judicial authorities, of the Convention system.

iv. The recipients of the awareness-raising measures

35. While some countries said that human rights training formed part of the basic training of all legal professionals, most said that more particularly they had adapted their training approach to the specific needs of certain sectors. Training is most often organised for judges, prosecutors and lawyers, and for police officers and those in contact with people deprived of their liberty. With regard to the training of judges, in Poland in 2012, the Legal Service Training College introduced systematic training in human rights, distinguishing between general training, focusing on the questions raised most often in the Court's case-law in respect of Poland, and specialist training, for "consultant" judges, focusing on the analysis of more specific issues. In The Netherlands, continuous advanced ECHR training for prosecutors, judges and support staff (and compulsory initial training) has been organised at the Training and Study Centre for the Judiciary for some decades now.

36. Other officials may also be targeted more specifically, such as bailiffs, for example in Romania, immigration officers, in Finland, and local authority representatives, for example in Bosnia and Herzegovina.

37. Few States specifically mentioned that human rights education had been introduced into their school system.²⁴ Likewise, few States mentioned prominence being given to training for trainers so that they could incorporate the human rights dimension into their courses. In 2010, the Irish Human Rights Commission launched a human rights education and training project for civil and public servants, which is also available online, comprising a specific module for trainers.

v. Problems and possible solutions

38. Among the difficulties encountered, those most often mentioned concerned language issues and the lack of resources, particularly for training. In this connection, it should be recalled that the Human Rights Trust Fund may be able to provide finance for relevant projects. It was also emphasised that raising awareness of the Convention standards could be complicated by the sheer volume of the Court's case-law and the fact that this was occasionally not sufficiently clear and consistent. In this connection, attention may be drawn to the Brighton Declaration which called on the Court to "indicate those of its judgments that it would particularly recommend for possible translation into national languages".²⁵ It can be noted that the Court has recently revised its policy for publishing judgments: in future, a far smaller, more selective number of judgments will be published by the Court; also, that the Department for the Execution of Court Judgments provides summaries of judgments to national authorities.

C. Conclusions and recommendations

39. As noted above, awareness-raising is closely related to other issues addressed in this report, including execution of Court judgments and drawing conclusions from judgments against other States. Measures taken in pursuit of one objective may thus have beneficial effects with respect to others.

40. Some States have chosen to designate co-ordinators and/ or set up networks of contact persons with a responsibility for awareness raising, so as to ensure effective co-ordination and dissemination of information: just as a central co-ordinator may be fundamental for the execution of judgments, so there may be advantage in having an identified authority with clearly defined responsibility for the implementation of awareness-raising measures, as well as for following the Court's case-law and transmitting information. National authorities' efforts at awareness-raising may be enhanced through co-operation with national human rights structures and civil society organisations. Engagement by the highest political levels with the Commissioner for Human Rights and other high-level office holders of the Council of Europe, with effective follow-up to such contacts, is also a valuable means of raising awareness at national level.

41. As regards the means implemented, transmission of information by electronic means and the making available on-line of case-law or information on the Convention system, for example in the form of databases, will contribute to

24. For example Bosnia and Herzegovina, Finland and Norway.

25. See the Brighton Declaration, paragraph 9 h).

increasing awareness of Convention standards. Partnerships with the private sector may also represent a valuable means of widening the publication of information on the Convention system. Training is another important means of awareness-raising. Training must be appropriate to the recipients concerned; to this end, specific programmes of training for trainers, integrating the human rights dimension, should be developed. In order to be able to evaluate and maximise the impact of these awareness-raising measures, it is also necessary to undertake evaluation of training and of those being trained.

42. Linguistic difficulties having been mentioned as one of the most commonly encountered problems, member States having mutually understandable national languages should develop co-operation activities, including with a view to translating and disseminating the Court's case-law. Finally, the CDDH recalls that States may benefit from the technical or financial assistance of the Council of Europe and that the Human Rights Trust Fund may play an important role in this respect.

2. Fully executing the Court's judgments, ensuring that the necessary measures are taken to prevent further similar violations.

9. Co-operating with the Committee of Ministers, after a final pilot judgment, in order to adopt and implement general measures capable of remedying the structural problems at the origin of repetitive cases.

A. Introduction

43. Article 46 of the Convention requires States Parties to abide by the final judgment of the Court in any case to which they are parties, such judgments being transmitted to the Committee of Ministers, which shall supervise their execution.

44. This obligation to execute Court judgments, along with those in Article 1, to respect human rights, and in Article 13, to provide an effective remedy for alleged violations, is one of the key provisions underpinning the Convention system of human rights protection. 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.²⁶

45. Although there have been certain positive developments in recent years, important problems persist. These include the increase in the number of judgments of which the finalisation of execution has been pending for over five years, most of which concern important structural problems.²⁷ Common problems include excessive length of judicial proceedings; non-enforcement of final domestic judicial decisions; poor detention conditions and excessive duration of detention on remand; excessive use of force and other forms of ill-treatment by

26. As noted in the preamble to Committee of Ministers' Recommendation CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the Court ("CM/Rec(2008)2").

27. See the 5th Annual Report of the Committee of Ministers on Supervision of the execution of judgments and decisions of the Court (for 2011, "Committee of Ministers' Annual Report, 2011").

police or security forces and ineffective investigations into resulting violations; inadequate restitution of or compensation for expropriated property; and lack of effective remedies for such violations.²⁸

46. In recent years, the Court has intervened in such situations through recourse to the pilot judgment procedure,²⁹ which highlights the obligation to resolve problems giving rise to repetitive cases. The need for rapid and effective execution of pilot judgments, and others revealing important structural problems, has been consistently underlined. Although the Court, through justifiable caution, continues to apply the pilot judgment procedure in a relatively small number of cases, it regularly gives high priority to these and other cases involving hitherto unexamined structural or endemic situations,³⁰ as such cases threaten the effective functioning of the Convention system. The Committee of Ministers likewise prioritises such cases by allocating them to the new “enhanced procedure” for supervision of execution. Nevertheless, whilst there is a shared responsibility to maintain the overall effectiveness of the Convention system, the primary responsibility for executing such judgments and fully resolving the underlying problems lies on the respondent State concerned.

47. There have also been important developments concerning execution of judgments in recent years, both before and since the Interlaken Conference, concerning both national implementation and Committee of Ministers’ supervision. Notable amongst these are Committee of Ministers’ Recommendation CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the Court, and the CDDH’s proposals for the supervision of the execution of judgments in situations of slow execution, which resulted notably in more systematic use of actions plans and action reports as part of the Committee of Ministers’ supervision process³¹ and the new “twin-track” procedure introduced on

28. See, for example, the Committee of Ministers’ Annual Report, 2011; also PACE doc. 12455, “Implementation of judgments of the European Court of Human Rights”, report of the Committee on Legal Affairs and Human Rights.

29. According to Rule 61 of the Rules of Court, introduced on 21/02/11 in response to the call made in the Interlaken Declaration, “[t]he Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.” The procedure involves adjournment of any related applications pending judgment in the pilot case. The judgment not only finds a violation in the individual case but identifies the underlying systemic or structural problem and defines the broad outlines of general measures intended not only to remedy the applicant’s situation but also those of other (potential) applicants. The decision on just satisfaction in the pilot case may then be adjourned for the respondent State to implement these general measures. Once this has been satisfactorily achieved and a friendly settlement reached, the Court strikes out the remainder of the individual applicant’s case. Any pending applications are also struck out on the basis that there is now an effective domestic remedy available for their resolution.

30. See Rule 41 of the Rules of Court and the Court’s Priority Policy, available on the Court’s website.

31. See the CDDH’s “Practical proposals for the supervision of the execution of judgments of the Court in situations of slow execution”, made to the Committee of Ministers in December 2008 (doc. CDDH(2008)014 Addendum II), following which “action plans” (measures a State intends to take to execute a judgment) and “action reports” (information on measures taken to execute a judgment or explanation of why no further measures are necessary) have been established as a key component of the Committee of Ministers’ working methods: see doc. CM/Inf/DH(2009)029rev.

1 January 2011 as part of the reform of the Committee of Ministers' working methods. Alongside these, the Parliamentary Assembly has continued its own work focussing on Court judgments against specific countries whose execution has long been pending, which now includes hearings with relevant national parliamentarians and officials on execution issues.³² The impact of these developments is apparent in member States' responses to the Questionnaire.³³

B. Issues

48. The responses received to the Questionnaire, taken as a whole, highlight the significance notably of the following issues.

i. Co-ordination of and responsibility for execution

49. In accordance with CM/Rec(2008)2, many States have designated a co-ordinator of execution of judgments at the national level. This function is often entrusted to the office of the Government Agent before the Court.³⁴ This would seem a sensible arrangement, given the Agent's prior familiarity with the subject-matter of cases heard by the Court and broader knowledge of both relevant national law and the Convention system.³⁵ Other approaches include co-ordination by bodies involving relevant ministries and other authorities³⁶ or, in the case of Liechtenstein, the collegial Government as a whole. The important thing is that responsibility and competence for co-ordination are clearly established.

50. In this connection, several States mentioned the legal basis of the Agent's role in the execution process. In the Czech Republic, Law No. 186/2011 establishes the Agent's "initiating, coordinating and consultative" role, as well as imposing an obligation on other "relevant authorities" to execute Court judgments and co-operate with the Ministry of Justice (i.e. the Agent); the Agent's role is further defined in the 2009 Statute of the Government Agent. In Poland, a combination of legislation and ministerial ordinance and decision establish a special unit for co-ordinating execution of judgments within the department that supports the work of the Agent. In Serbia, a decree provides that the Agent "ensure the implementation of judgments of the Court" and requires all State authorities to provide relevant information and documents, as well as necessary legal and administrative assistance.

51. In addition to the co-ordinator, the ministry or authority responsible for the relevant issue will also be involved in the execution process. Contact persons for liaison with the overall co-ordinator may be designated in individual ministries (e.g. France). There are several examples of legal provisions imposing an obliga-

32. See, most recently, PACE Resolution 1787 (2011) and Recommendation 1955 (2011) on implementation of judgments of the European Court of Human Rights, along with the report of the Committee on Legal Affairs and Human Rights (doc. 12455).

33. See also the results of the *Round table: Efficient Domestic Capacity for rapid execution of the European Court's Judgments* (Tirana, Albania, 15-16 December 2011), in particular the "Conclusions of the Chairperson" and "Synthesis of the replies by member States to the questionnaire on the domestic mechanisms for rapid execution of the Court's judgments".

34. As, for example, in Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Malta, Norway, Poland, Serbia and Sweden.

35. As noted also by the Department for the Execution of Judgments: see "Synthesis of the replies to member States to the questionnaire on the domestic mechanisms for rapid execution of the Court's judgments", prepared for the Tirana Round-table (15-16 December 2011).

36. As in, for example, Armenia, Croatia, Denmark.

tion on public authorities either to ensure execution of Court judgments or to co-operate with the co-ordinating body. In Lithuania, for example, a draft law, once implemented, will establish the obligation of State and municipal authorities or enterprises to take the necessary measures for execution of Court judgments. In Sweden, there is a specific requirement to grant a residence permit to an applicant against whom a refusal of entry or expulsion order was found by the Court to be in violation of the Convention, unless there are exceptional circumstances. In Liechtenstein, there is the possibility of recourse to a higher political level for resolution of any disagreements that may arise between the bodies involved.

52. The Agent (or another co-ordinating body) may also be responsible for dissemination of information on public authorities' legal obligations. In Bosnia and Herzegovina, for example, the Agent provides national institutions with clarification of the judgment and the obligations that arise from it, also for local authorities. In Germany, the Representative for Human Rights Matters in the Federal Ministry of Justice ensures that all those involved are conscious of the necessity of full execution of a given judgment. In Norway, the Legislation Department of the Ministry of Justice and Police, which *inter alia* co-ordinates execution, informs relevant ministries of the requirements arising from Article 46. In Poland, the Inter-ministerial Committee for matters concerning the Court – composed of experts from relevant government bodies and chaired by the Agent, who may (and does) invite other bodies to participate (e.g. the Ombudsman's, Prosecutor General's, Sejm's and Senate's offices) – raises awareness of the Convention system within the government administration.

ii. Translation and dissemination of Court judgments

53. Many States specifically mentioned the importance to the execution process of translation and dissemination of Court judgments, insofar as it is intended to achieve necessary changes in domestic case-law and practice. This task is often the responsibility of the co-ordinator/ Agent.³⁷ In Sweden, the Agent forwards copies of judgments, with explanatory reports in Swedish, to the courts and authorities concerned, sends copies to the Courts of Appeal, Parliamentary Ombudsman, Chancellor of Justice & Bar Association, and publishes summaries on the government's human rights website. In Latvia, the Agent also prepares summary information on judgments for the mass media. In addition to electronic dissemination, judgments are often published in the official journal or gazette.³⁸ In Romania, it is rather the prosecutor's office at the High Court of Cassation, which produces a summary of the Court's case-law for the period 2009-2010 having an impact on criminal law, intended for all prosecution offices.

iii. Role of parliaments

54. Several States underlined the importance of close co-ordination between the government and the parliament in order to ensure the passage of legislation necessary to the implementation of general measures. This may take various forms and entail different degrees of implication on the part of the co-ordinator. In Bulgaria, Denmark, Greece and Turkey, for example, the Agent gives advice or makes proposals to the relevant ministry and other institutions as appropri-

37. As in, for example, Austria, Bosnia and Herzegovina, Bulgaria and Greece.

38. As in, for example, Latvia, Serbia.

ate. In Cyprus, the Agent drafts necessary legislation and transmits bill to ministry concerned, which then tables it before parliament, with lawyers from the Agent's office attending parliamentary committee proceedings.

55. In addition to their legislative role, parliaments may also engage in oversight of execution of Court judgments. In Germany, the Bundestag has “[urged] the Federal Government to report annually and in an adequate form to the appropriate [parliamentary] committees on the execution of judgments against Germany”, in response to which the Federal Ministry of Justice now submits an annual report to the relevant committees, which may decide to place it on their agendas. In Hungary, there has been parliamentary supervision of execution of judgments since 2007, with the Minister of Justice presenting an annual report to the constitutional and human rights committees on execution of judgments and cases pending before the Court. In The Netherlands, Parliament has been informed since 2006 of all measures adopted to implement Court judgments, and may debate specific individual cases. In the United Kingdom, the Government produces approximately once a year a report on progress in implementing Court and domestic courts' human rights judgments, which is scrutinised by the parliamentary Joint Committee on Human Rights.

iv. Role of courts

56. The importance of close contacts with the domestic judicial system, another key actor in the execution process, was also underlined. In Liechtenstein, the Ministry of Justice is in continuous contact with the national courts, allowing questions concerning remedy of a violation of procedural rights to be clarified quickly and “unbureaucratically”. In Serbia, the Agent visits courts and takes part in meetings and discussions to indicate the importance of respecting the Convention and executing Court judgments. In the Slovak Republic, there are intensive contacts between the Ministry of Justice and the Constitutional Court, with the participation of the judge of the Court elected with respect to the Slovak Republic and the Agent, aiming to harmonise the Constitutional Court's practice with that of the Court. In “the former Yugoslav Republic of Macedonia”, there are regular meetings between the Agent and the presidents of the national courts to underline the significance of executing Court judgments, especially in relation to individual measures, including through reopening where necessary (see further below).

57. One important role that domestic courts can play is the reopening of proceedings: in Estonia, Latvia and “the former Yugoslav Republic of Macedonia”, the Criminal, Civil and Administrative Procedure Laws contain provisions on re-examination and reopening, as do the Criminal and Civil Procedure Codes in Georgia and Montenegro; in the former, Court judgments are taken to establish new circumstances justifying review of previous domestic court decisions, and in the latter, domestic courts are bound by the Court's legal views in reopened civil proceedings. In Romania, an extraordinary remedy exists by way of revision of a domestic judgment following a Court judgment.

58. Domestic courts may also provide remedies for non- or incomplete execution of Court judgments. In Germany, the Basic Law [Constitution] makes it possible to raise an objection before the Federal Constitutional Court that State organs disregarded or failed to take into consideration a decision of the European Court of Human Rights. Similarly, in Spain, the Constitutional Court has recognised applicants' right to seek redress from national courts following a Court judgment, when the effects of the violation persist. In Lithuania, if the leg-

islator fails or delays to amend legislation found defective in a Court judgment, the national courts may make good this omission by directly applying the judgment. In Malta, domestic courts may intervene to direct execution of Court judgments.

v. Co-operation with the Council of Europe

59. Several States mentioned the value of co-operation with the Court and the Committee of Ministers and the Department for the Execution of Court Judgments, including through seminars and round-tables and other targeted assistance and co-operation activities, such as expert evaluation of draft legislation. In Belgium, the ministries concerned by a judgment are invited to meetings between the Agent and the Execution Department, with further annual bilateral contacts between the national authorities and the Execution Department, including on specific aspects of general measures. The parliamentary Joint Committee on Human Rights in the United Kingdom itself regularly visits the Execution Department to discuss cases.

vi. Pilot judgments

60. Relatively little specific information was received concerning implementation of pilot judgments, in part due to the fact that such judgments have only been delivered with respect to a few States Parties.³⁹ Certain interesting observations were nevertheless made.

61. The Czech Republic noted that in principle, the tools necessary for implementation of a pilot judgment were in place, being those applicable also to implementation of “regular” judgments. Execution of a pilot judgment would probably require co-ordination at a higher political level than that of Agent, which could entail difficulties and the risk that the solution would not be adopted in a timely fashion. In this connection, it can be noted that in Romania, an Inter-ministerial Committee was established to address the problem of reform of legislation and procedures in the field of property restitution following the relevant pilot judgment. Ukraine noted that the issue of execution of specific pilot judgments had been discussed at meetings between the Director General, Human Rights and the Rule of Law of the Council of Europe and high officials including the Head of the Parliament, the Head of the Presidential Administration and judges of the Supreme Court.

62. Germany noted that execution of the pilot judgment to which it was party involved continual exchanges between the Federal Government and the Department for the Execution of Judgments. Romania also underlined the importance of such contacts, along with the involvement of other directly concerned

39. The Registry identifies the following as pilot judgments: *Broniowski v. Poland* (31433/96, 28/09/05), *Hutten-Czapska v. Poland* (35014/97, 19/06/06), *Xenides-Arestis v. Turkey* (46347/99, 22/12/05), *Burdov (No. 2) v. Russia* (33509/04, 15/01/09), *Olaru & Others v. Moldova* (17911/08, 28/07/09), *Yuriy Nikolayevich Ivanov v. Ukraine* (40450/04, 15/10/09), *Suljagic v. Bosnia and Herzegovina* (27912/02, 03/11/09), *Kurić and Others v. Slovenia* (26828/06, 13/07/10), *Rumpf v. Germany* (46344/06, 02/09/10), *Atanasiu and Others v. Romania* (30767/05, 12/10/10), *Greens & M.T. v. the United Kingdom* (60041/08, 23/11/10), *Athanasiou & Others v. Greece* (50973/08, 21/12/10), *Hamanov and Dimitrov v. Bulgaria* (48059/06, 10/05/11), *Finger v. Bulgaria* (37346/05, 10/05/11), *Ananyev & Others v. Russia* (42525/07, 10/01/12), *Ummuhan Kaplan v. Turkey* (24240/07, 20/03/12) and *Michelioudakis v. Greece* (54447/10, 03/04/12); the judgments in the cases of *Lukenda v. Slovenia* (23032/02, 06/10/05), *Orchowski v. Poland* (17885/04, 22/10/09) and *Kauczor v. Poland* (45219/06, 03/02/09) share some but not all of the defining characteristics of a pilot judgment.

national authorities, citing the example of a conference in Bucharest on “The problem of restitution of properties and the award of pecuniary damages in the light of the perspective of the Court’s case-law”, organised by the Agent and the Ministry of Foreign Affairs with the Council of Europe and the Court, in which participated high-level representatives of 20 other member States affected by similar problems and at which good practices were exchanged. In Greece, a representative from the Agent’s office participated in the committee for the drafting of legislation in order to address structural problems found by the only pilot judgment issued against Greece up to now.

vii. Problems and possible solutions

63. A range of possible problems was mentioned by States, although few responses included suggestions of how they might be solved. Possible problems include:

- ▶ Budgetary issues, particularly with respect to implementation of general measures. Azerbaijan indicated that in one situation, these had been addressed through introduction of a special action programme and associated budget.
- ▶ Differing approaches or competing interests at administrative/ government level; the Czech Republic noted that this could be compounded by the lack of a national authority empowered to rule that the obligation to execute a judgment has not been met and to impose measures or penalties as a result.
- ▶ Political controversy surrounding particular general measures and/ or insufficient understanding of the obligation to execute Court judgments.
- ▶ A lack of political will at government level.
- ▶ Similarly, a lack of political will at parliamentary level, where processes occur independently of the government.
- ▶ Failure on the part of domestic courts to adapt their case-law, including through re-interpretation of existing legislation, in accordance with the Strasbourg Court’s judgments.
- ▶ The length of time that has passed between the date of the facts in issue and the Court’s final judgment.
- ▶ The sometimes ambiguous wording of judgments and/ or the possibility of misinterpretation of the judgment.

C. Conclusions and recommendations

64. As a starting point, it is clear that CM/Rec(2008)2 has proved a source of valuable guidance to many States in enhancing their capacity to execute Court judgments rapidly and effectively, in particular the designation of co-ordinators of execution of Court judgments.⁴⁰ An explicit legal basis for the existence and role of the co-ordinator may usefully reinforce clarity, visibility and legal certainty. The formal appointment of contact persons in other ministries and public authorities with whom the co-ordinator will liaise may also facilitate the process.

40. In this respect, see also the results of the Round table: Efficient Domestic Capacity for rapid execution of the European Court’s Judgments (Tirana, Albania, 15-16 December 2011), in particular the “Conclusions of the Chairperson” and “Synthesis of the replies by member States to the questionnaire on the domestic mechanisms for rapid execution of the Court’s judgments”, available on the website of the Department for the Execution of Judgments of the Court.

Formalisation of the legal obligation on domestic authorities to execute Court judgments, along with dissemination of information to those authorities on that obligation, may also have similar beneficial effects. Where difficulties arise, in particular in relation to general measures including those required for execution of pilot judgments, the possibility of recourse to higher political authority may help overcome obstacles. Rapid translation and dissemination of Court judgments⁴¹ and summaries thereof, as well as of Committee of Ministers' decisions and resolutions adopted during the supervision process, would also contribute.

65. Parliaments have an important role to play. The co-ordinator should remain informed of the process of drafting necessary legislative reforms, and may play an appropriate role in this process. States should also examine the possibility, within existing constitutional constraints, of involving national parliaments in an oversight role over execution of judgments.

66. Co-ordinators should also remain informed of developments before relevant domestic courts concerning the resolution of different execution issues through changes in domestic courts' practice or case-law. Similarly, those States which have not already introduced legal provisions permitting the direct application of the Convention by domestic courts should, where necessary and as appropriate, consider doing so. The crucial role of domestic courts should also be enhanced by ensuring adequate possibilities for re-examining, including reopening of, proceedings where necessary to remedy a violation found by the Court.⁴²

67. Finally, States should ensure full and effective co-operation with the Council of Europe, in particular the Court and the Department for the Execution of Judgments, including through enhanced technical cooperation, issue-specific conferences, seminars etc., and involving also other relevant domestic authorities, including the judiciary, in such processes. This is especially the case where major structural or systemic problems are at stake. The CDDH notes that the Human Rights Trust Fund may be able to provide financing for such co-operation activities.

3. Taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system.

A. Introduction

68. Article 46 of the Convention requires States Parties to abide by final judgments of the Court in cases to which they are parties. That said, Article 32 states that "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..." The States Parties thereby recognise the Court's final authority in these matters. Through its case-law, the Court establishes both general principles of interpretation of the scope and meaning of Convention rights, and the application of those rights in particular circumstances. These

41. In accordance with Committee of Ministers' Recommendation Rec(2002)13 on the publication and dissemination in the member States of the Convention and the case-law of the Court.

42. In accordance with Committee of Ministers' Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the Court

principles of interpretation and, where sufficiently similar circumstances exist in the domestic system, application have foreseeable consequences in States other than the Respondent in a case. The Interlaken Declaration therefore encouraged States Parties to respond also to the general principles of the Court's case-law as a whole, so as to resolve predictable problems at domestic level, in accordance with the principle of subsidiarity. In this respect, it should be recalled that the Court has more recently envisaged the possibility of broadening its interpretation of the notion of "well-established case-law",⁴³ by which applications may be dealt with under the summary Committee procedure and which hitherto has only been applied in the context of repetitive cases, to take into account the Court's well-established case-law "beyond the particular respondent State concerned".⁴⁴ This would be a further argument for States Parties to maintain a good, up-to-date level of knowledge and understanding of generally applicable principles of the case-law as a whole.

69. The issue of execution of Court judgments by the respondent State under Article 46 is dealt with under a separate heading. This part of the report will therefore focus on States Parties' application of the general principles found in the Court's case-law as a whole. That said, the current issue and that of execution of judgments are clearly closely related, as was apparent from the information received.

B. Issues

70. The responses received to the Questionnaire, taken as a whole, highlight the significance notably of the following issues.

i. Responsibility for taking account of the Court's developing case-law and drawing conclusions from judgments against other States

71. It may be recalled that, in connection with execution of judgments under Article 46 of the Convention, a key aspect is the role of a central co-ordinator, as reflected in Committee of Ministers' Recommendation CM/Rec (2008) 2 on efficient domestic capacity for rapid execution of judgments of the Court. Many States indicated that governmental bodies were involved in following the Court's case-law, including judgments against other States: in Austria, for instance, the Federal Chancellery disseminates circulars to all central bodies, the highest courts and the national parliament with a summary of the Court's recent case-law; and in Germany, the Federal Ministry of Justice commissions a report on Court decisions against other States which is widely distributed, including to the Parliament. The Government Agent was, again, frequently mentioned.⁴⁵ In Estonia, for example, the Agent prepares annual overviews of the Estonian cases for the government, including an outline of possible problems of compatibility of the domestic legal order with the Convention apparent as a result of judgments against other States, along with proposals for preventing similar violations through amendment of legislation or development of domestic courts' case-law. Several States, including Germany and Liechtenstein, also mentioned the role of the national Permanent Representation to the Council of Europe.

43. See Article 28(1)(b) of the Convention.

44. See the Preliminary Opinion of the Court in preparation for the Brighton Conference (doc. v2-#3841140, 20/02/12), paras. 22-23.

45. As in, for example, Cyprus, Czech Republic, Estonia, Georgia, Germany, Hungary, Monaco, Slovak Republic, Sweden, the former Yugoslav Republic of Macedonia.

72. Many States referred to the role of the courts.⁴⁶ The Constitutional Court of Bosnia and Herzegovina takes into account the relevant jurisprudence of the Strasbourg Court as a whole, as do the Spanish Constitutional and Supreme Courts, the Austrian Constitutional, Administrative and Supreme Courts and the Swiss Federal Tribunal. Similarly, the Lithuanian courts consider the Court's case-law to be an integral part of Convention law, to be taken into account when considering cases. Judges in San Marino refer to the Court's case-law without distinction as to respondent State. Portugal's reply mentioned the fact that the Court's case-law is referred to during judicial training, with the most relevant issues being illustrated by reference judgments delivered whether against Portugal or other States. In Romania, the Superior Judicial Council is considering the value and resource implications of translating and publishing the Court's factsheets on-line. In Sweden, the National Courts Administration (a "service organisation" for domestic courts) publishes a regular newsletter entitled "News from the European Court of Human Rights", with summaries in Swedish of cases deemed to be of interest to Swedish courts concerning both Sweden and other States.

73. Some States mentioned the involvement of parliament. In Luxembourg, for example, the Chamber of Deputies, on adopting reforms to the legislation on hunting following the Court's judgment in the case of *Schneider v. Luxembourg*, invited the government to continue to follow closely the Court's future judgments concerning hunting and to analyse in detail their effects on the relevant national legislation, anticipating the Court's future judgment in the case of *Hermann v. Germany*.

74. The Czech Republic's reply referred to a multiplicity of actors, namely the Agent's office, the Office of the Government Commissioner for Human Rights, the (Registries of the) Constitutional, Supreme and Supreme Administrative Courts, amongst others. In Austria a similar collaborative effort is made in consequence of the constitutional rank of the Convention in the Austrian legal order. In Poland, the inter-ministerial Committee for Matters Concerning the European Court of Human Rights, in which other actors, for example the Ombudsman, participate, is responsible for analysing the most important problems resulting from the Court's case-law with respect to other countries. In Romania, the Court's case-law concerning other States is analysed when the prosecutor is involved in relevant proceedings before the Constitutional Court and High Court of Cassation and Justice.

ii. Legal basis

75. Several States underlined the fact that this responsibility was established through law. In Austria it stems from the constitutional rank of the Convention. In Latvia, a 2009 governmental instruction requires the results of an analysis and assessment of international obligations, including review of the Court's case-law, to be included in an explanatory text accompanying draft legislative acts. Similar instructions exist in The Netherlands. In Lithuania, a draft Law on the Basics of the Legislative Process would require governmental institutions to publish the results of an analysis of the compliance of draft legislation with the Convention and the Court's case-law. In Romania, a legal amendment introduced in 2011 requires all legislative proposals to be accompanied by a preliminary evaluation of the human rights impact of the new regulations, including by reference to the

46. As in, for example, Bosnia and Herzegovina, Estonia, Lithuania, Luxembourg, Norway.

Court's case-law. In Ukraine, the Law on enforcement of judgments and application of the European Court of Human Rights' case-law requires national courts to apply any relevant judgments when considering cases. In the United Kingdom, the 1998 Human Rights Act requires domestic courts to take into account any relevant decision of the Court when determining questions concerning Convention rights.

iii. Procedures

76. Several replies gave information about the procedures followed. In Azerbaijan, weekly seminars and round-tables are held in the Supreme Court and Prosecutor General's office to discuss and draw conclusions from Court judgments finding a violation by another State, leading to guidance to lower courts of prosecutors respectively. In Cyprus, the Agent's office systematically follows the Court's case-law and checks on legislation and domestic administrative practice in order to communicate relevant Court judgments to the domestic authorities concerned; if these authorities provide information to the effect that the law or practice is not compatible with a Court judgment, the Sector advises on the necessary action to be taken. The Agent's office is also informed of potential incompatibilities with the Court's case-law by the Ombudsman, other human rights bodies of the Council of Europe and other international organisations, and following requests for advice from domestic authorities themselves. In Germany, the Agent's office analyses the Court's case-law based on the Court's own "case-law information notes", following which it forwards relevant insights to the competent offices. In Ireland, the case-law information notes and list of weekly communicated cases are actively circulated by the foreign ministry. In the former Yugoslav Republic of Macedonia, the Agent once a year translates relevant Grand Chamber judgments that may have an impact on domestic law.

77. Slovenia specified that, whilst following the evolution of the Strasbourg case-law, it took particular account of systemic judgments, including those against other States; as an example, it mentioned the case of *S. & Marper v. the United Kingdom*, which concerned retention of DNA material, in relation to drafting of new legislation concerning the police.

iv. Modalities of dissemination/ the internet

78. Certain replies addressed the modalities for disseminating relevant information. In Georgia, a collection of judgments, including judgments delivered against other States, is created for national courts. In Liechtenstein, judges and other relevant authorities are provided with commentaries. The Agent's office in Montenegro has in the past two years published two books of selected Court judgments. The importance of the internet was often apparent. Liechtenstein, for example, mentioned that its domestic courts and authorities access the Court's HUDOC database of its case-law. Luxembourg stated that the Justice Ministry's website included a heading concerning international courts, including the Strasbourg Court, under which could be found links to *inter alia* the Court's factsheets and a general collection of the Court's case-law. The United Kingdom reply noted that various sources of information were used, including informal contacts with officials from other States (see further below) and information published on the Court's website, notably the weekly list of communicated cases.

79. The need for translation in addition to publications, for example of law journals, by civil society was also mentioned as a factor. In Romania, for example, not only Court judgments concerning Romania are translated and disseminated but

also relevant judgments against other States. The Court's factsheets have been translated into German published on the Court's website thanks to a German donation and the Practical Guide on Admissibility Criteria thanks to a Liechtenstein donation.

v. Co-operation with other States Parties

80. Several States mentioned actions taken in co-operation with other States. The Ministry of Justice of the Slovak Republic, for example, noted that it intended to co-operate with that of the Czech Republic in publishing all translated judgments against the two States on their respective websites. The Agent's offices of Bosnia and Herzegovina, Croatia, Serbia and the former Yugoslav Republic of Macedonia are inter-connected, so that each has access to relevant judgments against the others, bearing in mind the similarities of the respective legal systems and official languages.

vi. Third-party interventions before the Court

81. As the CDDH has underlined in the past, third party interventions are an important tool in the development of principles of general, or wide, application in the Court's case-law.⁴⁷ The French reply mentioned the practice of making such interventions in cases before the Court that may have consequences for similar national legislation, noting that this exercise was undertaken with great caution, insofar as the standards in question may appear similar but actually be quite different within their respective legal context. Likewise, San Marino referred to its third-party intervention in the Grand Chamber proceedings in the case of *Lautsi v. Italy*, made in anticipation of the clear domestic implications that the eventual judgment would have.

vii. Examples of domestic action taken as a consequence of judgments against other States

82. The replies received contained several specific examples. The case of *Salduz v. Turkey* was mentioned by several States. In November 2010, for instance, the national parliament of Andorra modified various legal texts relating to criminal law and the rights of the defence. Legislative reforms were also introduced in Belgium and in The Netherlands,⁴⁸ whilst in the United Kingdom, the principle in *Salduz* was incorporated into domestic law through a 2010 decision of the Supreme Court. Other specific judgments mentioned included *M. v. Germany*, following which the Supreme Court of Estonia in June 2011 declared invalid a provision of the Penal Code concerning preventive detention of a person following the completion of their sentence, and *Hirst v. the United Kingdom*, following which Latvia in 2009 had amended its election law. Sometimes changes were based on several Court judgments: in Lithuania, for example, a Supreme Administrative Court judgment of 2011 concerning freedom of assembly referred to various Strasbourg Court judgments against Bulgaria, Poland and Russia; and in Latvia, a government regulation on prison rules was amended in 2011 with respect to the rights of convicted prisoners to keep religious objects, with the accompanying explanatory note referring to several Court judgments.

47. See, for example, the CDDH Activity Report on guaranteeing the long-term effectiveness of the control system of the ECHR, doc. CDDH(2009)007 Addendum I, paras. 26-30.

48. The Netherlands also introduced policy changes in response to other Court judgments including *Marckx v. Belgium*, *Brogan v. the United Kingdom*, and *M.S.S. v. Belgium and Greece*.

83. The significance of third party interventions in proceedings before the Court was underlined by specific examples: in Latvia, for instance, numerous amendments to relevant legislative acts concerning child abduction were made following Court judgments in which Latvia had made third party interventions.

84. The value of Committee of Ministers' recommendations as guidance to the application of general principles from the Court's case-law was also apparent. In Estonia, for example, an Act regulating the right of journalists to protect their sources of information came into force in December 2010, prepared in response to Court judgments against other States and inspired by Committee of Ministers' Recommendation No. 7 (2000) on the right of journalists not to disclose their sources of information.

viii. Problems and possible solutions

85. A range of possible problems was mentioned by States, although possible solutions were less apparent. Possible solutions may nevertheless be found amongst the conclusions and recommendations that appear in section C below.

86. One problem often mentioned was the fact that the domestic settings, the concept and scope of relevant legislation and the structure of domestic legal systems often differ between member States. This may make it difficult to refer to a Court judgment concerning another State even if the same problem of principle it addresses has been identified in the domestic legal system, as described by Sweden.⁴⁹

87. Various factors relating to the volume and complexity of the Court's case-law were mentioned, including by Estonia and Poland. The French reply stated that the scope of the legal issues involved in judgments against other States cannot be clearly ascertained unless the case-law on a particular issue is sufficiently clear, consistent and stable.

88. Linguistic difficulties were mentioned, in particular an insufficient knowledge of the official languages of the Court among the judiciary.

89. Another common problem was limited availability of budgetary and human resources. In different ways, Bulgaria, the Czech Republic, Lithuania and the Republic of Moldova all stated that insufficient means hampered their ability to take more effective action in this area.

90. The Czech Republic alluded to political obstacles, noting that in a political debate, despite a general commitment to human rights, Convention standards are not always considered to be the most important criterion, especially when violation of those standards has been found in a case against another State where it could be argued that the legal situation is not exactly the same.

C. Conclusions and recommendations

91. Although there is no explicit Convention obligation to take account of judgments against other States, the status of the Convention as an instrument of European legal order combined with the final interpretative authority of the Court imply that to do so is an important aspect of effective domestic implementation of the Convention, as reflected *inter alia* in the Interlaken Declaration. The replies received show that in many States, this message is already well understood and increasingly put into effect. As mentioned elsewhere in this report, however, the volume of the Court's case-load, including notably the very high

49. A problem also variously referred to by, for example, Albania, France and Malta.

proportion of judgments finding violations in areas on which there is well-established case-law, as well as the content of its case-law, suggest that much more could yet be done in this area.

92. Given the importance of a central co-ordinator to execution of judgments against a Respondent State, a related process, it is also important that an identified, central authority have clearly defined responsibility for following the Court's case-law as a whole and for transmitting information and/ or giving appropriate advice to relevant actors when significant judgments are delivered. In many cases, this role falls to the Agent's office, including with support provided by the national Permanent Representation to the Council of Europe. A clear legal mandate, where appropriate, might reinforce the role and status of the responsible actor in this respect.

93. The function involves several complementary aspects, including co-ordination and information-sharing with different secondary actors (other government offices, the Ombudsman or national human rights institution, the judicial system and, as regards transmission of information, relevant stakeholders such as the bar, universities and publishers of law journals). In order to help simplify the otherwise daunting task of keeping abreast of the Court's case-law as a whole, systematic use should be made of existing tools, notably those provided on-line by the Court, such as the regular case-law information notes and the continuously updated thematic factsheets, and by the Execution Department, many of which exist in several languages. Informal contacts, both with Council of Europe staff (especially in the Court's Registry) and other Government Agents, should be developed and exploited. Groups of States with mutually understandable official languages and similar domestic legal systems should consider pooling their resources, co-ordinating their work and sharing the results through more formal arrangements, as is already the case for some. Results should be widely and appropriately distributed domestically, including by electronic means such as official websites.

94. At the level of Court proceedings, States should consider – possibly following consultations with relevant national authorities, which may where appropriate include the judiciary – making third-party interventions in cases in which a judgment may be given that would be susceptible to having implications within their own domestic legal order. States should also consider taking action to inform other potentially interested States of forthcoming cases in which they may wish to make third-party interventions.

95. Whilst many of the problems mentioned – such as the volume and complexity of the case-law, its clarity, consistency and stability, linguistic difficulties and budgetary limitations – are not entirely avoidable or resolvable, they or their effects may be significantly mitigated by taking measures such as those described above.

4. Ensuring, if necessary by introducing new legal remedies, whether they be of a specific nature or a general domestic remedy, that any person with an arguable claim that their rights and freedoms set forth in the Convention have been violated has available to them an effective remedy before a national authority providing adequate redress where appropriate.

A. Introduction

96. Article 13 of the Convention establishes the right to an effective remedy, whereby “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”. According to the Court’s case-law, an effective remedy must exist for all arguable claims of a violation. It must allow the competent domestic authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.⁵⁰ A remedy is only effective if it is available and sufficient. It must be sufficiently certain not only in theory but also in practice,⁵¹ and must be effective in practice as well as in law,⁵² having regard to the individual circumstances of the case. Its effectiveness does not, however, depend on the certainty of a favourable outcome for the applicant.⁵³ The “national 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 before it is effective.⁵⁴

97. The Committee of Ministers has given further guidance on the implementation of Article 13 in its Recommendation Rec(2004)6 on the improvement of domestic remedies, which mentioned the need for constant review, in the light of the Court’s case-law, of the existence and effectiveness of domestic remedies and which underlined the importance of remedies for structural or general deficiencies in national law or practice.

98. The right to an effective remedy, along with the obligations in Article 1, to respect human rights, and Article 46, to execute Court judgments, is one of the key provisions underpinning the Convention system of human rights protection. By contributing to the resolution of complaints at domestic level, it is fundamental to the practical application of the principle of subsidiarity. The availability of effective domestic remedies for all arguable claims of violation of the Convention should permit a reduction in the Court’s workload – particularly in respect of repetitive cases – as a result, on the one hand, of the decreasing number of cases reaching it and, on the other, of the fact that the detailed treatment of the cases at national level would make their later examination by the Court easier.⁵⁵ Furthermore, giving retroactive effect to new remedies, particularly those intended to address structural or systemic problems, would help relieve the Court’s case-load by permitting applications already made to Strasbourg to be resolved domestically.⁵⁶

50. See *Halford v. the United Kingdom*, App. No. 20605/92, judgment of 25/06/97, para. 64.

51. See *Riccardo Pizzati v. Italy*, App. No. 62361/00, Grand Chamber judgment of 29/03/06, para. 39.

52. See *Kudła v. Poland*, App. No. 30210/96, judgment of 26/10/00, para. 157.

53. See *Kudła v. Poland*, op. cit., para. 157.

54. *Ibid.*

55. As noted in Committee of Ministers’ Recommendation Rec (2004) 6 on the improvement of domestic remedies (“CM Rec(2004)6”).

56. See, for example, CM/Rec(2010)3, in the context of remedies for excessive length of proceedings.

99. In addition to Article 13 and the Court’s case-law on it, the issue of the right to an effective remedy has been addressed by the Committee of Ministers, notably in Recommendation Rec(2004)6, as noted above, and also Recommendation CM/Rec(2010)3 on effective remedies for excessive length of proceedings. Excessive length of proceedings nevertheless remains the violation by far the most frequently found in Court judgments – despite introduction of the Court’s prioritisation policy, which gives low priority to repetitive cases – and is very often accompanied by a finding of a lack of effective remedy for the violation. Indeed, such repetitive cases generally betray a chronic failure to institute effective domestic remedies, since previous Court judgments, especially pilot or leading judgments, will usually have given indications of general measures necessary to avoid future violations.

B. Issues

100. The responses received to the Questionnaire, taken as a whole, highlight the significance notably of the following issues.

i. Ascertaining the lack of a domestic remedy

101. Several States’ replies highlighted the importance of a process or mechanism for ascertaining the lack of a domestic remedy in particular situations. In Cyprus, for example, the Human Rights Sector of the Agent’s office ascertains the non-availability of an effective domestic remedy on the basis of Strasbourg and domestic court decisions, or of its own initiative. All Strasbourg Court judgments, both those against Cyprus and those against other States that establish new legal principles, are also communicated to the Registrar of the Supreme Court, which is thereby made aware of the unavailability or ineffectiveness of a particular remedy. In Denmark, the government routinely evaluates the need for introducing new remedies, whether specific or general. The Estonian reply underlined that domestic case-law may be an effective means of revealing the need for new remedies: for example, a 2011 Supreme Court ruling that the State Liability Act was unconstitutional for failure to provide a remedy for excessive length of pre-trial detention, the ruling also remedying the ongoing violation by way of compensation.

ii. General remedies, including “constitutional complaints”

102. The Convention is now effectively incorporated into the domestic law of all member States, very often at constitutional level⁵⁷ or with other superior status,⁵⁸ with general remedies for violations of rights available before the domestic courts.⁵⁹ In Andorra, for example, this is done by the ordinary courts through an urgent procedure: any person may request directly of the duty judge to guarantee respect of their rights or bring to an end a violation; the problem must be resolved within five days and the procedure as a whole within 30 days and the decision may be challenged before the Superior Court of Justice, which must determine the appeal within a month.

57. As in, for example, Austria, Bosnia and Herzegovina, Croatia, Czech Republic, Latvia, Montenegro, Poland, the Slovak Republic.

58. As in, for example, Liechtenstein, Norway.

59. As in, for example, Germany, Ireland, Luxembourg, Monaco, San Marino.

103. Many States mentioned a remedy before the national Constitutional Court, often described as a “constitutional complaint”.⁶⁰ The 2012 Fundamental Law in Hungary, for example, introduced an enhanced system of constitutional complaint whereby the Constitutional Court was empowered to review the fundamental rights-compliance of final judicial decisions; previously, this power was limited to review of the constitutionality of the law applied by the courts. Often this remedy is subsidiary, meaning that other available remedies, notably those before lower courts, must first be exhausted.⁶¹ In Bosnia and Herzegovina, the Constitutional Court has appellate jurisdiction over constitutional issues, including respect for Convention rights and freedoms. In Liechtenstein, the Constitutional Court is the domestic court of last instance for complaints of violation of an individual’s Convention rights. In Lithuania, persons alleging a violation of their Convention rights may apply to the courts, which may, if necessary, apply in turn to the Constitutional Court to determine the constitutionality of domestic legal acts, including their compatibility with the Convention, an integral part of domestic law. The Constitutional Court may intervene before all general remedies are exhausted, however, if there is a question of general interest at stake or alternative general remedies would not provide adequate relief.

104. Several States, including Latvia and Poland, underlined the accessibility of such general remedies, referring both to procedural simplicity and the lack of any fee.

105. Many replies referred to the situation of a domestic court finding a domestic legislative provision to be incompatible with Convention rights. The status of the Convention in domestic law and a country’s constitutional system are fundamental considerations in this respect. In 2008, major constitutional reforms in France introduced the possibility for a party to raise the unconstitutionality of a legislative provision during proceedings before a domestic court. In Norway, the Convention is an integral part of domestic law under the 1999 “Human Rights Act”, by which provisions of incorporated human rights convention are directly applicable, prevailing over national legislation, and may be invoked in administrative proceedings before the ordinary courts. In Poland, a constitutional complaint may lead to judgment on the conformity with the constitution or a statute of other normative act on the basis of which a court of administrative authority has issued a final decision.

106. In several States, domestic courts may declare legislative provisions to be incompatible with the Convention.⁶² Such findings have different consequences. In Austria and Liechtenstein, the Constitutional Court may void any final decision or decree of and remand the case to a public authority, and may issue a temporary injunction securing the interests of the complainant for the duration. In Switzerland, the courts may decide not to apply a legislative provision in favour of another legal norm, including those established by the Convention. In the United Kingdom, domestic courts must, if possible, read and give effect to legislation in a way that is compatible with Convention rights. If this is impossible, they may make a declaration of incompatibility, which neither affects continuing operation or enforcement of the legislation nor binds the parties to the case, since parliament remains the supreme law-maker, although secondary legisla-

60. As in, for example, Austria, Bosnia and Herzegovina, Croatia, the Czech Republic, Hungary, Latvia, Liechtenstein, Montenegro, Poland, Serbia, the Slovak Republic, Slovenia, Spain.

61. As in, for example, the Czech Republic, Montenegro, Serbia, Slovenia.

62. As in, for example, Ireland, Liechtenstein, Malta and the United Kingdom.

tion may be struck down or not applied unless it repeats a requirement of an Act of Parliament. Remedial measures following declarations of incompatibility may be made by ministerial order before parliament or primary legislation. There is no obligation on the government to propose remedial action or on parliament to accept it, although governments in practice have done so.

iii. Remedies introduced by way of legislation

107. The most common way of introducing remedies is by legislation. In Cyprus, the Human Rights Sector of the Agent's office incorporates provisions establishing effective remedies when introducing new or amending existing legislation, with the views of the domestic courts being sought concerning bills introducing judicial remedies. These remedies may also be co-ordinated with action at European level: in Lithuania, for example, the draft Law on the Legal Status of Aliens, when in force, will oblige domestic authorities to execute Strasbourg Court indications of interim measures relating to the expulsion of aliens.

iv. Remedies introduced by way of domestic courts' case-law

108. Another way of introducing remedies – both specific and general – is through domestic courts' case-law. In Lithuania, domestic courts have developed case-law allowing assessment of the compatibility of domestic legal acts with the Convention. In Poland, the Supreme Court may extend the application of existing remedies to new problems identified by the Strasbourg Court. In Sweden, the Supreme Court's case-law has developed a remedy allowing an individual to bring proceedings before a district court if the Chancellor of Justice, to whom claims are first brought, finds there is insufficient evidence to award compensation for violations of Convention rights.

v. Forms of redress

109. Various forms of redress were said to be available in the case of a finding of a violation. The possibility of financial compensation was often mentioned.⁶³ In the Slovak Republic, the Constitutional Court may quash offending acts or order action to be taken; it may also order the relevant authority to abstain from such violations in future or to restore the prior situation, as well as granting adequate financial satisfaction. In the United Kingdom, courts and tribunals may grant any appropriate remedy within their powers, such as damages, quashing a decision or conviction or ordering a public authority not to take impugned action, to victims of violations by public authorities. The Estonian reply suggested that the national legal provisions on redress for violations of Convention rights should in practice eliminate the need for the Court to award just satisfaction.

110. Several States mentioned the possibility of re-examination and re-opening of proceedings as an important part of the system of remedies, contributing to *restitutio in integrum*. In Croatia, the Criminal Procedure Law was recently amended to allow reopening of criminal proceedings following Court finding of violation. In Italy, a new remedy introduced in 2011 allows both re-examination of decisions taken by final instance courts and reopening of proceedings.

vi. General effect of judgments and class actions/ collective complaints

111. Several States' replies referred to the possibility of remedies having effects beyond individual proceedings. In Latvia, the Constitutional Court's judgment is generally binding, so a finding that a legal provision is incompatible with the

63. As in, for example, Bosnia and Herzegovina, Monaco, Serbia, the Slovak Republic.

Constitution applies not only to the complainant but generally. In Lithuania, a Conceptual Framework on Group Action was introduced by the government in 2011, in response to the fact that the number of people making human rights-based complaints to the domestic courts, often based on the same factual and legal issues, was increasing (see further below).⁶⁴

vii. Excessive length of proceedings

112. As noted above, excessive length of proceedings, very often due to structural or systemic problems, remains the most common type of violation found by the Court in its judgments. Many States referred to specific remedies recently introduced to address this problem. In Estonia, a 2011 amendment to the Code on Criminal Procedure and other procedural acts established new preventive remedies against excessive length of proceedings making it possible for domestic courts to be asked to perform a specific procedural act, with any refusal subject to appeal, and introducing new time-limits for guaranteeing an accused's fundamental rights. In Lithuania, a 2010 reform of the Code of Criminal Procedure fixed the maximum period for pre-trial investigation and a 2011 reform of the Code of Civil Procedure allows applications to the Court of Appeals to fix the time within which a lower court must take certain procedural actions. In the Republic of Moldova, the Law on redress by the State of the damage due to infringements of the right to trial within a reasonable time or the right to enjoy the enforcement of a judgment within a reasonable time entered into force in 2011, although it is still too early to assess its effectiveness. In Romania, legislative reforms and provisions in the new criminal and civil procedure codes were introduced in 2010, with measures to ensure trial within a reasonable time and to expedite delayed proceedings. In addition, the Superior Judicial Council has sought to sanction disciplinary faults contributing to delays, and a conference on relevant case-law of the Court, involving the Ministry of Foreign Affairs and the Superior Judicial Council, was held in 2010. The response of the Czech Republic referred to the "repatriation" of applications already made to the Strasbourg Court as a result of the introduction in 2006 of a compensatory remedy with retrospective effect.

viii. Detention conditions

113. Another area in which the Court frequently finds violations due to structural or systemic problems is that of detention conditions. Several States mentioned remedies introduced to address such problems. In Georgia, for example, a new Code on Imprisonment entered into force in October 2010, with provisions establishing rights and procedures concerning detention conditions, in particular the right to health care. In Romania, a series of measures have been introduced to address problems relating to detention conditions, including incorporation of recommendations of the Committee for the Prevention of Torture in national legislation.

64. At the Round Table organised by the Slovenian Chairmanship of the Committee of Ministers (Bled, Slovenia, 21-22 September 2009), the following definition of "class action" was put forward: an "action brought by a representative on behalf of an entire class of people with identical or similar rights which results in the imposition of a decision having the authority of res judicata in respect of the members of such class". Other definitions, however, may be equally valid.

ix. Problems and possible solutions

114. As regards responses suggesting problems and their possible solutions, several States mentioned budgetary and human resources as possible limiting factors on the potential to introduce new remedies.⁶⁵ Some States noted that the legislative reform process necessarily takes a certain time.⁶⁶ Ukraine noted that there were several structural problems for which an effective remedy is still lacking, including non-enforcement of domestic court judgments and poor detention conditions, although the government had drafted a Law on State Guarantees of Enforcement of Court Judgments.

115. As regards constitutional complaints, several States noted problems due to a rapid increase in the number made. In Montenegro, for example, there had been an increase of over 3,000% between introduction of the system in 2007 and the end of 2011; a proposed constitutional amendment would increase efficiency by allowing constitutional complaints to be decided by the Constitutional Court sitting in a three-judge panel. Similarly, in Serbia, the increasing number of constitutional complaints has led to a detailed analysis of possible measures to increase the efficiency of the Constitutional Court and resolve complaints without recourse to the Strasbourg Court.

116. Other specific problems concerned remedies for excessive length of proceedings. In Bulgaria, it has been noted that the scope of the State and Municipality Responsibility for Damage Act needs broadening to include right for compensation for excessively lengthy proceedings. Draft legislative reforms are expected to be prepared by Ministry of Justice working group during 2012 and adopted by the National Assembly thereafter. In Germany, the general constitutional remedy had been found by the Strasbourg Court to be deficient with respect to excessive length of proceedings. In response, the Act on Legal Protection in the Event of Excessive Length of Court Proceedings and Criminal Investigative Proceedings entered into force in December 2011, allowing for a compensation claim in relation to proceedings before any domestic court up to and including the Constitutional Court. The reply of the Czech Republic noted that the effectiveness of a remedy for excessive length of proceedings may be undermined by, for example, inadequate levels of compensation. As with constitutional complaints, a rapid increase in the number of complaints concerning excessive length of proceedings, as for example with the Supreme Court of the Republic of Moldova, may create a backlog.

C. Conclusions and recommendations

117. It would appear that many significant national initiatives have been taken concerning domestic remedies, triggered by judgments of the Court but also inspired by non-binding instruments, notably Committee of Ministers' Recommendations Rec(2004)6 and CM/Rec(2010)3. The Court's judgments revealing persistent systemic and structural problems that give rise to continuing repetitive cases, however, show that in many areas and in many States, further efforts are still required.

65. E.g. Albania, Armenia, Bulgaria.

66. E.g. Albania, Bulgaria, Finland.

118. As a starting point, it is important to have mechanisms, systems or processes in place to identify areas in which new remedies are needed, both of their own initiative and in response to the findings of domestic courts and the Strasbourg Court.

119. Very many States now benefit from some form of general domestic remedy for violations of Convention rights: in many cases, this takes the form of a remedy before the Constitutional Court, often known as a “constitutional complaint”, which may be of subsidiary nature (requiring prior exhaustion of other remedies); in others, allegations of human rights violations may be raised in proceedings before any court or tribunal. Several States underlined the importance of this remedy being easily accessible. Various responses have been developed, in accordance with the particularities of the national legal system, to situations in which relevant domestic legislation is found to be incompatible with the Convention: in some countries, the offending provisions may be voided by the relevant court, with general effect; in others, a judicial declaration of incompatibility may be made, requiring action by parliament if the incompatibility is to be resolved.

120. Whilst legislation is the most common means of introducing new remedies, another approach, valuable on account of its flexibility and relative rapidity, is to do so through development of domestic case-law.

121. Where many similar complaints are or even may be brought, there may be an advantage in giving general effect to judgments brought in individual cases (see also above in relation to incompatibility of legislation with Convention rights). There may also be an interest in examining the possibility of introducing some form of class action/ collective complaint procedure.

122. There is still a widespread need to introduce effective domestic remedies for systemic or structural problems. Many States have also found introduction or adaption of general remedies to be a useful solution to such problems. States that continue to be confronted by excessive length of proceedings, the most common violation due to such problems, should also seek inspiration from CM/Rec(2010)3 and its accompanying Guide to Good Practice, which reflected the preference for resolving underlying problems (thereby avoiding future or continuing violations) rather than merely compensating the violations that arise from them – as would be in conformity with the obligation under Article 1 of the Convention.

123. It is important to ensure, at the earliest possible stage, that general remedies are adequate for all situations in which they may be relied upon and specific remedies are fully effective, so as to allow any necessary modification or reform to be undertaken before problems with the remedy arise or applications are made to the Court, in accordance with the principle of subsidiarity in the Convention system. Likewise, where the level of recourse to a particular specific or general remedy becomes problematic, every effort should be made to find solutions at domestic level.

5. Considering the possibility of seconding national judges and, where appropriate, other high-level independent lawyers, to the Registry of the Court.

124. Several member States indicated having proceeded to secondment of national judges or lawyers to the Court's Registry⁶⁷ or had begun the selection process to this end.⁶⁸ Many member States indicated that this possibility was or would be examined.⁶⁹ By contrast Finland has, since 2000, provided direct funding to the Court to cover the cost of an additional lawyer to work on applications against Finland; The Netherlands has a similar arrangement in place.

125. For those few States that indicated that they did not foresee, for the time being, the secondment of national judges to the Registry, difficulties invoked were mainly financial. National circumstances such as the size of the State were also invoked.

126. This practice can only be encouraged insofar as it permits, in particular, on the one hand the reinforcement of the Court's Registry and the reduction of its backlog and, on the other, an increase in the national judge's knowledge of the Court's case-law and the Convention system, which can thereafter play a role in raising awareness of Convention standards when the judge resumes his or her functions at the conclusion of the secondment.

6. Ensuring review of the implementation of the recommendations adopted by the Committee of Ministers to help States Parties to fulfil their obligations.

127. Few recent measures, other than those already mentioned in the framework of the follow-up of certain Committee of Ministers' Recommendations by the CDDH⁷⁰ in 2008, were evoked. Member States also often made reference to measures that were developed in the framework of their responses to other issues, for example concerning the execution of judgments, the introduction of new remedies or raising awareness of Convention standards.

128. Generally speaking, member States undertake translation and dissemination of the recommendations,⁷¹ the role of the Government Agent in the follow-up to the recommendations also being underlined.⁷² Committee of Ministers' Recommendation (2010)3 on effective remedies for excessive length of proceedings in particular was cited. Ireland thus indicated that a Committee of Experts, charged with the implementation of effective remedies for excessive length of proceedings, had been particularly inspired by the Guide to Good Practice accompanying the Recommendation. For its part, Romania mentioned the introduction of an acceleratory remedy in the new Code of Civil Procedure.

67. As in, for example, Armenia, Estonia, France, Germany, Ireland, Italy, Luxembourg, Montenegro, the Netherlands, Russian Federation, Serbia, Sweden, Switzerland, Turkey.

68. As in, for example, Republic of Moldova, Romania.

69. As in, for example, Albania, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Georgia, Italy, Lithuania, Norway, Poland, Slovenia, the former Yugoslav Republic of Macedonia, Ukraine.

70. See CDDH(2008)008 Addendum I: CDDH Activity Report: Sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels.

71. As in, for example, Czech Republic, Serbia, the former Yugoslav Republic of Macedonia.

72. As in, for example, Azerbaijan, Croatia, Czech Republic, Lithuania, Monaco, Romania.

Many States also referred to the follow-up of implementation of Recommendation CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights. For further details, see the chapter on the execution of Court judgments in the present report.

7. Ensuring that comprehensive and objective information is provided to potential applicants on the Convention and the Court's case-law, in particular on the application procedures and admissibility criteria.

A. Introduction

129. Following the appeal from the Interlaken Conference to the States Parties and the Court “to ensure that comprehensive and objective information is provided to potential applicants on the Convention and the Court’s case-law, in particular on the application procedures and admissibility criteria”, in its decision of 11 May 2010 on the follow-up to the Conference, the Committee of Ministers “encouraged the Court to pursue its efforts to provide better information about the Convention system and invited the Secretary General to investigate possible means of providing comprehensive and objective information to potential applicants to the Court on the Convention and the Court’s case-law, in particular on the application procedures and admissibility, including through independent national human rights institutions or Ombudspersons”⁷³ For this aspect of the work, therefore, it is worth referring both to the relatively comprehensive information provided by the member States but also to the Secretary General’s post-Interlaken report on providing objective and comprehensive information to applicants to the Court.⁷⁴

B. Issues

i. Who is required to perform this task?

130. Several States highlighted the role of ombudspersons and national human rights institutions in the provision of both information and counselling and advice for potential applicants. Among the institutions cited were the Ombudsman in Bosnia and Herzegovina, the Ombudsman of the Republic of Bulgaria, the Ombudsman’s Office in Latvia, the Danish Institute for Human Rights, the Consultative Committee on Human Rights in Luxembourg and the various national human rights institutions in the United Kingdom. In this connection, it is worth noting that a round table meeting was held by the Council of Europe and the Spanish Ombudsman with national human rights bodies in Madrid on 21 and 22 September 2011 and focused in particular on the active role that national bodies might play in providing information for potential applicants to the Court.⁷⁵

73. Committee of Ministers’ 120th Session, 11 May 2010, Follow-up to the High-level Conference on the Future of the European Court of Human Rights (Interlaken, 18-19 February 2010).

74. Document SG/Inf(2010)23final of 6 January 2012.

75. www.coe.int/t/dghl/cooperation/capacitybuilding/Source/nhrs/RT_mad_DebriefingPaper_en.doc; see, in particular, the summary note on the prospects for national human rights institutions to play an active role in passing on information to potential applicants to the Court: www.coe.int/t/dghl/cooperation/capacitybuilding/Source/nhrs/RT_mad_Outline_Provision_information_applicants_en.doc.

131. Several States have set up departments responsible for answering questions from potential applicants. These include the community justice and law centres in France, in which people can seek free advice from lawyers, and a legal information and support service in Luxembourg, to which every citizen can turn for information.

132. Some States such as Bulgaria, Latvia and Switzerland also mentioned the important role of civil society, which serves as a communication channel with applicants.

133. In many States, government agents play a key role in providing information for potential applicants. In Bosnia and Herzegovina, Croatia, Lithuania, Serbia and Turkey, the government agents translate then publish on their websites all decisions and judgments against them, and their sites also include an electronic application form and instructions for potential applicants. In many member States, for example Austria, Finland and Sweden, the government agent's office provides general information on Court procedure and case-law. In Estonia, at the end of 2010, the government agent published an article on admissibility criteria in a legal review. In Romania, in December 2011, the government agent launched an information campaign for potential applicants in co-operation with the Judicial Service Commission by distributing information brochures designed for the general public in courts and public prosecutor's offices. In Ireland, in November 2011, the government agent held a seminar in co-operation with the Registry of the Court for all practitioners with an interest in the procedure before the Court. It should be said that in no circumstances does the agent provide any information or advice with regard to the merits of any case liable to be brought before the Court; in most cases agents do not have any direct contact with potential applicants but simply address the public at large or a specialised target group.

ii. What measures are implemented?

134. With regard to the measures taken to ensure that information is provided for potential applicants, many States stated that they have translated the practical guide on admissibility drawn up by the Registry of the Court, disseminated it on various government websites and sent it to the Bar. Besides the dissemination of the Court's case-law and general information on the procedure by the authorities,⁷⁶ reference was made to the production and dissemination of handbooks and reports on Court case-law and procedure⁷⁷, seminars for legal practitioners⁷⁸ and the provision of information to potential applicants in the course of free consultations. An interesting step was taken in Germany in summer 2011, when it staged a travelling exhibition on the 60th anniversary of the Convention so as to draw the public's attention to the Court and its procedure.

135. It should be noted that many States said that they disseminated information in particular to bar associations. For instance, in the Czech Republic, a handbook for lawyers was published in a review of the Czech Bar Association as well as being available on the web. In Germany, reports on Court case-law are sent to the Lawyers' Association and the Federal Bar Association with the suggestion that they may be used as materials for the training of lawyers. In Andorra and in the former Yugoslav Republic of Macedonia, the Registry's practical guide on admis-

76. Austria, Bulgaria, Hungary, Ukraine.

77. Czech Republic, Germany, Switzerland.

78. Ireland, Monaco.

sibility has been distributed to lawyers, including by e-mail. Increasing the capacity of lawyers to comply with admissibility criteria when lodging applications with the Court, in order to reduce the number of inadmissible applications, is also one of the goals that has been set by the Secretary General⁷⁹. As a result, as part of the European Programme for Human Rights Education for Legal Professionals (the HELP II Programme), a pilot project to enhance the capacity of lawyers to meet admissibility criteria has been devised, covering six pilot countries,⁸⁰ and information points on admissibility have been set up in these countries employing national experts, whose task is to provide information on admissibility criteria in co-operation with bar associations. Training programmes are also available on line, along with the Court's practical guide on admissibility and special guides produced to meet the specific needs of these six countries.

iii. Problems and possible solutions

136. The problems most often referred to were financial and linguistic ones. It was also noted that the national authorities were not necessarily always the most appropriate discussion partners for potential applicants⁸¹ and that, in any event, full and objective information was not always enough to dissuade applicants from lodging clearly inadmissible applications.⁸² It was suggested that independent information sources were needed, such as the Council of Europe's former documentation and information centres⁸³. In this connection, it should be noted that it was said in the Interlaken Declaration that "the role of the Council of Europe information offices could be examined by the Committee of Ministers"⁸⁴. The CDDH also noted, in its Activity Report on guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights, adopted in March 2009⁸⁵, that "the Warsaw pilot project⁸⁶ should be continued and consideration should be given to providing similar services in other Council of Europe information offices".

C. Conclusions and recommendations

137. Although they are generally considered to have resulted in a decrease in the number of inadmissible applications, it is difficult to assess the impact of the measures introduced. Nonetheless, as is pointed out in the report by the Secretary General cited above, "the impact of any measure will ultimately depend on the identification and/or setting up of effective means and channels for the dissemination of information to the potential applicants".

138. Various bodies can usefully play a role, including notably Ombudspersons and national human rights institutions (national human rights structures), but also law centres and similar bodies, legal professional associations and other civil society organisations. National authorities should in particular establish or

79. For more details, refer to the report by the Secretary General cited above (doc. SG/Inf(2010)23final).

80. Albania, Bulgaria, Czech Republic, Lithuania, the Russian Federation and Turkey.

81. Hungary, Norway.

82. Czech Republic, Serbia.

83. Hungary.

84. Interlaken Declaration, C. 6. a.

85. See document CDDH(2009)007 Addendum I.

86. Project in which a lawyer specially trained by the Registry was sent to work part time at the Council of Europe Information Office in Warsaw in order to provide information on the Convention system to those interested.

further develop co-operation with national human rights structures. The government itself, often through the office of the Agent, may also play a certain role, although more usually in a more general way, for instance through publications and information campaigns. Whoever is involved, it is fundamental that all information provided is objective and comes from sources whose impartiality in the provision of such information is guaranteed.

139. With respect to national human rights structures, the Madrid Round Table (see paragraph 130 above) concluded that they could in particular:

- ▶ provide information about available domestic remedies and the admissibility criteria for applications to the Court on their websites, with links to the Court's website;
- ▶ include relevant information in their annual or thematic reports; and
- ▶ have on-duty lawyers to advise potential applicants to the Court about domestic remedies and general ECHR admissibility criteria.

140. Information may be provided by various means, including both general dissemination and targeted communication to relevant bodies, notably the Bar and other legal professional associations. The form the information takes may also differ. Translations into the national language, where appropriate, and dissemination of the Registry's Practical Guide on Admissibility Criteria are particularly useful for applicants' legal representatives, as are seminars and the production and dissemination of other more specialised publications. Thought should be given to more innovative approaches for drawing the general public's attention to relevant information; the Court's video-clip on admissibility is a good example of an accessible approach. Optimal use should be made of information technology, notably by making information available on-line or transmitting it to target groups (such as legal practitioners) by electronic means.

141. Full use should be made of available Council of Europe technical and financial assistance, including notably the HELP Programme, which is aimed in particular at lawyers. In this respect, once again, States should consider contributing to the Human Rights Trust Fund, which amongst other things finances the HELP Programme. Consideration should also be given by the Committee of Ministers to the possible role of the Council of Europe information offices in providing information to individual potential applicants, as stated in the Interlaken Declaration and previously supported by the CDDH (see above).

8. Facilitating, where appropriate, within the guarantees provided for by the Court and, as necessary, with the support of the Court, the adoption of friendly settlements and unilateral declaration.

142. All the member States which expressed themselves indicated that they facilitated, when appropriate, the conclusion of friendly settlement and the adoption of unilateral declarations. One of the practices evoked was the systematic examination, for each new case communicated, of the suitability of such an outcome.⁸⁷ The following other measures were in particular pointed out: In the Czech Republic, in the framework of the adoption of a new Statute of the Government Agent, the procedure for acceptance by the State of a friendly settlement has been simplified, in particular when the sums involved do not exceed €5,000, and the idea of unilateral declarations, which was unknown at national level, was introduced. In Poland, the rules concerning friendly settlements and unilateral

87. Austria, Belgium, Croatia, Germany.

declarations are discussed each year during specific meetings between the Polish authorities and the Court's Registry and are also the subject of inter-ministerial consultations. In Romania, a simple and rapid internal procedure has been put in place in order to ensure prompt friendly settlement and unilateral declarations. In Spain, a protocol has been adopted between the Minister of Finance and the Minister of Justice in order to facilitate friendly settlements and unilateral declarations.

143. The difficulties evoked are notably the absence of transparency in the Court's scales for calculating just satisfaction.⁸⁸ It has also been indicated that a frequent difficulty in the procedure for friendly settlements concerns the reticent attitude of applicants towards the amounts proposed.⁸⁹ This reluctance could be considerably reduced by providing better information to lawyers on the case-law of the Court concerning just satisfaction in similar cases and by the publication of the Court's scales.⁹⁰ It has been noted that a large number of cases do not automatically lead to friendly settlements insofar as they raise new issues and are rarely based on well-established case-law.⁹¹ Generally speaking, it has also been pointed out that the parties should be better informed on these possible measures,⁹² in particular on unilateral declarations,⁹³ in order that they may have a real impact on the Court's burden whilst being understood by the applicant.⁹⁴

144. The CDDH also reiterates its earlier recommendations on this issue. Member States should have more systematic recourse to the Registry's practice of putting itself at the disposal of the parties at any time during the proceedings in order to arrive at a friendly settlement of the case and encouragement to States parties to make greater use of friendly settlements in repetitive cases. They should also have more systematic recourse to the practice of unilateral declarations by Respondent States, with the Court encouraging the 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.⁹⁵

10. Ensuring, if necessary by improving the transparency and quality of the selection procedure at national level, full satisfaction of the Convention's criteria for office as a judge of the Court, including knowledge of public international law and of the national legal system as well as proficiency in at least one official language.

145. As regards this element of the Action Plan in particular, one should refer to the Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights and its explanatory report,⁹⁶ which includes examples of good practice.

88. Czech Republic.

89. Romania.

90. Romania.

91. Czech Republic.

92. Estonia.

93. With respect to unilateral declarations, it can be noted that the Court has now adopted Rule 62A regulating the practice and has also issued further guidance.

94. France, Ireland.

95. See the CDDH Final Report on measures resulting from the Interlaken Declaration that do not require amendment of the Convention, doc. CDDH(2012)R74 Addendum II.

96. Adopted by the Committee of Ministers on 29 March 2012 at the 1138th meeting of the Ministers' Deputies.

IV. Please indicate whether your authorities have held or are planning to hold consultations with civil society on effective means to implement the Interlaken Declaration Action Plan, as called for in the Declaration itself.

146. Several member States indicated having held or having foreseen to hold consultations with civil society on implementation of the Interlaken Declaration.⁹⁷ In Croatia, for example, the Working Group on implementation of the Interlaken Declaration Action Plan included a representative of civil society. In France, the consultation with civil society took place in a continuous way through regular, consistent contacts with the National Consultative Commission on Human Rights, on which sat 30 representatives of civil society, and to which the French national report on implementation of the Interlaken Declaration had been presented. In Romania, the Ministry of Foreign Affairs, in co-operation with the Council of Europe Information Office in Bucharest, organised in October 2010 a conference entitled “The European System of Human Rights Protection – Reform and Perspectives”, to which civil society representatives were invited. In Serbia, in October 2011, the Government Agent organised a Round Table on the theme of Court reform in the light of the Interlaken Declaration, to which were invited representatives of civil society. Similarly, Spain mentioned a meeting with human rights associations in April 2011, at which the issue of implementation of the Interlaken Declaration Action Plan was raised.

147. One should note the particularly important role that civil society can play, especially in making available to potential applicants objective and complete information on the Convention and its case-law, in particular on the procedure for making applications and the admissibility criteria, and for raising national authorities’ awareness of Convention standards. For further details, see the relevant parts of the present report.

V. Please indicate whether your authorities would benefit from the technical or financial assistance of the Council of Europe in fulfilling the calls set out in the Interlaken Declaration.

148. Some member States indicated a wish to benefit from the technical or financial assistance of the Council of Europe.⁹⁸

3. FINAL CONCLUSIONS

149. National implementation is an essential part of the reform process. The review of the measures taken by member States to implement the relevant parts of the Interlaken and Izmir Declarations thus constitutes, alongside the expected amendments to the Convention itself, an essential feature in the current process of reform of the Convention system. It has proved to be of considerable value by providing a broad overview, covering many key aspects, of national implemen-

97. As in, for example, Armenia, Albania, Austria, Azerbaijan, Bulgaria, Croatia, Czech Republic, Denmark, France, Georgia, Ireland, Liechtenstein, Norway, Poland, Portugal, Romania, Serbia, Slovenia, Spain, Sweden, Turkey, the United Kingdom.

98. As in, for example, Albania, Armenia, Azerbaijan, Bulgaria, Croatia, Estonia, Georgia, Hungary, Lithuania, Montenegro, Poland, Portugal, Republic of Moldova, Romania, Serbia, Slovenia, the former Yugoslav Republic of Macedonia.

tation of the Convention. Indeed, it is unprecedented within the Council of Europe for so many issues to be addressed simultaneously across (almost) all member States in a single report.

150. A large quantity of information on a wide range of issues has been obtained from all but one of the States Parties to the Convention. National reports were almost all submitted in broadly comparable format and cover a common, recent time-frame, even if not limited to measures taken after (whether or not being, strictly speaking, a result of) the 2010 Interlaken Conference.

151. The CDDH has conducted a detailed review and evaluation of the information contained in these reports; although it should be understood that, on account of the nature of the CDDH itself and the quality of the information received, this cannot be considered tantamount to a monitoring exercise of national implementation of the Interlaken and İzmir Declarations. Although the information obtained is not – and was not intended to be – an exhaustive, comprehensive picture of the state of national implementation of the Convention, it nevertheless permits the identification of certain patterns and tendencies in national practices. Preceding chapters of this report have sought to identify good practices from amongst these, in particular concerning the various issues that have been identified as priorities.

152. The present report should be read alongside and in the light of the Brighton Declaration, which placed considerable emphasis on various aspects relating to national implementation and the Convention and to which it is intended to be complementary. The CDDH would also underline that the suggestions and proposals made in this report should not be taken as setting new standards or seeking to harmonise national practices; they are rather set out as potentially flexible solutions found to have been effective in certain member States, which other member States may wish to consider introducing into their own legal systems, circumstances allowing, in order to avoid or address similar issues.

153. On this basis, the CDDH suggests that the Committee of Ministers endorse the following possible recommendations.

Increasing the national authorities' awareness of the Convention standards and ensuring their application

Recommendations for the attention of member States:

- ▶ designate co-ordinators⁹⁹ in ministries and/or other networks of contact persons for issues relating to human rights in order to ensure optimum co-ordination and dissemination of information;
- ▶ strengthen co-operation with national human rights institutions and/ or other relevant bodies;
- ▶ encourage the setting up of online databases or the transmission of information via electronic means;
- ▶ in the field of training, focus on training for trainers to ensure that syllabuses incorporate the human rights dimension and are tailored to the target audience, with appropriate use of the resources made available under the HELP Programme;

99. NB this co-ordinator could be responsible for several areas of activity.

- ▶ develop co-operation activities between member States, especially those sharing the same national language in order to translate and disseminate the Court's case-law;
- ▶ explore further the possibilities for partnerships with the private sector for the publication of information on the Convention system;
- ▶ where appropriate, request the technical or financial assistance of the Council of Europe;
- ▶ bearing in mind the importance of available financing to many of the above activities, consider contributing to the Human Rights Trust Fund.

Recommendations for the attention of the Committee of Ministers:

- ▶ examine the sources and sufficiency of resources to ensure that the necessary technical and financial assistance may be made available;
- ▶ ensure that the Council of Europe is capable of acting as an effective partner to national authorities and other bodies, including national human rights structures;
- ▶ review the structures for provision of technical assistance to ensure its effectiveness and sufficient flexibility/ adaptability.

Execution of judgments,¹⁰⁰ including pilot judgments

Recommendations for the attention of member States:

- ▶ ensure full implementation of Committee of Ministers' Recommendation CM/Rec(2008)2, in particular by designating a co-ordinator¹⁰¹ for execution of Court judgments;
- ▶ consider giving, where appropriate, an explicit legal basis to the existence and role of the co-ordinator;
- ▶ consider formally appointing, where appropriate, contact persons in other ministries and public authorities with whom the co-ordinator may liaise;
- ▶ ensure that the co-ordinator remains informed of the process of drafting necessary legislative reforms, and may where appropriate play an appropriate role in this process;
- ▶ ensure that the co-ordinator remains informed of developments before relevant domestic courts concerning the resolution of different execution issues through changes in domestic courts' practice or case-law;
- ▶ ensure that relevant authorities are informed of the obligation to execute Court judgments and consider formalising, where appropriate, that obligation in domestic law;
- ▶ consider, where appropriate, establishing the possibility of recourse to higher political authorities for resolution of difficulties, in particular in relation to execution of general measures;
- ▶ ensure, where appropriate, rapid, high-quality translation and dissemination of Court judgments against the State, as well as of Committee of Ministers' decisions and resolutions concerning supervision of execution;

100. Following the enlargement under Protocol No. 14 of the Committee of Ministers' competence now to supervise also the execution of friendly settlements, the following points should be considered as applying *mutatis mutandis* also to friendly settlements.

101. N.b. this co-ordinator could be responsible for several areas of activity.

- ▶ examine the possibility, within existing constitutional constraints, of involving national parliaments in an oversight role over execution of judgments;
- ▶ where not already the case, consider introducing legal provisions permitting direct application of the Convention by domestic courts;
- ▶ ensure adequate possibilities for re-examining, including re-opening of proceedings, at least in criminal cases, where necessary to remedy a violation found by the Court;
- ▶ ensure full and effective co-operation with the Council of Europe, in particular the Court and the Department for the Execution of Judgments, and involving also other relevant domestic authorities, including the judiciary, in such processes.

Drawing conclusions from judgments against other States

Recommendations for the attention of member States:

- ▶ ensure, where appropriate, the existence of an identified, central authority¹⁰² with clearly defined responsibility for transmitting information and/ or giving appropriate advice to relevant actors when significant judgments are delivered; this may be the Government Agent, possibly with support from the Permanent Representation to the Council of Europe;
- ▶ consider, where appropriate, giving a clear legal mandate to this authority;
- ▶ ensure co-ordination and information-sharing with different secondary actors;
- ▶ make systematic use of existing tools to help keep abreast of the Court's case-law, notably the Court's on-line case-law information notes and thematic factsheets and resources made available by the Execution Department;
- ▶ develop and make use of contacts both with Council of Europe staff (including the Court's Registry) and between Government Agents;
- ▶ ensure, where appropriate, high-quality translation and dissemination of relevant Court judgments against other States;
- ▶ consider co-operating with other States having mutually understandable official languages and similar domestic legal systems; widely and appropriately disseminate information domestically, including by electronic means, such as official websites;
- ▶ consider making third-party interventions in cases in which a judgment may be given that would be susceptible to having implications within their own domestic legal order;
- ▶ consider taking action to inform other potentially interested States of forthcoming cases in which they may wish to make third-party interventions;

102. NB The body responsible for this could also be responsible for other areas of activity.

Effective domestic remedies

Recommendations for the attention of member States:

- ▶ put in place mechanisms, systems or processes to identify areas in which new remedies are needed, both of their own initiative and in response to the findings of domestic courts and the Strasbourg Court;
- ▶ examine the possibility of introducing some form of general domestic remedy: this may take the form of a subsidiary remedy before a constitutional or other highest court (a “constitutional complaint”) or a remedy allowing allegations of human rights violations to be raised in proceedings before any court or tribunal;
- ▶ develop, in accordance with the particularities of the national legal system, appropriate responses to situations in which relevant domestic legislation is found to be incompatible with the Convention;
- ▶ examine means to enhance the potential for domestic courts to develop remedies through case-law;
- ▶ examine the possibility of giving general effect to judgments brought in individual cases and consider whether there may be interest in introducing some form of class action/ collective complaint procedure;
- ▶ ensure effective domestic remedies for systemic or structural problems, which may be through the introduction or adaptation of general remedies; with respect to excessive length of proceedings, seek inspiration from Committee of Ministers’ Recommendation CM/Rec(2010)3 and its accompanying Guide to Good Practice;
- ▶ ensure, at the earliest possible stage, that general remedies are adequate for all situations in which they may be relied upon and that specific remedies are fully effective;
- ▶ where the level of recourse to a particular specific or general remedy risks over-loading domestic courts, make every effort to find solutions at domestic level.

Providing comprehensive and objective information to potential applicants on the Convention and the Court’s case-law, in particular on the application procedures and admissibility criteria

Recommendations for the attention of member States:

- ▶ ensure that all information provided to potential applicants is impartial and comes from a source whose objectivity in the provision of information is guaranteed;
- ▶ increase the use of information technology;
- ▶ establish or further develop co-operation with national human rights structures;
- ▶ ensure that the tools devised by the Court, particularly the practical guide on admissibility and the video clip on admissibility, are broadly disseminated, where appropriate after translation;
- ▶ make use, where appropriate, of the Council of Europe’s technical and financial assistance, especially its HELP Programme, notably resources developed in the framework of the Council of Europe project “Enhancing

the capacity of lawyers to comply with the admissibility criteria in application submitted to the European Court of Human Rights”;

- ▶ consider contributing to the Human Rights Trust Fund.

Recommendations for the attention of the Committee of Ministers:

- ▶ Consider expanding to other member States the pilot project on “Enhancing the capacity of lawyers to comply with the admissibility criteria in applications submitted to the European Court of Human Rights” implemented under the HELP Programme.

CDDH REPORT CONTAINING ELEMENTS TO CONTRIBUTE TO THE EVALUATION OF THE EFFECTS OF PROTOCOL NO. 14 TO THE CONVENTION AND THE IMPLEMENTATION OF THE INTERLAKEN AND İZMIR DECLARATIONS ON THE COURT'S SITUATION

Adopted by the CDDH on 30 November 2012

I. INTRODUCTION

1. The CDDH's terms of reference for the biennium 2012-2013 require it, through its subordinate body the Committee of experts on the reform of the Court (DH-GDR), *inter alia* to prepare a report for the Committee of Ministers "containing elements to contribute to the evaluation of the effects of Protocol No. 14 to the Convention and the implementation of the Interlaken and İzmir Declarations on the Court's situation". The DH-GDR in turn conferred the initial preparation of the draft report on its drafting group A (GT-GDR-A). The present document constitutes the report required under the CDDH's terms of reference.

2. Protocol No. 14 was opened for signature on 13 May 2004; it received its final ratification on 18 February 2010 and entered into force on 1 June 2010. During the intervening period, in view of the continuing rapid growth in the Court's case-load and its inability to meet this challenge within the prevailing Convention framework, the States Parties on 12 May 2009 adopted Protocol No. 14 bis and the Madrid Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force. Both of these instruments allowed individual States Parties to accept provisional application of the single judge and three-judge committee formations, as defined in Protocol No. 14, with respect to applications brought against them. By the time of entry into force of Protocol No. 14 – at which point Protocol No. 14 bis and the Madrid Agreement ceased to have effect – the former was in force or applied on a provisional basis with respect to nine States Parties and the latter in effect with respect to ten. Thus certain of the provisions of Protocol No. 14 – namely those introducing the single judge and committee formations – had come into effect for certain States Parties at various points in time before Protocol No. 14 itself came into force.

3. The Court's experience of operating the single judge and committee formations thus extends back as far as 1 June 2009, initially with respect to only two member States, although that number increased to sixteen by the end of that

year, with three more in 2010. It can be noted, however, that these new formations did not apply to cases against any of the long-standing five highest case-count countries (which between them account for almost two thirds of the pending applications allocated to a judicial formation) until Protocol No. 14 itself came into force on 1 June 2010. Equally, the most important internal structural reforms introduced by the Court to maximise the impact of the entry into force of Protocol No. 14 occurred after its general entry into force. Roughly speaking, therefore, the time frame for assessing the effects of Protocol No. 14 on the Court's situation can be taken as starting on 1 June 2010 up to the date of the present report. It should also be noted that only since 1 June 2012 have Single Judges been able to apply the new admissibility criterion of manifest disadvantage (see under "Article 12" below).

4. The CDDH has relied upon information from other sources, in particular the Court itself, as well as the report of the *Cour des comptes* on the Court.¹ It considers that the present report represents significant added value in bringing together, for the first time, information on the overall effects of the substantive changes wrought by Protocol No. 14 on the Convention system. This synthesis or summary of the available information constitutes essential elements contributing to the final evaluation of the effects of Protocol No.14 on the Court's situation.

5. As regards the effects of the Interlaken and İzmir Declarations on the Court's situation, the CDDH does not at present dispose of information that may contribute to an objective evaluation of effects identifiably due to the Declarations. Indeed, an examination of the provisions of section E ("The Court") of the Interlaken Declaration and section F ("The Court") of the İzmir Declaration shows that the political declarations contained therein could not be expected to generate isolatable, quantifiable results; in many cases, they consist of encouragement to the Court to persevere with existing actions. The CDDH notes, however, that the Court provided information directly to the Ministers' Deputies at their meeting on 24 October 2012.² It also recalls that the Interlaken Conference invited the Committee of Ministers to evaluate, during the years 2012 to 2015, to what extent the implementation of Protocol No. 14 and of the Interlaken Action Plan had improved the situation of the Court, and that the present report is thus a contribution to an on-going process.

II. EFFECTS OF PROTOCOL NO. 14 ON THE COURT'S SITUATION

6. This section shall address each substantive provision of Protocol No. 14 in turn.

Article 1 amending Article 22 ("Election of judges") of the Convention

7. Article 1 of Protocol No. 14 deleted former paragraph 2 of Article 22 of the Convention on the election of judges. According to the Explanatory Report for Protocol No. 14, this was because paragraph 2 "no longer served any useful

1. See *Conseil de l'Europe – CEDH: Relevé des observations définitives sur la Cour européenne des droits de l'homme*, Cour des comptes (in French only).

2. See "The Interlaken Process and the Court", doc. 4038635, 16 October 2012.

purpose in view of the changes made to Article 23”. It is thus not necessary to evaluate the effects of this provision.

Article 2 amending Article 23 (“Terms of office”) of the Convention

8. Article 2 extended the judges’ terms of office to nine years whilst making them non-renewable. It is not necessary to evaluate the effects of this provision.³

Article 3 amending Article 24 (“Dismissal”) of the Convention

9. Article 3 deleted former Article 24 of the Convention. Since the provision it contained was inserted into a new paragraph 4 of Article 23 of the Convention, it is not necessary to evaluate the effects of this provision of the protocol.

Article 4 creating new Article 24 (“Registry and rapporteurs”) of the Convention

10. Article 4 of the Protocol made two changes: it deleted reference to “legal secretaries”, who had in practice never existed, and it introduced the function of rapporteur to assist the new single judges. These rapporteurs are generally referred to as “non-judicial rapporteurs” (NJR), so as to distinguish the function from that of Judge Rapporteur.

11. According to information given by the Court, 66 experienced permanent members of the Registry were initially appointed as NJR in May 2010, with further new appointments or renewals made in May 2011 and May 2012. A special Filtering Section of the Registry was created in early 2011 to deal with cases from the five highest case-count States, namely Poland, Romania, the Russian Federation, Turkey and Ukraine; to these “first-tier” countries has since been added France. The Filtering Section currently contains 80 lawyers, including secondments. New working methods were developed in the Filtering Section and are progressively being applied to applications made against other States (see further below). Other methods are also being tested, such as the immediate communication of incoming repetitive applications.

Article 5 amending Article 26 (“Plenary Court”) of the Convention

12. Article 5 gave a new competence to the plenary Court, in order to give effect to the new Article 26 paragraph 2 (the possibility of reducing the size of Chambers: see under Article 6 below). It will be addressed along with Article 6 below.

Article 6 concerning new Article 26 (“judicial formations”) of the Convention

13. Article 6 changed the Court’s judicial formations by introducing the new single judge formation, along with certain consequential changes. It also created a new system for the appointment of ad hoc judges and allowed for some flexibility in the size of the Court’s Chambers, which may for a fixed period be

3. It can be recalled that since the entry into force of Protocol No. 14, the Committee of Ministers has adopted Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights.

reduced from seven to five judges by the Committee of Ministers at the Court's request.

14. The effects of the new single judge formation will be examined under Article 7 below.

15. As regards the new system of appointment of ad hoc judges, the Court has set out new procedural rules in the Rules of Court (Rule 29). Following discussions with Government Agents, the Court is considering their revision. 38 Contracting States have provided the Court with their list of potential ad hoc judges, and these were published on the Court's website in February 2011. Since June 2010, ad hoc judges have been appointed in 121 cases, which is unusually high, on account of a specific situation concerning one judge.

16. As regards the possibility of reducing the size of Chambers, the Court initially chose not to deal with this issue as a matter of priority, in view of the number of organisational measures that were already necessary following the entry into force of Protocol No. 14. It was felt that the assessment as to whether moving to five judge Chambers would be advantageous to the Court could only be made when the other measures deriving from the Protocol had been put in place: in particular, it was necessary to set up and evaluate the new three-judge Committees. In addition, the Sections were re-composed with effect from 1 February 2011. Subsequently the Court examined the issue in depth, considering the advantages and disadvantages of such a change, including balancing a possible gain in productivity against the risk of inconsistency in case-law, leading to potential overburdening of the Grand Chamber, and the difficulty of maintaining an appropriate balance in the composition of Chambers. An additional problem identified by the Court was insufficient flexibility, since even if for some cases a five-member Chamber might be appropriate, there were always likely to be cases with which the Court would wish to deal in a larger formation, but which did not warrant relinquishment to the Grand Chamber. Moving to five-judge Chambers would moreover entail restructuring the Section system. In the light of these different factors the Court has come to the conclusion that, for the time being at least, the arguments in favour of making a request to the Committee of Ministers are not sufficiently persuasive.

Article 7 concerning new Article 27 (“Competence of single judges”) of the Convention

17. Article 7 defines the competence of the new Single Judge (SJ) formation concerning decisions in clearly inadmissible cases. The President of the Court appointed 20 judges, including both experienced and newly arrived judges, respecting the principle of equality between colleagues, to act as SJ as of 1 June 2010 until 31 May 2011. These judges were drawn evenly from the Court's five sections. The States for which each would be responsible were (flexibly) determined. For most States, one single judge was sufficient; the exceptions are Russia (5 single judges), Turkey (4), Romania (3), Ukraine (3) and Poland (2). On 1 June 2011, a replacement group of 20 SJ was appointed. In June 2012, the system was revised, with all judges (except the President and Section Presidents)⁴ acting as SJ.

18. Case-processing statistics from the Court show a constant and significant increase in the number of cases rejected at the filtering stage. In 2009, when fil-

4. The seat of the judge elected in respect of Bosnia and Herzegovina is currently vacant.

tering was done mainly by three-judge committees, they rejected 31,500 applications. The single-judge formation entered into force for all States Parties in mid-2010, and by the end of that year the number of cases rejected at the filtering stage increased by 11% to just over 35,000. The Court's output rose even further in 2011, when nearly 47,000 applications were dealt with by single judges, an increase of 31%. This upward trend has continued in 2012, with 66,907 single judge decisions taken up to the end of October 2012.

19. The number of cases pending before Single Judges has evolved over the period July-August 2011⁵ to October 2012⁶ as follows:

	No. of strike out/ inadmissibility decisions	No. of cases pending	Change in the no. of cases pending
July-August 2011	-	101,800	-
September 2011	9,047	96,700	- 5,100
October 2011	6,010	95,900	- 800
November 2011	5,306	94,000	- 1,900
December 2011	4,833	92,050	- 1,950
January 2012	3,638	91,900	- 150
February 2012	5,040	91,050	- 850
March 2012	7,767	87,550	- 3,500
April 2012	4,090	87,150	- 400
May 2012	10,658	80,250	- 6,900
June 2012	5,585	79,200	- 1,050
July-August 2012	7,568	80,550	+ 1,350
September 2012	12,568	72,800	- 7,750
October 2012	9,993	67,900	- 4,900
TOTAL			- 33,900 (- 33%)

20. The report of the Cour des comptes notes that whilst the number of Registry lawyers increased from 218 in 2008 to 260 in 2011, or 19%, the number of applications resolved by a decision or judgment increased by 81% over the same period. The *Cour des comptes* attributes this in particular to the filtering mechanisms introduced in 2010, which is when Protocol No. 14 came into full effect. The report also notes that the productivity of Registry lawyers increased from 141 cases (not including those subject to administrative termination) treated per lawyer in 2007 to 213 in 2011, an increase of 51%. Within the filtering section, consisting of the equivalent of 55 full-time staff, productivity stood at 581 applications treated per person per year.

21. These results had made it possible for the Court, as early as autumn 2011, to envisage a situation in which, as far as filtering is concerned, there would, by the end of 2015, be both a balance between the "input" of new cases and the "output" of decided cases, and elimination of the current backlog of clearly inadmissible applications. The Court also indicated, however, that this would require certain additional resources for the Registry, which could take the form of temporary secondments from Contracting States. Further steps are being taken,

5. The Court produces statistics for the months of July and August together.

6. The latest month for which statistics are available.

including inter alia extension of working methods developed under this procedure within the Filtering Section to the rest of the Registry and for all countries: on 1 January 2012, for example, the Registry's filtering section extended its activities to applications against also "second-tier" states Bulgaria, Italy, Moldova, Serbia and the United Kingdom. In March 2012, new guidelines on filtering were introduced in order to ensure use of standardized, simple forms and procedures for filtering across the Court. The Court is also evaluating the effects of taking a more rigorous approach to the question of what constitutes an application, although this initiative is not strictly speaking a result of the entry into force of Protocol No. 14.

22. On the basis of its own findings, the Cour des comptes agrees, concluding that "It is undeniable that the new mechanisms for filtering applications are producing effects and that it is becoming possible to reach an equilibrium between new cases and treated cases, along with a gradual elimination of the backlog of cases. That will depend, in particular, on obtaining supplementary resources for the Registry, for example in the form of temporary secondments of officials of States Parties... Thanks to the Single Judge formation and on the basis of the output levels observed in 2011, 95% of pending cases could be closed within as little as two and a half years." It is understood that the period of two and a half years refers to the total time required to eliminate the current backlog and not to the average time that will be required to resolve newly arrived clearly inadmissible applications.

Article 8 concerning new Article 28 ("Competence of Committees") of the Convention

23. Article 8 defines the new competence of three-judge committees concerning judgment in cases whose underlying question is already the subject of well-established case-law (WECL) of the Court (repetitive cases). The Court has regular recourse to this procedure (see further below). Implementation of the Court's priority policy, however, requires that resources be allocated to priority cases rather than the repetitive cases which are typically the subject of Committee judgments, which has limited the increase in the number of such judgments. These only represent part of the work done by Committees, however, which also dispose of applications by other means, e.g. striking out following a friendly settlement or acceptance of a unilateral declaration (see further below). In its Preliminary Opinion in preparation for the Brighton Conference, the Court signalled that it envisaged a broader interpretation of the notion of well-established case-law within the meaning of Article 28(1)(b) (see paragraph 23 of the Preliminary Opinion).

24. The number of cases pending before a Committee has evolved over the period July-August 2011⁷ to October 2012⁸ as follows:

7. The Court produces statistics for the months of July and August together.

8. The latest month for which statistics are available.

	No. of cases pending	Change in the number of cases pending
July-August 2011	11,150	-
September 2011	11,800	650
October 2011	12,450	650
November 2011	13,150	700
December 2011	13,700	550
January 2012	14,550	850
February 2012	15,050	500
March 2012	16,550	1,500
April 2012	17,300	750
May 2012	18,250	950
June 2012	18,400	150
July-August 2012	19,350	950
September 2012	19,650	300
October 2012	20,000	350
TOTAL		8,850 (+ 79%)

25. In 2011, a total of 380 applications were disposed of by Committee judgments made under Article 28(1)(b) of the Convention, with a further 330 by 31 October 2012. 2,703 repetitive applications were struck out or declared inadmissible by Committees between 1 January and 31 October 2012, which is almost twice the number during the same period in 2011. Much of the increase in the number of cases pending before Committees, in particular that during 2011, was due to their transfer from Chambers to Committees following identification as WECL cases. In total, the Court currently considers some 40,000 of the cases pending before it to be repetitive, of which some 20,000 are still allocated to Chambers.

Article 9 amending Article 29 (“Decisions by Chambers on admissibility and merits”) of the Convention

26. Article 9 makes the practice of the Court’s deciding on admissibility and merits together the rule rather than, as previously, the exception. This amendment reinforced a tendency that had already been apparent. It is not necessary to evaluate the effects of this provision.

Article 10 amending Article 31 (“Powers of the Grand Chamber”) of the Convention

27. Article 10 gives the Grand Chamber jurisdiction to give ruling on matters referred to the Court by the Committee of Ministers under Article 46(4) of the Convention. The Committee of Ministers has to date not yet made any such referral (see under “Article 16” below). The Grand Chamber has thus not yet exercised its jurisdiction in this respect.

Article 11 amending Article 32 (“Jurisdiction of the Court”) of the Convention

28. Article 11 also gives further effect to the amendment made by Article 16 (see below). It is not necessary to evaluate the effects of this provision.

Article 12 amending Article 35(3) (“Admissibility criteria”) of the Convention

29. Article 12 introduced the new “manifest disadvantage” admissibility criteria into Article 35(3)(b) of the Convention. The Court’s Chambers have so far applied the new criterion to dismiss at least the following 29 cases:

- ▶ *Ionesco v. Romania* (App. No. 36659/04; 01/06/10)
- ▶ *Korolev v. Russia* (App. No. 25551/05; 01/07/10)
- ▶ *Vasilchenko v. Russia* (App. No. 34784/02; 23/09/10)
- ▶ *Rinck v. France* (App. No. 18774/09; 19/10/10)
- ▶ *Holub v. the Czech Republic* (App. No. 24880/05; 14/12/10)
- ▶ *Bratři Zátkové v. the Czech Republic* (App. No. 20862/06; 08/02/11)
- ▶ *Gaftoniuc v. Romania* (App. No. 30934/05; 22/02/11)
- ▶ *Matoušek v. the Czech Republic* (App. No. 9965/08; 29/03/11)
- ▶ *Čavajda v. the Czech Republic* (App. No. 17696/07; 29/03/11)
- ▶ *Ștefănescu v. Romania* (App. No. 11774/04; 12/04/11)
- ▶ *Fedotov v. Moldova* (App. No. 51838/07; 24/05/11)
- ▶ *Burov v. Moldova* (App. No. 38875/03; 14/06/11)
- ▶ *Ladygin v. Russia* (App. No. 35365/03; 30/08/11)
- ▶ *Kiousi v. Greece* (App. No. 52036/09; 20/09/11)
- ▶ *Havelka (II) v. the Czech Republic* (App. No. 7332/10; 20/09/11)
- ▶ *Jancev v. “the former Yugoslav Republic of Macedonia”* (App. No. 18716/09; 04/10/11)
- ▶ *Savu v. Romania* (App. No. 29218/05; 11/10/11)
- ▶ *Fernandez v. France* (App. No. 65421/10; 17/01/12)
- ▶ *Gururyan v. Armenia* (App. No. 11456/05; 24/01/12)
- ▶ *Munier v. France* (App. No. 38908/08; 14/02/12)
- ▶ *Gagliano Giorgi v. Italy* (Ap. No. 23563/07; 14/02/12)
- ▶ *Sumbera v. the Czech Republic* (App. No. 48228/08; 21/02/12)
- ▶ *Shefer v. Russia* (App. No. 45175/04; 13/03/12)
- ▶ *Bazelyuk v. Ukraine* (App. No. 49275/08; 27/03/12)
- ▶ *Liga Portuguesa de Futebol Profissional v. Portugal* (App. No. 49639/09 ; 03/04/12)
- ▶ *Jirsak v. the Czech Republic* (App. No. 8968/08; 12/04/12)
- ▶ *Heather Moor & Edgecomb Ltd v. the United Kingdom* (App. No. 30802/11; 11/07/2012)
- ▶ *Bjelajac v. Serbia* (App. No. 6282/06; 28/08/2012)
- ▶ *Zwinkels v. the Netherlands* (App. No. 16593/10; 09/10/2012)

30. Chambers have also considered but rejected use of the provision in at least the following 19 cases:

- ▶ *Dudek (VIII) v. Allemagne* (Apps No. 12977/09 et al.; 23/11/10)
- ▶ *Gaglione a.o. v. Italy* (App. No. 45867/07 a.o; 21/12/10)
- ▶ *Sancho Cruz a.o. v. Portugal* (App. No. 8851/07 a.o ; 18/01/11)
- ▶ *3A.CZ.S.R.O. v. the Czech Republic* (App. No. 21835/06; 10/02/11)
- ▶ *Benet Praha, Spol.S.R.O. v. the Czech Republic* (App. No. 33908/04; 24/02/11)

- ▶ *Finger v. Bulgaria* (App. No. 37346/05; 10/05/11)
- ▶ *Durić v. Serbia* (App. No. 48155/06; 07/06/11)
- ▶ *Luchaninova v. Ukraine* (App. No. 16347/02; 09/06/2011)
- ▶ *Giuran v. Romania* (App. No. 24360/04; 21/06/2011)
- ▶ *Van Velden v. the Netherlands* (App. No. 30666/08; 19/07/2011)
- ▶ *Živić v. Serbia* (App. No. 37204/08; 13/09/2011)
- ▶ *Flisar v. Slovenia* (App. No. 3127/09; 29/09/2011)
- ▶ *Fomin v. Moldova* (App. No. 36755/06; 11/10/2011)
- ▶ *Giusti v. Italy* (App. No. 13175/03; 18/10/2011)
- ▶ *Nicola Gheorghe v. Romania* (App. No. 23470/05; 03/04/12)
- ▶ *De Iesco v. Italy* (App. No. 34383/02; 24/04/12)
- ▶ *Berladir and Others v. Russia* (App. No. 34202/06; 10/07/2012)
- ▶ *Zborovský v. Slovakia* (App. No. 14325/08; 23/10/2012)
- ▶ *Joos v. Switzerland* (App. No. 42345/07; 15/11/2012)

31. Although these cases may not be very numerous, the two year period following the entry into force of Protocol No. 14 has allowed Chambers to develop legal principles for the application of the new admissibility criterion. These principles will now be followed also by Single Judges, whose sole task is to issue inadmissibility decisions. (It should be recalled that, under Protocol No. 14, only Chambers were competent to apply the new criterion for the first two years of the protocol being in force; Single Judges began to apply it only after 1 June 2012.) The President of the Court has also observed that the great majority of cases which might fall to be dealt with under this provision are declared inadmissible more rapidly and more easily under other criteria. The Court nevertheless also considers that there is a certain group of cases which, although otherwise admissible, have no serious issue at stake.⁹

Article 13 amending Article 36 (“Third party intervention”) of the Convention

32. Article 13 gives the Commissioner for Human Rights the right to intervene in cases before Chambers and the Grand Chamber. On 14 October 2011, the Commissioner made his first and so far only third party intervention before the Court under his own initiative, as permitted by Article 36(3) (as amended by Protocol No. 14), in the case of *The Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, App. No. 47848/08.

Article 14 amending Article 38 (“Examination of the case”) of the Convention

33. Article 14 refines the provisions on examination of the case to take account of the new practice introduced under Article 9. It is not necessary to evaluate the effects of this provision.

9. In the case of *Dudek v. Germany* (app. Nos. 12977/09 et al., decision of 23 November 2010), the Court itself, referring to the explanatory report to Protocol No. 14 dealing with this provision, stated that “The High Contracting Parties clearly wished that the Court devote more time to cases which warrant consideration 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”.

Article 15 amending Article 39 (“Friendly settlements”) of the Convention

34. Article 15 was intended to facilitate the friendly settlement procedure and mandates the Committee of Ministers to supervise their execution. It can be noted that the Court, also in response to recommendations made at the Inter-laken and İzmir Conferences, has further developed its practice with regard to friendly settlements (as well as 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%. The first ten months of 2012 have already produced the same results as the whole of 2011.

Article 16 amending Article 46 (“Binding force and execution of judgments”) of the Convention

35. Article 16 introduces new paragraphs 3, 4 and 5 into Article 46 of the Convention.

36. New paragraph 3 allows the Committee of Ministers, if it considers that the supervision of the execution of a final Court judgment is hindered by a problem of interpretation of the judgment, to refer the matter to the Court for a ruling on the question of interpretation. The Committee of Ministers has to date not yet made any such referral.

37. New paragraphs 4 and 5 concern the new procedure whereby the Committee of Ministers, if it considers that a High Contracting Party refuses to execute a final judgment of the Court, may refer to the Court the question of whether that Party has failed to fulfil its obligation under paragraph 1. The Committee of Ministers has to date not yet made any such referral. The CDDH recalls that this provision was intended to give the Committee of Ministers, in exceptional circumstances, a wider range of means of pressure to secure execution of judgments.¹⁰

Article 17 amending Article 59 of the Convention

38. Article 17 allows for future accession of the European Union to the Convention. Following its Extraordinary Meeting of 12-14 October 2011, the CDDH transmitted a report on the state of discussions, with the draft legal instruments on accession of the EU to the Convention attached, to the Committee of Ministers for consideration and further guidance. The CDDH resumed its work on the issue with a series of meetings in the autumn of 2012.

III. FINAL REMARKS

39. In reviewing the effects of Protocol No. 14 on the Court’s situation, the CDDH is reminded of the attention that it gave prior to the Brighton Conference to the issue of the backlog of cases pending before Chambers of the Court,¹¹ an issue also analysed and addressed in the Court’s Preliminary Opinion in preparation for the Brighton Conference. In this connection, it observes that, with the exception of the provision in Article 6 concerning the size of Chambers, Protocol

10. See the Explanatory Report to Protocol No. 14, paragraph 100.

11. See in particular the CDDH Final Report on measures requiring amendment of the ECHR, doc. CDDH(2012)R74 Addendum I.

No. 14 did not contain measures aimed at relieving the Court's backlog of cases before Chambers. The CDDH considers that it may be necessary to address this situation further in future.

40. Finally, the CDDH recalls that the present report is presented at an early stage in the process of evaluation of the effects of Protocol No. 14 on the Court's situation; furthermore, implementation of all provisions of this protocol has only recently been completed and the potential of some of its provisions has thus not yet been fully realised.

CDDH REPORT ON INTERIM MEASURES UNDER RULE 39 OF THE RULES OF COURT

Adopted by the CDDH on 22 March 2013

I. INTRODUCTION

1. Rule 39 of the Rules of the European Court of Human Rights reads as follows:

“The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.”

2. Rule 39 is linked to Article 34 of the Convention, by which the State Parties “undertake not to hinder in any way the effective exercise of the right” of individual application. The Court’s practice is only to issue an interim measure against a State Party where, having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm¹ if the measure is not applied.² The Court has held that its indications of interim measures under Rule 39 are legally binding and that a failure by a State Party to comply with them is normally to be regarded as preventing the Court from effectively examining the applicant’s complaint and as hindering the effective exercise of his or her right of individual petition in violation of Article 34 of the Convention.³ The Court has further specified that exceptionally such a failure may not amount to a violation of Article 34 where the respondent State has demonstrated that an objective impediment prevented compliance and that it took all reasonable steps to remove the impediment and to keep the Court informed about the situation.⁴

3. Although the Court has made publicly clear that interim measures “are only applied in exceptional cases”⁵; the number of requests for such measures showed until recently an enormous increase, notably between 2006 and 2010. Between

1. Such cases usually involve Articles 2 or 3 but exceptionally may involve Articles 6 or 8 of the Convention.

2. See the Court’s Practice Direction on requests for interim measures, contained in doc. GT-GDR-C(2012)002.

3. See *Mamatkulov & Askarov v. Turkey*, App. No. 46827/99, Grand Chamber judgment of 4 February 2005.

4. See *Paladi v. Moldova*, App. No. 39806/05, para. 92 and *Al Saadoon & Mufdhi v. the United Kingdom*, App. No. 61498/08, para. 161.

5. See doc. GT-GDR-C(2012)002.

October 2010 and January 2011 alone, the Court received around 2,500 requests concerning only returns to Iraq.⁶ At more or less the same time, there were a large number of requests concerning returns under the Dublin Regulation. This explosion in requests, described by the President of the Court as “alarming” and with “implications for an already over-burdened Court”, led to concern at the highest political levels of the member States.⁷

4. The Declaration adopted at the İzmir High-level Conference on the future of the European Court of Human Rights, organised by the Turkish Chairmanship of the Committee of Ministers (İzmir, Turkey, 26-27 April 2011), expressed this concern, whilst also welcoming the improvements in the practice already put in place by the Court.⁸ The İzmir Declaration then recalled certain important points concerning the requirement for States Parties to comply with indications of interim measures, application of the principle of subsidiarity, the role of the Court, the requirement for States Parties to provide domestic remedies with suspensive effect, the Practice Direction to applicants (with an invitation to the Court to draw appropriate conclusions from an applicant’s failure to comply with it), the procedural rights of the States Parties, and treatment of the request and of the underlying individual application (paragraph A3). On this basis, the Declaration expressed “its expectation [of] a significant reduction in the number of interim measures granted by the Court, and ... the speedy resolution of those applications in which they are, exceptionally, applied, with progress achieved within one year” (“Implementation”, paragraph 4).

5. The Declaration adopted at the subsequent Brighton Conference, organised by the United Kingdom Chairmanship of the Committee of Ministers (Brighton, United Kingdom, 19-20 April 2012), “[invited] the Committee of Ministers to assess both whether there has been a significant reduction in their numbers and whether applications in which interim measures are applied are now dealt with speedily, and to propose any necessary action” (paragraph 12.e). The Committee of Ministers, at its 122nd Session (23 May 2012), “instructed the CDDH to submit, by 15 April 2013, its conclusions and possible proposals for action in response to paragraph 12e ... of the Brighton Declaration”.

6. The present report constitutes the CDDH’s response to this instruction. It is divided into two parts. The first part provides factual information on the questions posed in the Brighton Declaration (i.e. whether there has been a significant reduction in the number of interim measures and whether applications in which interim measures are applied are now dealt with speedily). The second part addresses related issues concerning interim measures considered by the CDDH.⁹ The report includes proposed actions some of which relate to action to be taken by the member States, whilst others concern invitations to the Court.

7. The present report does not address the issue of whether to give a new legal basis to interim measures. The CDDH recalls that its work on this issue took place in the context of work on a simplified procedure for amendment of certain

6. For a short period in late 2010, the Court, under unusual pressure, adopted a “quasi-systematic” approach involving a presumption in favour of application of Rule 39 in these cases.

7. See the “Statement on requests for interim measures” issued by the President of the Court on 11 February 2011, doc. GT-GDR-C(2012)005.

8. Including the revised Practice Direction (see doc. GT-GDR-C(2012)002) and the President’s Statement (see doc. GT-GDR-C(2012)005).

9. In addition to the issues raised in the Brighton Declaration, the CDDH examined a number of further questions about interim measures, which form the basis of section III below.

provisions of the Convention, including the possibility of creating a Statute for the Court. The Committee of Ministers agreed to return to this issue once work has been completed on the priority issues set out in its decisions for the biennium 2012-13.¹⁰

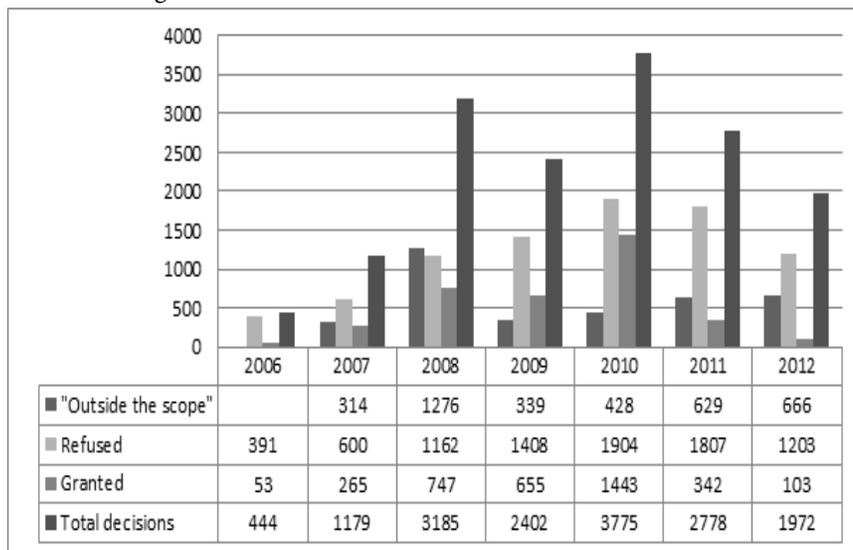
8. The factual information contained in the present report originates from the Registry of the Court, which provided extensive information and explanations directly to the CDDH during the course of its work. The CDDH appreciates this excellent co-operation with the Court and its Registry.

II. FACTUAL INFORMATION ON THE SPECIFIC QUESTIONS POSED

9. The CDDH is called upon “to assess both whether there has been a significant reduction in their numbers and whether applications in which interim measures are applied are now dealt with speedily, and to propose any necessary action”.¹¹ The report will address these issues in turn.

A. Figures

10. The development of the situation over recent years can be seen from the figures in the following table. It should be noted that the Court’s figures relate only to decisions taken on requests for interim measures and not to the requests themselves; figures on the latter are not available.



11. On 11 February 2011, in the face of an alarming increase in requests for interim measures, the then President of the Court, Jean-Paul Costa, issued a public statement recalling to governments and applicants the role of the Court in immigration and asylum law matters and emphasising their respective responsibilities.¹² On 7 July 2011, a revised Practice Direction of the Court on

10. See doc. CM/Del/Dec(2012)1154/1.6.

11. See para. 5 above.

12. See doc. GT-GDR-C(2012)005.

requests for interim measures was introduced. The Court and its Registry also established a centralised procedure on 5 September 2011. As a result, all requests are now considered by a centralised Rule 39 unit¹³ against a standard checklist.¹⁴ This system is designed to improve efficiency and consistency and ensure rapid identification of groups of similar cases, including those concerning several member States. This more streamlined and efficient approach makes the Registry better able to deal with high volumes of requests and, in part, helps to avoid the need to apply Rule 39 in a quasi-systematic way; the Court is resolved to avoid doing this in the future, and has confirmed that each request will be considered on the basis of, *inter alia*, the existence of a personal risk for the applicant established by a substantiated account.¹⁵ In addition, judgments of principle,¹⁶ which set out whether the Court considers that the real risk threshold is met in relation to groups of persons deported to particular country at a specific time (e.g. Tamils to Sri Lanka in 2007), have assisted in the reduction of interim measures.

12. It is clear that the procedural reforms introduced by the Court have contributed to the fall in the number of interim measures being imposed, as has the absence of a sudden influx of cases relating to a specific situation. The extent to which these reforms will be capable of dealing with such an influx should such a situation reoccur remains to be seen.

B. Whether applications in which interim measures are indicated are now dealt with speedily

13. The İzmir Declaration¹⁷ emphasises that requests should be based on an assessment of the facts and circumstances in each individual case, followed by a speedy examination of, and ruling on, the merits of the case or of a lead case.

14. The Court's practice has gradually changed so that the decision to apply Rule 39 is increasingly combined with a decision to communicate the application to the government.¹⁸ Similarly, where a Rule 39 request is refused, that decision is now increasingly combined with a decision to declare the application inadmissible.¹⁹ If immediate communication is not possible, the Court will try to communicate it in the following days or week. An internal control system is being

13. Requests for interim measures are first considered by the lawyer in the relevant division who will make a reasoned proposal as to whether the request should be granted or refused, or whether further information is required. Another senior lawyer in that division will then review the proposal. The checklist is then sent to the Rule 39 Unit which is composed of experienced lawyers (A4/5). After the quality control undertaken by the Rule 39 unit, the check list is sent to the judge elected with respect to the respondent State, then to the Section Vice-president. Three Section Vice-presidents nominated for this purpose by the President of the Court constitute a decision centre for all requests for Rule 39 submitted to the Court.

14. The checklist requires the lawyer to summarise the facts and the domestic decisions, and recommend to either (1) apply interim measure (2) refuse interim measure (3) declare inadmissible (4) urgent notification (5) grant priority (6) grant anonymity (7) ask for factual information (8) communicate for observations. The checklist can be found in appendix to the present report.

15. See GT-GDR-C(2012)009, paras. 28 and 41 and footnote 4 above.

16. See for example, *N.A. v. the United Kingdom* (No. 25904/07), *Salah Sheek v. the Netherlands* (No. 1948/04), *M.S.S. v. Belgium and Greece* (No. 30696/09), *Hirsi Jamaa and Others v. Italy* (No. 27765/09), *Sufi and Elmi v. the United Kingdom* (Nos. 8319/07 and 11449/07).

17. See Action Plan A.3.

18. See doc. DH-GDR(2012)018, p. 8.

19. *Ibid.*

studied within the Registry to regularly verify the follow-up given to cases. It should also be noted that the application of Rule 39 is systematically accompanied by giving the case priority²⁰ and also results in shortened deadlines for the parties' submission of observations. These measures should have the effect of reducing the length of time that it takes the Court to deal with applications in which interim measures are imposed.

15. From September to December 2011, approximately 44% of cases in which Rule 39 was imposed were subject to immediate communication. In 2012, the proportion rose to 59%.²¹ Similarly, 21% of the applications where Rule 39 was refused were declared inadmissible at the same time.²² There are three reasons why not all applications in which interim measures are imposed are communicated immediately: (1) factual information is requested (2) the Court does not have the time or resources to immediately communicate the case²³ and (3) applications are grouped and serially communicated. In terms of cases pending in which interim measures have been imposed, in August 2011, 1553 cases were pending while on 1 January 2013, this figure had fallen to 328. The Registry has indicated that in 2012 the average length of time taken by the Court to dispose of applications in which an interim measure was in force for the entire duration of the procedure was 28 months.²⁴ As of 1 January 2013, cases with interim measures imposed had been pending since that imposition for an average of approximately 22 months.

III. ISSUES CONCERNING PROPER FUNCTIONING OF THE INTERIM MEASURES SYSTEM

16. Having examined the question of interim measures in the round, the CDDH wishes to draw particular attention to the following issues, focussing mainly on removal proceedings, which are the subject of most requests for interim measures.

A. Issues leading up to the moment the Court has to deal with a request for an interim measure

i. Effective domestic remedies

17. The İzmir Declaration stressed “the importance of States Parties providing domestic remedies, where necessary with suspensive effect, which operate effectively and fairly and provide a proper and timely examination of the issue of risk in accordance with the Convention and in light of the Court’s case-law”.

20. The prioritisation of cases is governed by Rule 41 of the Rules of Court and the Court’s published Priority Policy, which orders priority according to a list of seven categories of case; cases involving application of Rule 39 are in the first category. The Registry confirmed that the Court has a policy of automatically prioritising applications when interim measures are applied.

21. GT-GDR-C(2012)009, para. 17.

22. See doc. DH-GDR(2012)018, p. 8.

23. Requests for Rule 39 at the end of the week, during holiday periods, in cases of multiple applications concerning the same country, etc.

24. In 2012, 547 applications in which interim measures had been indicated were determined by the Court; the average time for which those applications had been pending was 28 months.

18. The requirements of the case-law on the suspensive effect and the effectiveness of remedies under Article 13 of the Convention, in conjunction with Articles 2 and 3, have been recently recalled by the Grand Chamber of the Court in the judgment *De Souza Ribeiro v. France*²⁵ which recalls that the person concerned shall have access to a remedy with automatic suspensive effect where a complaint concerns allegations that the person's expulsion would expose him/her to a real risk of treatment contrary to Article 3 of the Convention or to a real risk of a violation of his/ her right to life safeguarded by Article 2 of the Convention, as well as for complaints under Article 4 of Protocol No. 4.

19. In conformity with the principle of subsidiarity,²⁶ the Court attaches great importance to the reasons set out by the national courts or tribunals for rejecting an asylum application or an objection to removal. Accordingly, generally speaking, the more that national decisions are detailed and explicitly reasoned, the better informed is the Court as to the applicant's situation and the better able to assess the request for an interim measure.²⁷

ii. Timely notification of removal and enforcement actions by the authorities

20. The Court's practice direction states that it "may not be able to deal with requests in removal cases received less than a working day before the planned time of removal. Where the final domestic decision is imminent and there is a risk of immediate enforcement, especially in extradition or deportation cases, applicants and their representatives should submit the request for interim measures without waiting for that decision, indicating clearly the date on which it will be taken and that the request is subject to the final domestic decision being negative"²⁸

21. The underlying aim is that the Court receive requests for interim measures as soon as possible. The practice of applying the one working-day deadline, however, implies that the applicant is aware of the planned time of removal. As national practices among State Parties vary considerably when it comes to timely notification of removal and enforcement actions,²⁹ the Court is prevented from applying the one day deadline in all cases. However, the Court generally seeks to clarify the reasons for a late request in order to see which information was transmitted by the national authorities to the applicants or to their representatives.

B. Ensuring awareness of the Court's procedure

i. The requirements surrounding requests for interim measures

22. Concerns have been raised that applicants were not always fully aware of the requirements for submitting a request for an interim measure: for example, the one working day requirement or the requirement to provide supporting documents.³⁰ The Registry has provided training to representatives of bar associations and NGOs *inter alia* on these requirements, as has the UNHCR, which

25. App. No. 22689/07, judgment of 13 December 2012, para. 82.

26. The Court considers national authorities better placed to evaluate the evidence presented before it.

27. See also doc. GT-GDR-C(2012)009, para. 29.

28. See doc. GT-GDR-C(2012)002.

29. Most countries in the Council of Europe do not systematically communicate the date and time of removal to individuals by, for example, a removal direction.

30. See doc GT-GDR-C(2012)002.

published a toolkit in 2012.³¹ Relevant information is also available on the Court's website under "Applicants" – "Interim Measures" – "Practical Information", including the Practice Direction adopted by the President of the Court (updated on 7 July 2011).

ii. The legal representative's standing to make a request for interim measures

23. Concerns have been raised that legal representatives sometimes make a request to the Court or pursue proceedings without the explicit consent of the applicant.³² In the context of interim measures, although an application and consent form is required from the applicant, this can only be done after the request has been received given the timeframe within which interim measures are examined. Even for applications not accompanied by requests for interim measures, the application and consent forms are requested during examination of the file and not at the very outset of the procedure. Supplementary information could be provided on the Court's website about the need for the applicant to provide explicit consent by way of a consent form.

24. Concerns have been raised that in some instances applications were pursued when the legal representative was no longer in contact with the applicant. Any loss of contact between the applicant and his/ her legal representative may imply the striking out of the application in substance (Article 37(1)(a) of the Convention). This approach, which the Court has developed in its case-law, is stricter than that in certain national courts, which will continue the examination of the case in the presence of the representative alone, even though the latter has no contact with the client. Legal representatives should of their own initiative inform the Court of any loss of contact with his/ her client. The State concerned is informed of the possible strike out decision.

25. Concerns have been raised that interim measures are on occasion imposed by the Court in cases where it turns out that the applicant has in fact voluntarily returned to his country of destination, for example with the aid of the International Organisation for Migration (IOM). This clearly raises the question whether the legal representative is still in touch with his client.

26. Where the Court strikes an application out of its list under Article 37(1)(a), this would imply also lifting any interim measure that may have been indicated.

iii. Whether there is still a domestic remedy (with suspensive effect) available

27. Concerns were raised that applicants were not always fully aware of the domestic remedies with suspensive effect that needed to be exhausted before requesting an interim measure (see para. 18 above). More could be done to clarify and increase awareness of what remedies are available and should be exhausted.

31. "Toolkit on how to request interim measures under Rule 39 of the Rules of the European Court of Human Rights for persons in need of international protection"

32. Although it is possible for an application to be pursued by a representative on behalf of an applicant (Rule 36 of the Rules of the Court), the application must be made with the explicit consent of the applicant who must be an alleged victim of a breach of the Convention (Article 34 of the Convention).

C. Issues relating to the way in which a request for an interim measure is processed by the Court

i. Incomplete requests

28. Incomplete requests (i.e. those that are not accompanied by the necessary documents etc.) are captured in the “outside the scope” section of the Court’s statistics. “Outside the scope” also includes requests that are either too late or fall below the threshold of real risk of serious, irreversible harm. There are accordingly no statistics for precisely how many requests are considered as incomplete, nor is there precise information on why they are considered incomplete other than the fact that they were not accompanied by the necessary documents.

ii. Introducing adversarial elements in the procedure, including a possible mechanism to challenge an interim measure once imposed

29. The possibility of introducing an adversarial stage before the imposition of an interim measure was discussed, as it would allow States to submit observations, including relevant factual information, to the Court on the necessity or otherwise of imposing an interim measure. In this connection, it was noted that:

- ▶ Where necessary, the adversarial stage would need to be preceded by a suspensive measure.
- ▶ The effect of this would be to prolong the length of detention of persons subject to removal at national level and add to the workload of the Court.
- ▶ Once imposed, it is already possible for a respondent government to contest an interim measure at any time by sending observations or additional information.³³
- ▶ The Court’s new policy is to rapidly communicate an application once an interim measure is imposed³⁴ which provides the respondent government with the necessary factual information to challenge the interim measure.

33. As noted above, applications of interim measure are now often accompanied by either immediate or rapid communication to the respondent government. See document GT-GDR-C(2012)009, para 17.

34. If a respondent State challenges an interim measure it will be transmitted to the applicant for information and possible comments. The Registry then prepares a full note with the original check list and new material which is sent to the quality checker then the Judge elected with respect to the respondent State. It will then be transmitted to the Vice-President who had taken the decision to apply the interim measure. The latter may decide to lift the interim measure, to maintain it until the substance of the case is examined or to transmit the application to lift the interim measure to the Chamber, if necessary. Numerical data on the number of successful applications for lifting are not available. Requests for lifting may be justified by factual developments (for example, development of the political situation in the applicant’s destination country) or by the transmission of further information to the Court (for example, *Haliti v. France*, no 72227/12: the applicants, a family composed of two parents and five children aged between less one and eight years, were placed in a detention centre on the morning of 14 November 2012 with a view to being sent that very afternoon to Serbia. Invoking the judgment in the case of *Popov v. France* (Nos. 39472/07 and 39474/07), they alleged principally that the placement of their children in administrative detention was contrary to Articles 3, 5 and 8 of the Convention. Rule 39 was applied, then lifted on 28 November 2012, following observations provided by the French government concerning notably the detention conditions of the applicants and their children.

- ▶ The Court can request any necessary factual information from the parties (Rule 49(3) (a) of the Rules of the Court), including before deciding on the request for an interim measure.
- ▶ It would delay the determination of unmeritorious requests for interim measures.

iii. The desirability of an “intermediate check” for cases that are not communicated after the imposition of an interim measure

30. Consideration was given to whether there should be an intermediate check of cases that are not rapidly communicated after the imposition of an interim measure (which leaves the respondent State without all the factual information to challenge the measure concerned). Some applications were still waiting for the case to be communicated many months after the imposition of an interim measure. Such cases should be in the process of disappearing, given the implementation of systematic immediate communication. An internal control system is being studied within the Registry in order to regularly verify the follow-up given to cases. It can also be noted that respondent States may at any moment provide further information to the Court or challenge the interim measure, including prior to communication.

iv. The grounds on which a request may be granted

31. The Court will only issue an interim measure against a State Party where, having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not indicated.³⁵ Whilst the scope of application of Rule 39 is not restricted to any specific articles of the Convention, requests for its application usually concern the rights to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or others guaranteed by the Convention.³⁶ It is a question of avoiding serious irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted.³⁷ It follows that requests for interim measures based on Articles other than 2 and 3 of the Convention only very rarely fall within the scope of the application of Rule 39. The majority of requests concerning Article 8 of the Convention are thus rejected, except certain exceptional cases showing irreparable damage.³⁸ It is likewise the case for requests concerning only Article 5 of the Convention (unless it is a matter of the applicant’s state of health) or Article 6.³⁹

32. When considering the request for interim measures, the Court normally does not have information or observations provided by the respondent State, only the applicant. The Court may nevertheless look at additional sources of

35. See doc. GT-GDR-C(2012)005.

36. *Mamatkulov and Askarov v. Turkey*, *op. cit.*, para. 104.

37. *Ibid.*, para. 125.

38. *Evans v. the United Kingdom*, No. 6339/05, para. 5, a case in which Article 2 was also invoked; *Neulinger and Shuruk v. Switzerland*, No. 41615/07, para. 5, a case in which Article 3 was also invoked; for an example of rejection see *KissiwaKoffi v. Switzerland*, No. 38005/07, para. 24.

39. Interim measures have only very rarely been imposed on the basis on Article 6, for example in the case of *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, judgment of 17 January 2012 a case in which Article 3 was also invoked.

information, for example reports of the United Nations High Commissioner for Refugees and at times, may depart from the applicant's conclusions. It may also depart from the terms of the request by ordering "lesser measures" sufficient to achieve the aim of avoiding the risk of serious irreversible harm.⁴⁰ Furthermore, it may exceptionally apply Rule 39 *ex officio*.

v. The Court giving reasons for the imposition of an interim measure

33. The Court does not currently as a matter of course give reasons for imposing interim measures.⁴¹ It was discussed whether this practice should change to allow States to better understand what amounts to irreparable harm, to address necessary issues at the domestic level (i.e. the need for a more thorough examination of risk by domestic courts) and to enable States to more appropriately challenge the imposition of interim measures. The Registry responded to this by explaining that for cases subject to immediate communication this would amount to duplication. However, it could be envisaged in exceptional circumstances, on an ad hoc basis. Furthermore, the Registry indicated that any supplementary formulation of reasoning would amount to further work for the Court.

vi. Duration of an imposed interim measure

34. The Court's current general practice is to impose interim measures for the duration of the proceedings before the Court. In certain cases, interim measures may be imposed for a specified duration. As has been noted above, a respondent State can challenge the imposition of an interim measure at any time after it has been imposed. To systematically impose interim measures for a specified duration would imply significant administrative management: it would oblige the Court to re-examine periodically the necessity or not of prolonging interim measures requested for each application. This would significantly increase the workload of the Court which would detract from the time devoted to substantive cases. The continuation of the current practice (duration of imposition determined by the Court), combined with the possibility for States to request the lifting of interim measures at any time and the priority treatment of cases appears to provide the most balanced situation.

vii. Applications that are not pursued

35. Once Rule 39 has been imposed, the applicant may decide not to pursue the case for various reasons, including (1) the case being re-examined by national authorities and the applicant obtaining a status (recognition of refugee status, subsidiary protection etc.), (2) the loss of contact between the applicant and his/her representative and the Registry, and (3) adoption of a judgment in a lead case followed by serial striking out of significant numbers of cases. In all these situations, the substantive case will be subject to striking out, which implies lifting of the interim measure.⁴² Detailed statistical data on the different reasons for strike out decisions adopted by the Court are not available.

40. For example a person detained may request that they are released for the purpose of medical treatment. The Court may respond by requiring the respondent State to take certain steps to ensure access to medical treatment, without ordering release from detention.

41. See doc. GT-GDR-C(2012)009, Appendix 2.

42. The respondent State is informed of this.

D. The effect of an imposed interim measure

i. Exhaustion of non-suspensive domestic remedies following imposition of interim measures

36. The case-law does not, in fact, reveal such a requirement. Accordingly, in recent “lead” judgments concerning cases in which interim measures had been imposed, non-suspensive domestic remedies had not been exhausted.⁴³

ii. Interim measures requiring specific action to be taken

37. It is possible for the Court to order positive interim measures if it is necessary to avoid irreversible harm that would prevent it from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. For example, in recent cases against Greece concerning detained persons, the Court has requested that the government do its utmost so that the persons benefit from the care necessary to their state of health; in one case, it also requested that the frequent transfers between the place of detention and a hospital take place in conditions appropriate to the applicant’s state of health. Any “positive” interim measures should not, however, seek to provide *restitutio in integrum* (fully restore the prior situation).

iii. Treatment of the applicant by the respondent State following imposition of an interim measure

38. The principal obligation is to respect the indicated interim measure. As to the treatment of the applicant following the indication of the interim measures (for example, reception facilities), obligations flow from the Convention⁴⁴ and other sources of international law.

E. Publication by the Court of information concerning interim measures

39. Publication by the Court of information concerning interim measures has improved considerably. The Court publishes yearly statistics on interim measures and has recently started to publish half-yearly statistics.

40. The possibility of the Court publishing information on the reasons for rejection of interim measure requests (rejections constituting more than 50% of total decisions) was discussed. Such information would provide applicants’ representatives, unrepresented applicants and national authorities with a better understanding of what situations do not amount to irreparable harm and what suspensive remedies should have been exhausted. This would, *inter alia*, assist in reducing the number of repeated failed requests by applicants and their representatives. The Registry indicated its willingness to consider the communication of such information. However, it was noted that, given the potential for creating risk to the applicant, the Court should not publish information concerning individual cases, but only general data on common typologies.

43. See *M.S.S. v. Belgium & Greece*, *Na v. the United Kingdom*, *I.M. v. France* and *Daoudi v. France*, para. 71.

44. Certain standards were evoked in the judgment in *M.S.S. v. Belgium and Greece*.

F. Interim measures preventing removal to another member State where the applicant would be at risk of irreparable harm

41. It was mentioned that a high number of interim measures relate to the return of persons to another Council of Europe member State. Questions were raised about whether it would be possible and/or appropriate for the Court to impose an interim measure on the destination State (i.e. an interim measure on the destination State from committing the irreparable harm). This raised further questions about whether the Court could impose interim measures against a State not party to the instant application. In relation to returns to a member State, the Court applies the same criteria as are applied for non-member States.⁴⁵

IV. CONCLUSIONS AND RECOMMENDATIONS

42. The number of indications of interim measures has fallen considerably over the past two years. The Court is to be commended on the efforts it has made – notably the President’s Statement, the new Practice Direction, transfer of responsibility to the Filtering Section of the Registry and centralisation of treatment of requests also at the decision-making level – that have contributed to this development. The Court could nevertheless be invited to consider whether any further measures need to be introduced to ensure that it can cope with an influx of requests such as happened in 2010/2011 in the context of returns to Iraq, as it is too soon to conclude that the procedural reforms introduced by the Registry would be sufficient to deal efficiently with such a scenario.

43. The Court is to be commended for its on-going efforts to deal speedily with applications in which interim measures have been imposed, notably by their immediate communication, according them high priority treatment, and establishing an internal control system to regularly verify the follow-up given to them. It can be presumed from this that such applications are now dealt with more speedily than in the period immediately prior to the İzmir Conference. The Court could be invited to provide further information on progress of this system, and to update periodically statistical information on the average length of time between the granting of an interim measure and the final determination of a case. The CDDH also encourages the Court to deal speedily with these applications and to consider whether more may be done to shorten the time between imposition of an interim measure and final determination of the application.

44. The Court’s recent initiative to publish half yearly statistics on interim measures is to be welcomed. The Court could consider also communicating additional, generic information on interim measure requests, including on the reasons for refusals, in such a way as not to put the safety of the applicant at risk. The means of communication could include amendment of the Practice Direction as and when necessary, the Court’s website and its regular meetings with government Agents and applicants’ representatives. The CDDH recalls the Court’s detailed memorandum on the practice of the panel of the Grand Chamber and invites the Court to consider preparing a similar text on its practice with respect to interim measures.

45. Member States should be reminded of the importance of providing national remedies, where necessary with suspensive effect, which operate effectively and fairly and provide, in accordance with the Convention and in light of the Court’s

45. For criteria see document GT-GDR-C(2012)009, para. 28.

case-law, a proper and timely examination of the issue of risk (see paragraphs 17-19 above). The CDDH would propose that it be recommended to member States that national decisions should be such as to provide the Court with sufficient information to ascertain the quality and sufficiency of the domestic procedure. Member States could also better publicise the domestic remedies with suspensive effect that are available to individuals subject to removal and which should therefore be exhausted before requesting an interim measure.

46. The CDDH underlines the importance of the Court ensuring, as soon as possible, that a legal representative acts with the consent of the applicant in cases in which interim measures are requested or have been imposed. It invites the Court to clarify on its website the requirement of the applicant's consent and to implement a timely check of whether or not such consent exists.

47. Although this is currently mentioned in the Court's letter to applicants and/or their representatives, the Court could also provide supplementary information on the Court's website and its practice direction informing applicants' representatives that they must promptly inform the Court of their own motion if they are no longer in contact with the applicant. Related to this, the Court could provide supplementary information on the need for it to be informed, whether by the applicant, the legal representative or the respondent State, when the applicant has voluntarily departed. The Court could keep these matters under regular review, including by verifying the representative's continuing contact with the applicant.

48. Given the relevant material and time constraints, it would seem that the possibility of a "prior dialogue" between the Registry and the State concerned during the examination of the request for interim measures could and should in no way be systematic. It can and should only be a solution for use on an ad hoc basis, on the basis of the Court's decision and if the latter considers it useful in order to obtain specific, factual information. Whilst the CDDH would not propose an adversarial procedure, it nevertheless encourages the practice of dialogue between the Court and the respondent State concerned and places importance on the possibility for the respondent State effectively to challenge any interim measure.

49. The Court could be invited to consider its case-law with respect to requiring exhaustion of effective, non-suspensive remedies as a condition for examination of applications concerning which an interim measure has been imposed. This would allow completion of domestic procedures, in accordance with the principle of subsidiarity.

50. Where national authorities have provided sufficient notice to an applicant of the planned time of his or her removal, the Court could be invited to enforce strictly its requirement that requests for interim measures be made at least one working day before that removal is planned to take place.

51. Acknowledging that whilst in general, it is important for decisions to be reasoned, providing reasons for the imposition of interim measures would represent additional work for the Court. The Court could consider giving reasons on an ad hoc basis in exceptional circumstances.

52. The Committee of Ministers could take note of the high number of interim measures that are related to expulsions to another Council of Europe member State and remind member States of their obligations under the Convention. The

Court could also be asked to consider whether it would be possible in certain such cases to indicate interim measures relating to the treatment of the applicant to the member State to which the applicant is being sent.

53. The CDDH underlines the importance of prompt and effective domestic implementation of judgments concerning Articles 2 and 3, which helps to diminish the number of Rule 39 requests in similar cases.

54. Member States should be reminded that Article 34 of the Convention entails an obligation for States Parties to comply with an indication of interim measures made under Rule 39 of the Rules of Court and that non-compliance normally implies a violation of Article 34 of the Convention.

APPENDIX

Registry Checklist and letters to Applicants

General Checklist

Application No. /	Section:
..... v.	Rapporteur:
	Division FS.8: .././....
<input type="checkbox"/> Application form received	ref: #.....
<input type="checkbox"/> Section assistant informed	

I. APPLICANT

1. Name:
2. Address:	Mr 97.....
3. Date of birth:
4. Nationality:
5. Representative:	Phone: None Fax: [Click and Type (add in CMIS)] E-mail: None

II. REQUEST

6. Date request received (MESURE/DEM):	[Click and Type (add in CMIS)]
7. Interim measure requested:	[Click and Type]
8. Convention issue or Article referred to:	[Click and Type]
9. Grounds for the request:	[Brief Summary of Story + Request]

III. FACTUAL BACKGROUND AND DOMESTIC PROCEEDINGS:⁴⁶

[Click and Type]

46. Concerning the domestic proceedings indicate decision body, date of decision and a succinct summary of reasons.

IV. DECISION

[Click and Type]

Proposal(s) and reasons

[Click and Type]

Quality-checker:	Judge Rapporteur:
Date:	Date:
Signature:	Signature:

Ruling by the Casepresident to correct

- Apply interim measure^a (Rule 39) (MESURE/Y)
- Refuse application of interim measure (Rule 39) (MESURE/N)
- Declare application inadmissible under Article 27 § 1 (IRRECEV)
- Urgent notification (Rule 40) (INF/REQ/40)
- Grant priority (Rule 41) (PRIORITE/Y)
- Grant anonymity (Rule 47 § 3) (ANON/Y)
- Grant confidentiality^b (Rule 33) (FILE/CONF/Y)
- Ask for factual information (Rule 54 § 2 (a))
- Communicate for observations (Rule 54 § 2 (b))

Date:	Hour:
Signature:	Name:

- a. If interim measures are applied, *priority* must also be granted.
- b. If anonymity is granted, *confidentiality* must also be granted.

Request too late / not considered

.....
.....
.....
.....

.... SECTION

ECHR-LE1.1R R39

.../.../...

Strasbourg, (date)

Application No. /

..... V.

Dear,

I acknowledge receipt of your fax of and accompanying documents requesting the European Court of Human Rights under Rule 39 of the Rules of Court to prevent your client's removal to [Click and type State (please update CMIS)]. **This request has been given the above application number, to which you must refer in any further correspondence relating to this case.**

Your fax was received at the Court at 16:30 French time on, to prevent removal at 08:00 on [J + 1], Due to its late submission, the Court was not in a position to consider your request.

Applicants are advised to send documents at the earliest opportunity.

Removal directions sent to the Court after 15:00 French time (2 pm UK time) on the day before removal may not be dealt with. When removal takes place at the weekend, the day before removal is Friday.

I would be grateful if you would inform me as soon as possible, and in any event before **[DATE 4 WEEKS]**, if your client wishes to continue with her complaint under the Convention. If you do not confirm by this deadline that you wish to continue with your complaint, your file will be destroyed without further notice.

Yours faithfully,

.....
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Outside the Scope

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.....
.....

ECHR-LE2.0R FS

Strasbourg, (date)

Application No./.....

..... V.

Dear,

I acknowledge receipt of your fax of 5 December 2012 requesting the European Court of Human Rights to make an interim measure under Rule 39 of the Rules of Court to [prevent] [click and type Measure requested/Country].

This application falls clearly outside the scope of Rule 39 and therefore has not been submitted to the [Acting] President of a Chamber for decision. The Court will not, therefore, [prevent] [click and type Measure requested/Country].

The Court applies Rule 39 only where an applicant faces imminent risk of serious and irreparable damage. The vast majority of cases in which Rule 39 is applied concern deportation and extradition proceedings and involve complaints that the applicant will be at real risk of a violation of Article 2 (the right to life) or Article 3 (the right not to be subjected to torture or inhuman treatment) of the Convention, if returned to the receiving State.

I would be grateful if you would inform me as soon as possible, and in any event before, whether you wish to continue with your complaints under the Convention. If so, you should provide the Court with a forwarding address. If no such information is received by that date, your file will be destroyed without further notice.

Yours faithfully,

.....
.....

Incomplete Rule 39 request

.....
.....
.....
.....

Fax: +

.... SECTION

ECHR-LE2.0R R39

.../.../....

Strasbourg, (date)

Application No./.....

..... V.

Dear Sir,

I acknowledge receipt of your recent correspondence / fax(es) of, in which you request a measure under Rule 39 of the Rules of Court to stop your / your client's [removal / deportation / extradition] to [Click and type State (please update CMIS)].

This request has been given the above application number, to which you must refer in any further correspondence relating to this case.

I would inform you that, according to the Court's practice, unsubstantiated requests for an interim measure within the meaning of Rule 39 are not submitted to the [Acting] President of the Section for decision. This includes requests, like yours in the present case, where the relevant documents have not been submitted, such as [a detailed account of the circumstances that led to the departure from your / your client's country of origin and a statement specifying the grounds on which your / his / her particular fears of return are based], [the nature of the alleged cited risks] [and the Convention provisions alleged to have been violated]. A mere reference to submissions in other documents or domestic proceedings is not sufficient; which implies that requests must be accompanied by copies of all relevant domestic court, tribunal or other decisions or material.

[In particular, you must submit the following document(s):

List of required documents, to be inserted by each division

Netherlands: copies of all interviews and decisions taken by the national administrative and judicial authorities

Sweden: the decisions / judgment from the **Migrationsverket**, **Migrationsdomstolen** and **Migrationsöverdomstolen**. Furthermore, you are requested to fill out and return the enclosed questionnaire.

UK: any letters from the Home Office, **any appeal determinations from the relevant asylum and immigration tribunals** and any judicial review **decisions from the High Court** (if applicable).]

If there are any medical documents (reports or other) relevant to this claim, you should also send copies of these.

Accordingly, in its present form and for as long as the relevant documents have not been received, [prior to your / your client's removal / deportation / extradition, or by [Click and type Time] on] your request to apply Rule 39 will not be submitted to the [Acting] President of the Section.

You are invited to consult the practice direction on interim measures available on the Court's internet site.

The file opened in respect of your communication **will be destroyed without being submitted for judicial decision, six months from the date of the present letter**, unless the duly completed Rule 39 request and/or an original formal application form has been received in the meantime.

[As you are [/ your client is] being removed / deported / extradited to another Member State of the Council of Europe, it will be open to you / your client to make an application against that country if it appears that it is responsible for any breach of your / his / her rights under the Convention.]

[Another version:]

[If you are [/ your client is] removed / deported / extradited to [Click and type State (please update CMIS)], which is another member state of the Council of Europe, it will be open to you / your client to make an application against Click and type State (please update CMIS)] if it appears that it is responsible for any breach of your / his / her rights under the Convention.]

Yours faithfully,

.....
.....

Enc:

- ▶ Application package
- ▶ (NB the enclosure will only be sent to your postal address)

R39 refusal + declared inadmissible

.....
.....
.....
.....

ECHR-LE11.00R (CD1 mod)
.../.../...

Strasbourg, (date)

Application No./
..... **v.**

Dear Sir,

I acknowledge receipt on of your fax of requesting the European Court of Human Rights under Rule 39 of the Rules of Court to stay the deportation of your to

On, after examining the request, the Acting President decided not to indicate to the Government of, under Rule 39 of the Rules of Court, the interim measure you are seeking.

In addition, in the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court (Judge's name), sitting in a single-judge formation, found that they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols and declared your application inadmissible.

This decision is final and not subject to any appeal to either the Court, including its Grand Chamber, or any other body. You will therefore appreciate that the Registry will be unable to provide any further details about the single judge's deliberations or to conduct further correspondence relating to its decision in this case. You will receive no further documents from the Court concerning this case and, in accordance with the Court's instructions, the file will be destroyed one year after the date of the decision.

The present communication is made pursuant to Rule 52A of the Rules of Court.

Yours faithfully,

For the Court

.....
.....

CDDH REPORT ON THE ADVISABILITY AND MODALITIES OF A “REPRESENTATIVE APPLICATION PROCEDURE”

Adopted by the CDDH on 22 March 2013

A. INTRODUCTION

1. The Declaration adopted at the High-level Conference on the future of the European Court of Human Rights, organised by the United Kingdom Chairmanship of the Committee of Ministers (Brighton, 19-20 April 2012), “[b]uilding upon the pilot judgment procedure, invite[d] the Committee of Ministers to consider the advisability and modalities of a procedure by which the Court could register and determine a small number of representative applications from a group of applications that allege the same violation against the same respondent State, such determination being applicable to the whole group” (paragraph 20.d)) (henceforth described as a “representative application procedure”). At the Ministerial Session of 23 May 2012, the Committee of Ministers instructed the CDDH “to submit, by 15 October 2013, its conclusions and possible proposals for action to follow up” paragraph 20.d) of the Brighton Declaration. The present report constitutes the CDDH’s response to this instruction.

2. The Brighton Declaration and preparatory work for the Brighton Conference provide no further indication of what might be meant by a “representative application procedure”. Some guidance, however, comes from two circumstances.

3. First, the wording of paragraph 20.d) states that it must “build upon the pilot judgment procedure”. There are in fact several possible variants of the “pilot judgment procedure”, which deals with certain types of group of applications alleging against the same respondent State a violation arising from a structural or systemic problem or other similar dysfunction. The basic procedure involves the selection by the Court of a pilot case; judgment in this case will include identification of the nature of the underlying problem and indications to the respondent State on remedial measures to be taken in its execution. The first application of the pilot judgment procedure, in the case of *Broniowski v. Poland*,¹ involved adjournment of the question of just satisfaction in the pilot case pending adoption of the remedial measures; in more recent pilot judgments, however, this has not generally been the case. The procedure typically involves adjournment of other related applications pending adoption of the remedial measures. Recent pilot judgments have often involved direction to the respondent State to adopt

1. App. No. 31433/96, Grand Chamber judgment of 22 June 2004.

the remedial measures within a specified time. In all cases, the goal of the procedure is to allow striking out of the related applications under Article 37 of the Convention following implementation of these remedial measures.²

4. Second, whilst the draft Brighton Declaration was being negotiated, the Court received a very large number of applications against Hungary relating to the pension rights of former law enforcement officers who benefited from early retirement. In response to this situation, the Court Registrar issued a press release stating as follows:

“The Court will identify one or more applications which it will examine as a priority as leading cases and, pending the outcome of those cases, it will not take any procedural steps in relation to the other applications. In addition, applications which are not lodged through one of the trade unions concerned will not be registered for the time being... [F]or the time being the Court’s Registry will not inform individual applicants that their applications have been registered. Moreover, it will not correspond with individual applicants or respond to any enquiries relating to these cases, but will publish information about the leading cases on its internet at appropriate intervals.”³

5. In any event, introduction of a representative application procedure would be intended to provide the Court with an additional tool to respond to large inflows of what will, for the purposes of this report, be called “similar” applications, i.e. 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. The aim would be transparently to ensure adequacy and efficiency in dealing with such applications. Since the Brighton Declaration would require “building upon the pilot judgment procedure”, a representative application procedure should be something new and different to the pilot judgment procedure; and if it is to have added value, also to other existing procedural tools. It should be recalled that, as with all action in response to “similar” applications, there is a link to the issue of subsidiarity, including the willingness of a respondent State to take domestic remedial action. Such remedial action allows the Court to clear outstanding applications from its case-load and by preventing perpetuation of an underlying situation, avoids any accumulation of new applications.

6. In fulfilling the terms of reference, this report will seek to ascertain first, whether the Court’s current range of relevant procedural responses, including, *inter alia* the pilot judgment procedure, is sufficient to address the current problem of “similar” applications; and second, whether there might be scope to instigate a distinctive, significant development in the Court’s procedures in response to repetitive applications, with attention being given to the question of whether the Court’s response to the Hungarian pension cases may already constitute such a development.

2. For further details on the pilot judgment procedure, see Rule 61 of the Rules of Court.

3. See doc. GT-GDR-C(2012)007, “European Court Registrar calls for special measures to deal with influx of Hungarian pension cases”.

B. THE EXISTING PROCEDURAL TOOLS AVAILABLE TO THE COURT

7. As noted above, the Court already has at its disposal a variety of procedural tools capable of responding to “similar” applications. This section will describe these tools, including by reference to examples of cases in which they have been used.

8. The broad outlines of the **pilot judgment procedure** have already been sketched in paragraph 3 above. As noted, and as reflected in Rule 61, the procedure allows for a number of variants. There may also be cases with many of the characteristic features of a pilot judgment procedure but which are adjudicated without reference to Rule 61 (see e.g. *Grudić v. Serbia*).⁴ It had been suggested, particularly in the early days, that the pilot judgment procedure was not sufficiently clear, for instance in relation to how such a procedure could be initiated and in what circumstances. There is now greater familiarity with the procedure, however, it having been used some 20 times to date; and as noted, it has been codified in the Rules of Court, in response to paragraph 7.b) of the Interlaken Declaration.

9. One particular variant of the pilot judgment procedure would lead not to a judgment but to a decision of inadmissibility. For example, the Grand Chamber admissibility decision in the case of *Demopoulos and Others v. Turkey*,⁵ concerning deprivation of access to property, found that there was an effective domestic remedy which the applicants directly concerned by the decision had failed to exhaust, on which basis the Court subsequently declared inadmissible other similar applications and closed its examination of the question that had been addressed in the earlier case of *Loizidou v. Turkey*.⁶

10. The Court may identify, from a group of similar cases, an individual case in which to give a judgment of principle, these principles being applicable to other cases in the group. In the case of *M.S.S. v. Belgium & Greece*, for example, concerning removal from EU member States to Greece under the Dublin Regulation,⁷ the principles in the judgment were relevant to the compatibility with the Convention of removals to Greece under the Dublin Regulation by other States; The Netherlands, for example, was asked by the Court how it intended to respond to the *M.S.S.* judgment. In a similar process, following judgment in the case of *Sufi & Elmi v. the United Kingdom* (concerning returns to Somalia),⁸ the United Kingdom made proposals on re-examination of asylum requests in similar cases, following which the Court was able to strike other applications out.⁹

11. The Court may also join many applications and then decide them by a single judgment. In *Gaglione v. Italy*, for example, the Court addressed 475 applications concerning substantial delay in execution of domestic court judgments ordering

4. App. No. 31925/08, judgment of 17 April 2012.

5. App. No. 46113/99 et al., decision of 01 March 2010.

6. App. No. 15318/89, Grand Chamber judgment of 18 December 1996.

7. App. No. 30696/09, Grand Chamber judgment of 21 January 2011.

8. App. Nos. 8319/07 & 11449/07, judgment of 28 June 2011.

9. See *Musa and Others v. the United Kingdom*, App. No. 8276/07 and 175 others, decision of 26 June 2012.

compensation for excessive length of judicial proceedings.¹⁰ There are many other examples of the Court determining up to 100 applications in a single judgment.

12. The Court's Registrar has recently written to the Italian Government Agent with a list of some 5,800 applications received concerning length of proceedings and the lack of an effective domestic remedy, in order that the Italian Government might contact those concerned with a view to reaching **friendly settlements on the basis of the Court's awards** to the successful applicants in *Gaglione*.¹¹

13. The Court has developed, with the co-operation of the Ukrainian authorities, an **expedited Committee procedure** approach, so far used to deal with complaints against that country of non-execution of a final domestic judgment, the largest group of similar cases against that country. The *Ivanov* pilot judgment procedure,¹² which had dealt with this issue, was terminated on account of the failure to resolve the situation: 1000 new cases arrived in 2011. The new approach was instigated by a Committee judgment in the case of *Kharuk*, which used a simplified basis for calculating just satisfaction: where the domestic judgment had gone unenforced for three years or less, the award was €1500; where more than three years, €3000.¹³ The Respondent State was invited to settle other cases on this basis.

14. In this procedure, the Registry process is greatly simplified: only key facts are entered in the case-management information system from the file, after which everything is computerised – a highly automated process. There is no summary of the individual facts; instead, a single line of data is presented as part of a table. The Ukrainian authorities do not receive the application form or any submitted documents unless they request them. There is no reference to friendly settlement, since this would prolong proceedings; the government is invited to proceed directly to a unilateral declaration on the basis of the *Kharuk* judgment. The Court indicates that if no unilateral declaration is made allowing the case to be struck out, it will give judgment after six months. The Respondent State can always challenge the use of the procedure or the factual circumstances of a case. There is a working agreement between the authorities and the Registry that no more than 250 cases will be communicated per month; since summer 2012, over 1000 have been communicated. As a result of the new approach, newly arriving cases can be decided or disposed of within a year or less.

15. Finally, as noted at paragraph 4 above, there is the approach being taken by the Registry in the **Hungarian pension cases**. These concern so far 11,500 individuals, whose applications the Registry has collected into 37 groups. What is so unusual about this situation is the exceptionally large number of co-ordinated applications made in such a short period and the high degree of interaction between the Registry and those co-ordinating the applicants' actions at national level. At this relatively early stage of proceedings, it is unclear whether any particular innovations will be introduced, or whether the Registry is merely taking a pragmatic approach to case-management in an exceptional situation.

10. App. No. 45867/07, judgment of 21 December 2010.

11. See doc. GT-GDR-C(2013)004.

12. App. No. 40450/04, judgment of 15 October 2009.

13. App. No. 703/05 and 115 others, judgment of 26 July 2012.

16. The above descriptions illustrate how the Court may combine various procedural steps in an effort to respond as effectively and efficiently as possible to a particular situation. The range of procedural tools includes:

- ▶ The pilot judgment procedure (including 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;
- ▶ The expedited Committee procedure;
- ▶ Grouping of applications at the very outset.

17. Although not strictly speaking a procedural tool available at the discretion of the Court, Article 33 of the Convention, which allows for inter-State cases, does represent a further means of addressing situations that may give rise to “similar” (as well as other numerous) applications. Whilst inter-State cases have not been numerous, they tend to involve situations affecting large numbers of individuals.

C. IN WHAT CIRCUMSTANCES DOES THE COURT USE WHICH PROCEDURE?

18. The Court values the flexibility to select from amongst its different procedural tools and their variants that which is most appropriate to the specificities of a particular situation. These tools have been developed – and, indeed, continue to be developed – by the Court within the current legal framework of the Convention and in response both to the exigencies of particular situations and, notably in the case of the pilot judgment procedure, in close co-operation with States Parties.

19. In the Registry’s experience, where there is no prospect of domestic resolution of their root causes, it may be counter-productive to let “similar” applications constantly accumulate or to defer their processing. As noted above, for example, introduction of the expedited Committee procedure followed closely on the failure of the Ivanov pilot judgment procedure.

20. The Court does not seem yet to have been confronted with any situation of “similar” applications to which it has found itself without any procedural response. This is not to say that the Court has never met with difficult situations, much less that it has been able to resolve every situation which it has faced. There may be issues of sufficiency of resources or the sheer scale of the problem; the Court’s case-management in the Hungarian pension cases, however, shows how an innovative and flexible response can make a difficult situation more manageable. As regards resolution of the underlying problem, where this is not achieved, the Ukrainian situation described above shows the Court’s ability to respond in various, appropriate ways.

21. As regards the Hungarian pension cases, there has been little in the way of substantial development since the Registrar’s press release in early 2012. It is understood that the situation before the Court is considered now to be under control and no longer critical; as to further processing of the applications, they are not considered to be of high priority under the Court’s published policy. At the time of writing, there have been no further developments to report.

D. THE ADVISABILITY OF A “REPRESENTATIVE APPLICATION PROCEDURE”

22. Is there any need for a representative application procedure in addition to the Court’s existing procedural tools and their variants? As noted, 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.

23. Alternatively, one could ask what useful, new distinguishing features or advantages might there be? The Brighton Declaration merely indicates that it would involve the Court registering and determining [only] a small number of representative applications from the group.

- i. The possibility of **grouping many applications into one case** already exists. Article 34 of the Convention allows applications from a “group of individuals claiming to be the victim of a violation”; in the case of *Chagos Islanders v. the United Kingdom*, the group consisted of 1,786 individuals.¹⁴ In addition, the Court itself may group similar applications together, as, for example, in *Gaglione* (see para. 11 above).
- ii. Equally, in certain circumstances, the Court has decided **not to register all “similar” applications**, or at least not to continue their treatment. In the *Greens & M.T. v. the United Kingdom* pilot judgment, the Court stated that it would “suspend the treatment of any applications not yet registered at the date of delivery of this judgment, as well as future applications”.
- iii. The representative application procedure would **not**¹⁵ **require transmission of all the case files** to the respondent State but only that in the lead case; but neither is this required in the expedited Committee procedure (unless requested) nor, one can assume, will it be in connection with the Hungarian pension cases. There would be no need for individual assessment of just satisfaction by the Court in every similar case; but nor is there in the pilot judgment procedure.

24. Finally, it should be noted that the Court has applied the above-mentioned existing procedural tools in relation to only relatively few States Parties and in a relatively small number of cases; it has nevertheless 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.

25. In examining the advisability of introducing a representative application procedure, the CDDH has also assessed its possible effects on the Convention system.

- i. Such a procedure would undoubtedly have an effect on the right of individual petition, as judgment in the selected case(s) would have *res judicata* effect on other applications in the group. This would require being able to

14. App. No. 35622/04, decision of 11 December 2012.

15. App. Nos. 60041/08 & 60054/08, judgment of 23 November 2010.

identify all other individuals to whom the Court’s determination of the representative application should be applicable and may have consequences for Article 46(1) of the Convention on execution of judgments.

- ii. The procedure might be said to strengthen the practical effect of the right of individual petition, since all applications in the group would be judicially determined at the same time; under the Court’s priority policy, a similar application not taken as a “lead” case faces a potentially lengthy wait.¹⁶
- iii. Much the same could be said, however, of a successful pilot judgment procedure or, to a lesser extent, the expedited Committee procedure.
- iv. The greater case-processing efficiency one could expect from a representative application procedure may have some impact on the amount of time the Court subsequently devotes to other cases. As noted above, however, once a “lead” case has been identified, similar cases are given low priority by the Court, unless given high priority on account of their individual substance. Any advantage would be due to the introduction by the respondent State of a remedy allowing resolution of similar cases at domestic level, and could apply equally to other procedural tools.

26. In conclusion, therefore, the CDDH is of the view that there would be no significant added value to designing and introducing a “representative application procedure” in the current circumstances. It should be borne in mind, however, that future developments may require a reassessment of the matter.

E. MODALITIES OF A “REPRESENTATIVE APPLICATION PROCEDURE”

27. The CDDH’s terms of reference require it to consider the possible modalities of a representative application procedure, regardless of its conclusions on the advisability of such a procedure.

28. Paragraph 20.d. of the Brighton Declaration describes the following basic characteristics of the procedure:

- i. It should “build upon” the pilot judgment procedure (see para. 3 above).
- ii. It would apply where there is a group of “similar applications” (see para. 5 above).
- iii. The Court would register and determine only a small number of representative applications from that group.
- iv. The Court’s determination of those applications would be applicable to the whole group.

29. As noted in paragraph 5 above, any “representative application procedure” for dealing with “similar” applications should be something new and different not only to the pilot judgment procedure, but also to other existing procedural

16. The Court’s position on this is that once a lead case has identified the problem underlying the group of applications and has given indications on how to address it, resolution of similar cases is a matter for the respondent State.

tools available to the Court. Paragraph 22 above, however, shows that the basic characteristics suggested for a representative application procedure can, in fact, already be found amongst existing procedural tools.

30. On the basis of the outline given in the Brighton Declaration, the CDDH concludes that the procedure would be none of the following.

- i. **Class actions.** In a class action, the applications of all members of the group are determined; this would not be the case for a representative application procedure.
- ii. **Collective complaints.** In a collective complaints procedure (such as that under the European Social Charter),¹⁷ applications may be presented by a party who is not a member of the group or a victim of the alleged violation, and there may be no requirement of exhaustion of domestic remedies; both of these would require significant changes to certain fundamental principles of the Convention system (see Articles 34 and 35(1) respectively), which in the view of the CDDH go beyond what could be envisaged in the present context.
- iii. **Default judgment.** A default judgment, such as the Court indicated prior to the Brighton Conference that it envisaged introducing,¹⁸ would apply only to the instant application or applications; judgment on a representative application would apply also to other members of the group.

31. The CDDH is thus unable to identify modalities for a “representative application procedure” that would satisfy the outline given in the Brighton Declaration and show distinct advantages not already available to the Court.

F. FINAL CONCLUSIONS AND POSSIBLE PROPOSALS FOR ACTION

32. The CDDH considers not only that it would be inadvisable to introduce a “representative application procedure” but that it is in fact difficult to see what specific characteristics such a procedure could have that would usefully distinguish it from existing procedural tools. The CDDH therefore recommends that in the current circumstances, no further action be taken at inter-governmental level.

17. The CDDH, through the GT-GDR-C drafting group, had the benefit of a detailed presentation on the collective complaints procedure under the European Social Charter given by its Secretariat.

18. “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.” See the Preliminary Opinion of the Court in preparation for the Brighton Conference, doc. GT-GDR-C(2012)001, para. 21.

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

Adopted by the CDDH on 28 June 2013

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

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).

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.

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

3. In paragraph 7 below, the Court’s statistics on “repetitive applications” in fact include both groups.

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 Others*, App. No. 703/05 & others, 26 July 2012.

5. See *Vučković and Others v. Serbia*, App. No. 17153/11 and 29 Others, judgment of 28 August 2012.

(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 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).

6. See, for example, *Maria Atanasiu and Others v. Romania*, App. Nos. 30767/05 & 33800/06, judgment of 12 October 2010.

7. See, for example, *Grišević and Others v. Serbia*, App. No. 16909/06 and others, judgment of 21 July 2009.

8. See *Greens & M.T. v. the United Kingdom*, App. Nos. 60041/08 & 60054/08, judgment of 23 November 2010.

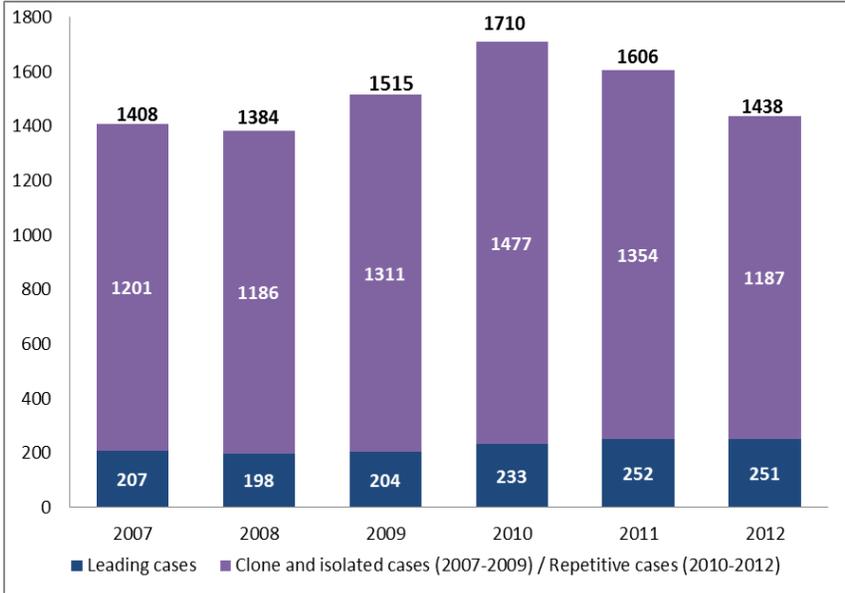
9. See the 2012 Annual Report on supervision of execution, in particular Appendix I, Table C2, p. 48ff.

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.

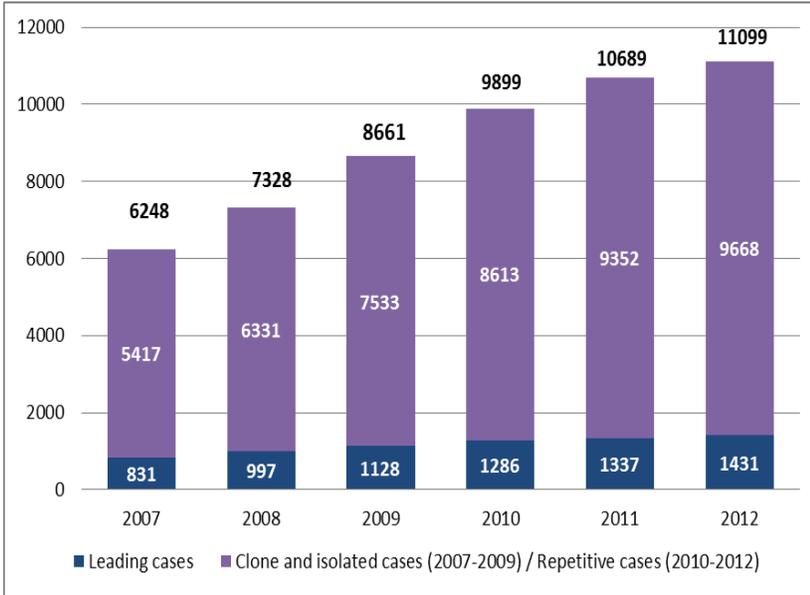
11. See doc. GT-GDR-D(2013)005. This figure corresponds to the number of priority category V cases – under the Court's published priority policy, these consist of "applications raising issues already dealt with in a pilot/leading judgment" – mentioned at p. 9 of the Court's Analysis of Statistics 2012.

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.

New cases which became final between 1 January and 31 December



Pending cases at 31 December



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 (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.

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 İzmir Declaration, para. 6.

15. See the Brighton Declaration, paras. 8 and 9.g)iii).

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 paragraph 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, 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,

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.

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.

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 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

22. See further doc. DH-GDR(2013)014.

23. See further *Wolkenberg & Others v. Poland*, App. No. 50003/99, decision of 4 December 2007, paras. 13 & 14.

24. See, for example, the Interlaken Declaration, Action Plan, para. D.7.a)i) and the İzmir 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.

21. In its Preliminary Opinion in preparation for the Brighton Conference, the Court stated that “[in] response to recommendations made at Interlaken and İzmir [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 Articles 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 situations which generate repetitive cases.”³⁰ The Court also gave notice that it envisaged introducing a new practice for dealing with repetitive cases:

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.

30. See the Court’s Preliminary Opinion, para. 35.

“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

31. *Ibid.*, para. 21.

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 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

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.

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 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

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.

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.

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), the 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 website), 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.

39. See the 6th Annual Report, p. 13.

40. See docs. CM/Inf/DH(2010)45 final and CM/Del/Dec(2010)1100eE.

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 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.

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.

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:

- ▶ identification of key challenges in each member State;
- ▶ a dialogue on appropriate remedies with the member States concerned;
- ▶ 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 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.

44. See doc. SG/Inf(2013)15.

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).

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 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 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.

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.

CDDH REPORT ON WHETHER MORE EFFECTIVE MEASURES ARE NEEDED IN RESPECT OF STATES THAT FAIL TO IMPLEMENT COURT JUDGMENTS IN A TIMELY MANNER

Adopted by the CDDH on 29 November 2013

I. INTRODUCTION

1. As noted in the Declaration adopted at the High-level Conference on the future of the European Court of Human Rights, organised by the United Kingdom Chairmanship of the Committee of Ministers (Brighton, 19-20 April 2012), “each State Party has undertaken to abide by the final judgments of the Court in any case to which they are a party. Through its supervision, the Committee of Ministers ensures that proper effect is given to the judgments of the Court, including by the implementation of general measures to resolve wider systemic issues... The Committee of Ministers must therefore 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 The Declaration then invited the Committee of Ministers “to consider whether more effective measures are needed in respect of States that fail to implement judgments of the Court in a timely manner”² Following the Conference, the Committee of Ministers instructed the CDDH to submit its conclusions and possible proposals for action to follow up paragraph 29.d) of the Declaration. The deadline for this work has been set at 31 December 2013. The present report has been prepared in response to the Committee of Ministers’ instruction.

2. The Committee of Ministers’ Annual Reports on the supervision of execution of judgments contain statistics indicating the scale of the problem and its evolution over recent years. The following figures run from 2010, the year of entry into force of Protocol No. 14, which, as noted in that year’s Annual Report, was associated with an important number of new types of case, mainly clone or

1. Paras. 26 & 27.

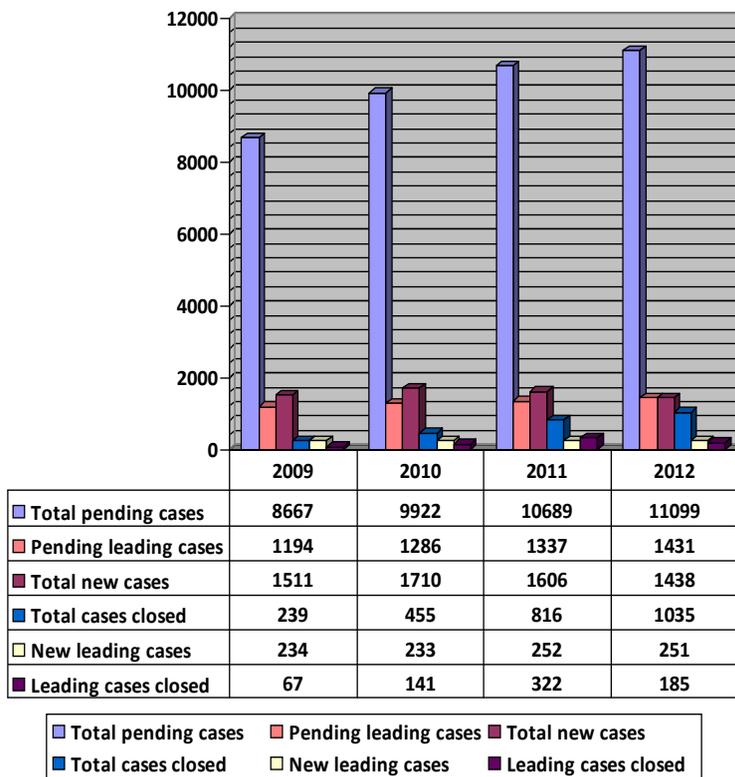
2. Para. 29.d).

repetitive, due to the fact that the Court began issuing committee judgments in repetitive cases and the Committee of Ministers began supervising implementation of friendly settlements. Most repetitive cases concern a few recurring systemic issues.³

- i. In 2010, the total number of pending cases increased by 14% over 2009 (from 8,667 to 9,922); the number of pending “leading” cases, by 8% (1,194 to 1,286).⁴ The total number of new cases increased by 13% (from 1,511 to 1,710); the number of new “leading” cases remained stable (234 to 233). The total number of cases closed by adoption of a final resolution increased by almost 90% over 2009 (from 239 to 455); the number of “leading” cases closed, by 107% (67 to 141).
- ii. In 2011, the total number of pending cases increased by 8% over 2010 (to 10,689); the number of pending “leading” cases, by 4% (to 1,337). The total number of new cases decreased – for the first time in ten years – by 6% (to 1,606); the number of new “leading” cases increased by 8% (to 252). The total number of cases closed by adoption of a final resolution increased by almost 80% (to 816); the number of “leading” cases closed, by 128% (to 322).
- iii. In 2012, the total number of pending cases increased by 4% (to 11,099); that of pending “leading” cases, by 7% (to 1,431). The total number of new cases again decreased, by 10% (to 1,438); that of new “leading” cases remained stable (251). The total number of cases closed by adoption of a final resolution increased by almost 27% (to 1,035); the number of “leading” cases closed decreased by 43% (to 185, still higher than the figure for 2010).

3. 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.

4. For these purposes, a “leading” case is defined in the Annual Reports as one which has been “identified as revealing a new structural or general problem in a respondent state and which thus may require the adoption of new general measures more or less important according to the case”.



Although these figures do not give a complete picture of the situation, the CDDH in particular notes that each year, the number of new cases continues to exceed the number of cases closed.

3. The present report will examine the issue raised in the terms of reference from the following perspectives:

- i. What constitutes execution of a judgment and what is failure to execute in a timely manner? As a preliminary point, the CDDH observes that this is a relative issue that depends on the nature and complexity of the measures required. It may be necessary to take into account delays in the treatment of information received from the respondent State, such as the evaluation of a proposed action plan and the time taken to close a case following submission of an action report.
- ii. Are more effective measures needed? A first reflection on the data provided above would certainly seem to suggest that an increasing number of judgments are clearly taking a long time to execute in full or to close. Hence there may be a need for further efforts at the level of both member States and the Council of Europe.
- iii. What such measures could be introduced? These measures will be examined in detail in sections III-V below.

4. The CDDH would also recall its work on issues relating to repetitive applications, given the fact that once the Court has given judgment, repetitive applications to the Court may represent a flow of related cases whose continuation is indicative of a failure to execute general measures intended to resolve the underlying systemic issue. In this connection, the CDDH has since the Brighton Conference transmitted to the Committee of Ministers a report on the advisability and modalities of a “representative application procedure” and another containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court.⁵ The latter report in particular underlined the importance of execution of judgments and looked forward to more detailed treatment of the issue in the present report.⁶

5. In the course of preparing the present report, the CDDH has, through the activities of Drafting Group “E” on the reform of the Court (GT-GDR-E), had the advantage of input from other parts of the Council of Europe, including the Committee of Ministers’ Ad-hoc working party on reform of the Human Rights Convention system (GT-REF.ECHR) and the Parliamentary Assembly,⁷ as well as extensive exchanges with representatives of civil society organisations and other independent experts, both in the course of meetings, including an initial half-day exchange of views,⁸ and through written contributions.⁹ The CDDH also recalls its earlier “practical proposals for the supervision of the execution of judgments of the Court in situations of slow execution”, which had included an invitation to a more in-depth reflection that it had declared itself ready to undertake.¹⁰ It further notes the on-going work of the Committee of Ministers, which covers also aspects going beyond the context of the present report.

II. ORIGINS OF THE PROBLEM

6. Broadly speaking, it can be said that there are three general causes of failure to execute judgments in a timely manner:

- i. Reluctance on the part of either the executive to propose measures or parliament to adopt legislation.
- ii. Technical complexity, e.g. need for a wide range of measures requiring co-ordination or extensive legal reforms.

5. See docs. CDDH(2013)R77 Addendum IV and CDDH(2013)R78 Addendum III respectively.

6. See in particular sections VII and X.

7. See in particular the working document “Measures to improve the execution of judgments and decisions of the Court (doc. GT-REF.ECHR(2013)2 rev2) and the “Memorandum on the Parliamentary Assembly’s proposal to introduce a system of financial sanctions or astreintes on states who fail to implement judgments of the Strasbourg Court” (doc. GT-GDR-E(2013)002).

8. See doc. GT-GDR-E(2013)001.

9. See in particular the Open Society Justice Initiative briefing paper on supervision of execution of judgments of the Court (doc. GT-GDR-E(2013)005), the proposals by Professor Antonio Bultrini concerning supervision by the Committee of Ministers of execution of judgments (doc. GT-GDR-E(2013)006) and the observations by the European Trade Union Confederation (doc. GT-GDR-E(2013)3).

10. See doc. CDDH(2008)014 Addendum II.

- iii. Substantive impediments, e.g. uncertainty about what the judgment requires or the refusal of the applicant or another private party to co-operate in the execution of the judgment.
- iv. Inertia (being a simple failure to take action not linked to any particular political or technical consideration but e.g. to a shortage of staff).

Financial difficulties may be relevant to some of the above: for instance, general budgetary problems may lead to a reluctance to take political decisions allocating scarce resources to executing a judgment; or a particular body may have difficulty, due to lack of resources, in finding technical solutions or giving sufficient attention to a problem.

7. Identification of the most suitable tool for responding to a problem depends on its cause. National authorities' reluctance to take action, for example, will require a response on the political level or which contains a political component. The provision of a Council of Europe technical assistance programme would be indicated in response to a technical problem.

8. The following sections group the various proposals into three categories, although it should be borne in mind that some proposals may have effects relevant to more than one category; they are included below in the category to which they are most relevant:

- i. tools to facilitate supervision by the Committee of Ministers;
- ii. tools to encourage full execution;
- iv. tools to enhance interaction between the Committee of Ministers and non-Council of Europe actors.

III. TOOLS TO FACILITATE SUPERVISION

9. *The Committee of Ministers working in smaller groups during the supervision process.* The CDDH recalls an earlier proposal that "groups of Deputies, either of their own motion or at the instigation of their Government Agents, confronted with similar problems could meet to seek together solutions and elaborate draft resolutions for submission to the plenary Committee, in collaboration with the Department for the Execution of Judgments and other relevant bodies of the Council of Europe".¹¹ It notes the reluctance for the Committee of Ministers to address questions relating to supervision of execution of Court judgments in anything other than plenary composition but considers that there may be scope, in certain situations and/ or at certain stages of the procedure, for certain tasks to be performed by smaller groups.

10. *More extensive/ systematic use of other bodies inside & outside the Council of Europe,* for instance the European Commission for Democracy through Law (Venice Commission) and the European Commission for the Efficiency of Justice (CEPEJ). It was noted that some developments were already under way, notably in relation to provision of technical assistance.¹² In addition, the Council of Europe Commissioner for Human Rights could also contribute to the formal supervision process before the Committee of Ministers. It was also

11. 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.iii.

12. For further details, see doc. CDDH(2013)R78 Addendum III, section VIII.

recalled that the Convention gives the role of supervising execution of Court judgments to the Committee of Ministers, which has a dedicated secretariat for this task. This latter brings to the attention of the Committee of Ministers all information about positions and potentialities of other Council of Europe bodies that could be useful in the framework of the execution of judgments, and to which the Committee of Ministers is always free to have recourse. This would have to be done without introducing new elements into the obligations flowing from a particular judgment. Nevertheless, certain bodies could become involved “by default” in relation to certain categories of cases, for example the European Committee for the Prevention of Torture (CPT) for relevant cases involving Article 3 of the Convention. Lacking to date has been a detailed concrete plan, co-ordinated across the bodies concerned, which would provide the impetus necessary to institute these reforms. It has also been suggested that there be periodic meetings between the Committee of Ministers, the Parliamentary Assembly (in particular its Committee on Legal Affairs and Human Rights) and the Council of Europe Commissioner for Human Rights to discuss issues relating to execution of judgments.¹³ (See also section VI below.)

11. ***Appointment of ad hoc experts by the Committee of Ministers.*** This proposal should be distinguished from the practice of recourse to outside experts as part of the technical assistance provided by the Department for the Execution of Judgments. It was noted that this could be a useful tool in exceptional circumstances. Such an expert would not audit or evaluate measures taken by a respondent State but conduct a needs assessment, evaluation of measures taken being the essence of the role of the Committee of Ministers. It was noted that the added value of a Committee of Ministers-appointed expert was uncertain, in the light of the fact that the practice of providing technical assistance had grown considerably in recent years.

12. ***The Court being more directive in its judgments on the measures needed.*** It should first of all be noted that the Court has stated that “exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, [it] will seek to indicate the type of measure that might be taken in order to put an end to a violation it has found to exist. In such circumstances, it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned. In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure”¹⁴ An example of the former is the pilot judgment in the case of *Broniowski v. Poland*, concerning the need for a domestic remedy providing compensation for property lost as a result of border changes following the Second World War.¹⁵ As to the latter type of case, in *Oleksandr Volkov v. Ukraine*, the Court directed the respondent State to ensure that the applicant be restored to his judicial post.¹⁶

13. A decision to this effect has in fact already been taken: see the “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 at the 116th Ministerial Session, 19 May 2006, para. X.c.

14. See e.g. *Fatullayev v. Azerbaijan*, App. No. 40984/07, judgment of 22 April 2010, para. 174; in this case, the Court ordered the respondent State to release the applicant from detention.

15. App. No. 31443/96, Grand Chamber judgment of 22 June 2004, para. 194.

16. App. No. 21722/11, judgment of 9 January 2013, paras. 202 & 208. The Court in this judgment also indicated that the respondent State should implement certain general reforms of its legal system.

13. It was noted that the Court has, in exceptional cases, already developed its practice in this sense. Some welcomed this as helpful in providing greater clarity as to what Convention standards required, thereby assisting States in executing judgments. Others opposed it on the basis that it exceeds the Court's role under the Convention, arguing that it fundamentally alters the relationship between the Court and the States Parties. The essential role of the Court is to determine whether or not protected rights and freedoms have been violated and, where necessary, to decide on just satisfaction. States are then free to choose the means by which to give effect to the Court's judgments, subject to the supervision of the Committee of Ministers, in accordance with the principle of subsidiarity. Questions were also raised as to the extent to which directives on specific measures required for execution would be binding, including where circumstances change and the measures directed are no longer appropriate/ adequate. It has been suggested that problems in determining the measures necessary fully to execute a judgment are due not to a lack of precision in the judgment but to the fact that the judgment is based upon a specific case and may be open to different readings, depending on one's perspective. Also, where there is uncertainty concerning the consequences of a judgment that depends on its interpretation, the CDDH recalls that Article 46(3) of the Convention allows the Committee of Ministers to refer the matter to the Court for a ruling on the question of interpretation (see also below). In any case, the Committee of Ministers' expectations of a satisfactory outcome to the process of implementation of a particular judgment must remain consistent with the judgment itself and preferably should be clear from the outset.

14. ***More interaction between the Court and the Committee of Ministers***, including through keeping one another informed of relevant developments (notably concerning systemic issues and repetitive applications, or introduction of an effective domestic remedy), taking synergistic actions (e.g. further Court judgments to clarify the legal/ factual situation concerning particular systemic issues, including pilot judgments) and co-ordination (e.g. where certain aspects of a case have already been transmitted to the Committee of Ministers whilst others remain pending before the Court). Such interaction already exists but it could usefully be further developed. Taking account of a subsequent Court judgment could however only be justified in exceptional cases and should not involve suspending closure of a case, at the risk of unduly prolonging the process. Any interaction must respect the fact that the Convention gives to the Committee of Ministers competence to determine whether the measures proposed and subsequently taken by a respondent State are adequate (subject only to the possibility of referral to the Court under Article 46(4)).

15. ***Appointment of a "special rapporteur"*** who would act, in direct partnership with the Department for the Execution of Judgments (which would become autonomous within the Council of Europe), as an independent advisor to the Committee of Ministers on the measures needed for execution of a judgment and on possible action in response to particular situations.¹⁷ As originally made, this proposal would involve an official appointed by the Committee of Ministers from amongst a list of personalities fulfilling the usual requirements of competence, impartiality and high moral character. This official would be auxiliary to the Committee of Ministers, providing an independent and objective assess-

17. See "Proposals by Prof. Antonio Bultrini concerning supervision by the Committee of Ministers of execution of judgment", doc. GT-GDR-E(2013)006.

ment of the specific circumstances of judgments whose implementation is subject to supervision. This assessment would be accompanied by proposals to the Committee of Ministers, including on measures that may be required as part of effective implementation of a judgment and on measures that could be taken to promote and encourage full implementation. The official could also decide which cases should be given publicity; for example, Committee of Ministers' decisions, examples of good practice or instances of particularly unsatisfactory implementation. Deciding whether a judgment had been effectively implemented would, however, remain the exclusive competence of the Committee of Ministers.

16. Issues requiring further examination include whether or not the official would have a status analogous to the various United Nations' Special Rapporteurs/ Representatives; whether the function should be a new office within the Council of Europe or be discharged by an existing one; and whether or not its creation would require amendment of the Convention (the proposal provisionally concluded that this would not be the case). More detailed consideration would have to be given to the precise criteria and procedure for appointment and functions of the new official, and their exact position in the organisation and role in the supervision process.

17. The proposal argued that the introduction of such an official would give an autonomous dynamic thrust to the otherwise essentially inter-governmental process; the absence of such an independent, pro-active institutional actor hindered the Committee of Ministers' capability to adopt incisive decisions, especially in cases of doubt over a State's compliance with a judgment. Experience with such organs as the committee of experts of the European Charter for Regional or Minority Languages or the Advisory Committee of the Framework Convention for the Protection of National Minorities shows how the Committee of Ministers may exercise its political competence more incisively when supported by the independent assessment of a dedicated official. The existence of such an official could help avoid confrontation between States over controversial issues, by allowing an independent actor to take initiatives. The very fact of establishment and existence of such an official would underline the importance of execution of judgments and the political priority attached to it by the Committee of Ministers. The costs involved would be relatively small, being limited to the expenses connected to the post itself; this would represent excellent value for money when set against the cost of delayed or incomplete execution of judgments in both financial, including for the Court and the Committee of Ministers, and human terms. There was some support for the proposal.

18. There were, however, widespread doubts about the added value of such a mechanism and, relatedly, concerns also about the possible high budgetary consequences of its implementation. It was underlined that Respondent States remain free to choose the most appropriate means to give effect to a particular judgment. It was felt that the Department for the Execution of Judgments, along with technical assistance programmes and, potentially, a more systematic recourse to the expertise of other Council of Europe bodies (see further below), had sufficient competence and qualifications as sources of support to the work of the Committee of Ministers. Concern was expressed that a new official could create uncertainty as to the different responsibilities of the various actors and complicate the supervision process, with the risk of delay: it was suggested that a better approach would be to reinforce the capacity of the Department for the Execution of Judgments to support States through close bilateral co-operation.

The need was expressed for greater clarity of the proposal and a better understanding of how it was supposed to work in practice. Even for some supporters of the proposal, it was felt that it would not be appropriate for such an official to decide on giving publicity to what this latter considered to be instances of particularly unsatisfactory implementation.

19. As a variation on the proposal, it was suggested that whilst any “special rapporteur” should not duplicate existing functions, there could be added value in a role as a conduit by which the views of and information from civil society and other external actors would be distilled and transmitted to the Committee of Ministers, which would also continue to receive all communications concerning a particular case. This could facilitate the work of national delegations in digesting the varied mass of information available on the very large number of cases on the Committee of Ministers’ agenda. Such a post could be located within the Department for the Execution of Judgments, or, with greater autonomy, the Office of the Council of Europe Commissioner for Human Rights. In response, it was felt that the Committee of Ministers should continue to examine all communications on an equal footing; that the basis on which a special rapporteur would select communications to bring to the Committee of Ministers’ attention would be difficult to define; and that the aim of the proposal could be achieved by a better presentation of relevant information within the existing frameworks.

IV. TOOLS TO ENCOURAGE FULL EXECUTION

20. *Recognition of good practice* in the execution of judgments could be further developed, including, for example, by giving publicity to resolutions or decisions when a State has particularly effectively or rapidly executed a judgment, or even when it has made notable progress towards full implementation, while good cooperation with states could also be further reflected in the Annual Reports. There should also be readily accessible information on the current state of progress in implementing both individual and general measures. Procedurally, full execution of a judgment should rapidly be followed by closure of the execution process and reflection of this in the relevant statistics. It is also important that decisions and resolutions be effectively disseminated to domestic authorities, in accordance with Committee of Ministers’ Recommendation CM/Res(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights.

21. *Use of proceedings under Article 46(4) of the Convention*, made possible upon the entry into force of Protocol No. 14 in June 2010. This mechanism has not yet been used by the Committee of Ministers, although it is understood that occasional requests have been made by applicants for the Committee of Ministers to consider using it. A possible practical obstacle to use of the provision may be the fact that delegations in the Committee of Ministers could be reluctant to call for a vote, given the need for a two-thirds majority decision. In order to dispel any uncertainty about the exact meaning of the provision, the CDDH recalls that the Explanatory Report to Protocol No. 14 clarifies that the expression “a High Contracting Party refuses to abide” covers refusal whether “expressly or through its conduct”.¹⁸

18. See para. 98 of the Explanatory Report.

22. The CDDH recognises the potential of the Article 46(4) procedure, which is intended to assess whether a judgment has been implemented: the response to non-implementation would remain a matter for the Committee of Ministers. At the same time, the CDDH appreciates that its use must be considered with especial caution.

23. With a view to exploring different approaches to the use of this provision, it has been suggested that it could be made one of a (formalised) series of steps in response to failure to execute (see *Graduated set of tools* below). The procedure may be particularly suitable where there is dispute as to the efficacy of measures taken; in which case, it should be recalled that proceedings could also culminate in a finding that the State in question has in fact adequately implemented the judgment, so that the Committee of Ministers would then close its supervision.

24. It was also argued that any introduction of measures even stronger than Article 46(4) should only be after the Committee of Ministers has actually used its existing powers, including under Article 46(4).

25. ***Astreintes/ financial penalties/ punitive damages.*** A proposal to introduce a system of *astreintes* was originally made by the Parliamentary Assembly in 2000 and reiterated in 2002 and 2004,¹⁹ during the process involving the Rome Conference and the preparation of the 2004 reform package. In its reply to the 2000 Recommendation, the Committee of Ministers considered that “the idea of a system of financial penalties (‘astreintes’) ... and, in particular, the practicalities of such a proposal, merit very thorough examination”, whilst noting that “the introduction of such a system into the control mechanisms instituted by the Convention raises a number of questions... In any event, persistent failure to execute judgments already carries financial consequences: the risk of being obliged to award just satisfaction to other persons affected by a persistent violation of the Convention may already bring with it a considerable economic pressure on the respondent State.”²⁰ The Assembly’s 2004 proposal was not retained in Protocol No. 14.

26. A proposal to introduce financial sanctions imposed by the Committee of Ministers did not attract consensus prior to the Brighton Conference; opinions in the CDDH are also clearly divided for and against proposals of this type (i.e. for measures whether ordered by the Committee of Ministers or the Court), as follows.

27. Amongst the concerns and objections that have been expressed are the following:

- ▶ States Parties did not sign up to a system involving punitive measures. To introduce such unusual and radical measures for non-timely execution of judgments now would change the nature of the Convention system.
- ▶ Any system of *astreintes* etc. would have to be effective in rectifying underlying systemic problems, not merely in requiring States to pay compensation/ damages.

19. See PACE Recommendations 1477 (2000) on execution of judgments of the European Court of Human Rights, para. ii and 2546 (2002) on implementation of decisions of the European Court of Human Rights, para. 4, and Opinion No. 251 on draft Protocol No. 14, para. 5.

20. See doc. CM/Del/Dec(2000)779/4.2. The Committee of Ministers’ reply to the 2002 Recommendation referred back to the earlier reply.

- ▶ It could be said that the money involved would be better spent on resolving the underlying systemic problems. Indeed, financial difficulties may be a reason for non-execution of certain judgments; financial sanctions or punitive damages may only exacerbate this situation.
- ▶ The Committee of Ministers may find it difficult to decide to apply a financial penalty, were it to be competent for doing so, given that it has not so far made use of Article 46(4) (see further above).
- ▶ It would be premature to consider the introduction of coercive measures before the effectiveness in practice of Article 46(4) had been tested.

28. Positive reaction to the proposal varies from interest in further exploration to strong support of some. It has been argued that financial incentives would be the strongest to ensure execution of judgments. It has been said that in some situations, it is “cheaper” for the respondent State to pay successive sums of just satisfaction than to resolve the underlying systemic issue: a financial penalty could help rebalance this calculation in favour of the latter and compliance with Convention obligations.

29. Issues requiring further exploration would include the following. It would be hard to quantify the potential efficacy of financial penalties, which would have to be set at a level high enough to be an effective incentive but not so high as to impair the State’s ability to implement the judgment, especially in situations of budgetary difficulty. It may also be necessary to accommodate the fact that not all States are equally wealthy, in order to equalise the impact of any penalty. For all these reasons, there would need to be an element of discretionary decision-making as to the amount of a penalty, begging the question as to who would exercise this discretion. The Court may have the necessary impartiality, but such a competence would to some extent change the nature of its relationship with the States Parties. There is, moreover, currently no legal provision for the Court to take punitive measures against States: it has never been competent to take such decisions and would have to be, in an appropriate manner, empowered to do so. In the present context, this would require an amendment of the Convention and not merely a Committee of Ministers resolution, as was the case for introduction of the pilot judgment procedure. Were the Court to be given competence to take punitive measures, it could at the same time be given greater competence to be directive in its judgments (see para. 12 above). Even were decisions on application of financial penalties to be taken by the Court, it is unclear how the process would be initiated, given that the Committee of Ministers is responsible for supervision of execution of judgments but has not so far made use of Article 46(4).

30. It was suggested that the Court could pass on its costs incurred in processing repetitive applications to the respondent State as an additional charge through a system ensuring that victims of such violations obtain redress without any significant additional administrative burden on the Court. Another option could be a requirement to pay civil-type damages to the Committee of Ministers as compensation for resources expended on prolonged supervision of execution of judgments in cases of persistent systemic issues. Such measures would not, however, strictly speaking be punitive but rather of a reparative nature, although some of the effects may be similar. In response, it was pointed out that the Court could not be considered as suffering “damage” on account of having to deal with repetitive applications, as it exists and is financed by the member States to deal

with all individual applications regardless of their nature; a similar consideration would apply to the proceedings before the Committee of Ministers. It was also suggested that both measures would require amendment of the Convention.

31. Overall, the CDDH did not envisage the possibility of consensus on the issues of *astreintes*/ financial penalties/ punitive damages in the foreseeable future but did not exclude all possibility of its being further discussed should the situation change in future.

32. ***“Naming and shaming”*** as a form of pressure: the Committee of Ministers could adopt a practice of being more critical and publicise its findings to that effect. The CDDH notes that in other contexts, Council of Europe bodies – for example, MONEYVAL (see further below) and the CPT – do use publicity as a response to failures in compliance. Concern was expressed that this was not necessarily the best way of obtaining execution: it does not help to identify solutions, which is better achieved by providing effective support to States, and tends to block discussion with the authorities, who if they feel stigmatised may defend their position. Certainly it should not be used indiscriminately, without regard to the consequences; it may be more suitable to clear procedural failings – e.g. non-presentation of an Action Plan – than to contestable substantive matters. There was no consensus in support of a use of publicity that would amount to “naming and shaming”. In the past, the Committee of Ministers has used publicity not to “name and shame” but to inform the public about problems in execution and in its own supervisory work (through e.g. press releases, Annual Reports): this has had some results on the domestic political level and should be encouraged and developed (see *“recognition of good practice”* above). Some aspects of the supervision process can be and, in fact long have been made public by administrative initiative, e.g. statistics and lists of long-pending cases: these resources could in future be made more accessible. A more effective approach may for this to be done following a transitional period during which outstanding procedural failures could be corrected. “Naming and shaming” may have a part to play in the more political processes of the Parliamentary Assembly, when acting to promote execution of judgments.

33. ***Graduated use of tools according to an agreed, pre-determined sequence*** could clarify the relative significance of particular measures taken by the Committee of Ministers in response to delay in execution. The CDDH notes the efforts already undertaken by the Committee of Ministers to this effect, and that the Council of Europe’s Committee of experts on Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) employs graduated steps as part of “compliance enhancing procedures” with respect to States found not to be in compliance with reference standards or the committee’s recommendations. It has been suggested that, in the context of supervision of execution of judgments, application of each successive tool or measure could be triggered automatically in accordance with a specified time-frame – which could be set, at least in part, by reference to that indicated in the respondent State’s action plan – subject to any decision to the contrary. Even if cases are different and the responses to them may need to differ, there could nevertheless be an established sequence of responses, subject to a certain flexibility, with no more than a rebuttable presumption that after a certain period of time, consideration will be given to taking the next measure. The importance of flexibility and the adaptability of responses to particular circumstances has, however, been underlined, and some expressed doubts that the same sequence of responses would always be appropriate in respect of every judgment. It was therefore considered

that the available measures could rather constitute a “toolkit” (or list of tools/measures), which could be based on the measures examined by the GT-REF.ECHR (see para. 5 and footnote 6 above).

34. The use of *peer pressure to overcome persistent difficulties to execute* has been a constant part of Committee of Ministers’ practice and a certain number of tools have been developed in response to concrete situations. A certain number of additional measures have been discussed but never implemented by the Committee of Ministers.²¹ In the opinion of the CDDH these measures should remain in the toolkit available to the Committee of Ministers. Nevertheless, there may be doubts as to their appropriateness for obtaining acceleration of execution measures, as such a potentially confrontational approach may undermine the dialogue between the Committee of Ministers and a respondent State.

35. On a more positive note, encouragement or support could be given to bilateral co-operation between a State faced with a particular systemic issue and another that has already successfully executed a judgment involving a similar issue (see also para. 9). This could also be considered a part of the Council of Europe’s technical assistance (see section VI below).

36. *Role of national parliaments.* Similarly, the CDDH recalls that national parliaments have an important role to play in the process of execution of judgments and could be encouraged to intervene in appropriate cases. The CDDH takes note of the Parliamentary Assembly’s efforts to this end.

V. TOOLS TO ENHANCE INTERACTION BETWEEN THE COMMITTEE OF MINISTERS AND NON-COUNCIL OF EUROPE ACTORS

37. *Involvement of national human rights institutions and Ombudsmen, and relevant international bodies.* National human rights institutions and Ombudsmen already have the right in principle to submit communications. The CDDH recalled the UN’s “Paris Principles”, which state that national human rights institutions “shall co-operate with regional institutions ... that are competent in the areas of the promotion and protection of human rights”.²² At the same time, it notes that some such bodies’ mandates may not allow them to take such action or may be uncertain on the matter.

38. Following on from the previous two proposals, one could also envisage amendment of Rule 9 to allow for the possibility of comments from other international organisations dealing with human rights, which is not currently explicitly foreseen.

39. *Formalisation of the process of civil society organisations giving briefings to permanent representations,* building on the existing practice of informal, ad hoc briefings. The CDDH does not consider that it would be advantageous to formalise an existing practice. What is important is that the Committee of Ministers can avail itself of information from a range of sources before reaching its decisions. In this connection, the proposals below, notably those connected to Rule 9, can be considered as a package.

21. See doc. GT-REF.ECHR(2013)2 rev2, p. 6.

22. See the “Principles relating to the Status of National Institutions”, adopted by General Assembly resolution 48/134 of 20 December 1993, para. 3.(e).

40. **Increasing applicants' understanding of the process**, including by making them aware that the process continues after adoption of a judgment and that they may still have a role to play. It reflects the fact that the Committee of Ministers is a political organ but supervision is a legal process. One should not, however, create a further adversarial stage nor excessively systematise exchanges of information and submissions before the Committee of Ministers. The purpose of submission of information should be to contribute to better implementation of judgments, in particular to determination of whether a particular judgment is fully executed. This does not extend, however, to the question of how that judgment should be executed: States are free to choose the most appropriate means of effectively achieving the result. When they receive the Court's judgment, applicants and their representatives are informed in general terms about the supervision process and provided with the contact details of the Department for the Execution of Judgments. It was suggested that they could also be informed when supervision is to be closed. Furthermore, applicants could receive copies of all information transmitted by the government to the Committee of Ministers. Applicants should not, however, be systematically invited to respond to every communication from the respondent State; instead, they should be allowed to act as and when they consider necessary – anything more would only create an additional and unnecessary burden for the Department for the Execution of Judgments, whose resources are already limited.

41. Applicants and the general public may not understand the significance of all the procedural terms used: for example, the term "execution" has an unfortunate, predominant connotation in English, and use of the term "resolution" for various measures of differing procedural significance may be confusing. A relatively simple step that could promote better understanding of the supervision process would be review and, where necessary, revision of the terminology used, which may also be in the interests of the Committee of Ministers.

42. **Amending Rule 9²³ to remove the distinction between injured parties (i.e. applicants) and NGOs/NHRIs as regards the possibility of addressing general measures**. This proposal received some support, with certain reservations. It was noted that increasing numbers of judgments depend on implementation of general measures for their full execution, and that it may be difficult for an individual applicant to comment on the issues involved; indeed, questions were raised as to the competence of individuals to provide an objective assessment of general measures, or even the legitimacy of such interventions. Again, it should be emphasised that in every case, the aim must be to improve implementation of judgments: interaction between the Committee of Ministers and other actors is not an end in itself.

43. **Encouraging applicants to communicate with the Committee of Ministers (including by raising awareness of Rule 9)** could be done in exceptional cases but should not become the standard practice. The Secretariat should be encouraged to propose taking this step to the Committee of Ministers where appropriate. Once again, the aim of communications with the Committee of Ministers can only be to improve the supervision process. Also in this connection, it may be that the variant on the "special rapporteur" proposal, giving any

23. Rule 9 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

such official a role in channelling information from third parties to the Committee of Ministers, could play a part in appropriately encouraging applicants to submit communications.

VI. COUNCIL OF EUROPE TECHNICAL ASSISTANCE AND ITS TARGETTING

44. The CDDH recalls the importance of Council of Europe technical assistance to facilitate full execution of judgments. In this context, the Secretary General's proposals were discussed at the May 2013 Ministerial Session, and it can be noted that within the Council of Europe, a relative emphasis is currently being given to co-operation activities. The CDDH recalls its examination of this issue in its recent 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.²⁴

45. Assistance may be of two types, addressing systemic issues (which requires large-scale, lengthy, complex programmes) or specific interventions (involving precise, sometimes very rapid action to help overcome particular technical difficulties; such activities may not require extensive resources).

46. It is clear that there is a need for co-ordination between Council of Europe co-operation activities in order better to target execution problems. It should be made easier to realign projects in response to changing circumstances (e.g. a new judgment of the Court on the issue in question), through increased flexibility in the administration and implementation of projects.

47. The CDDH itself could be deployed as a forum for the exchange of good practices. It has in the past prepared various recommendations and guides to good practice on issues of common interest, including both general capacity for implementing judgments and solutions to specific problems; this could be further pursued in future, with new issues being addressed and existing reports and instruments up-dated. More direct and flexible approaches to exchange of information could also be investigated.

48. The CDDH also considers that further attention should be given to resolving possible differences in priority between donors and the requirements of execution of Court judgments. Whilst technical assistance should follow broad strategic objectives, the central importance of the Convention system to human rights protection in Europe and the States Parties' obligation to execute Court judgments suggest that the requirements of execution should be borne in mind when designing and implementing assistance programmes.

49. Similarly, the CDDH reaffirms the importance of cooperation between the Council of Europe and the European Union, in particular to ensure the continued funding and effective implementation of joint programmes and coherence between their respective priorities in this field (see the Brighton Declaration, para. 9.i)).

24. See doc. CDDH(2013)R78 Addendum III, paras. 40-43 & 46.

VII. CONCLUSIONS & POSSIBLE PROPOSALS

50. The situation that confronts the Committee of Ministers in its role supervising the execution of Court judgments, in particular the excessively large and growing number of judgments pending before it, is clearly a cause of serious concern. The CDDH considers that measures must be taken to address this situation. This could include the more effective application of existing measures within the Committee of Ministers' new working methods, or the introduction of genuinely new, more effective measures, or both. Alongside this, the Committee of Ministers could consider whether there is a need to reinforce the staff and information technology capacity of the Department for the Execution of Judgments.

51. Finally, the CDDH recalls that the question of execution of judgments and its supervision will potentially be amongst the issues that it will examine as part of its work on the longer-term future of the Convention system and the Court; in this connection, it also notes that the issue will be on the programme of the Oslo Conference of April 2014.

CDDH REPORT ON THE REVIEW OF THE FUNCTIONING OF THE ADVISORY PANEL OF EXPERTS ON CANDIDATES FOR ELECTION AS JUDGE TO THE EUROPEAN COURT OF HUMAN RIGHTS

Adopted by the CDDH on 29 November 2013

I. INTRODUCTION

1. The legitimacy of the European Court of Human Rights (“the Court”) as a judicial institution is vital for the continuing effectiveness of the Court. This includes respect for the integrity and quality of its judgments, in the eyes of not only Governments and domestic courts but also applicants and the general public as a whole. As a consequence, it is crucial that candidates presented for election to the Court are persons of high standing with all the specific professional qualities necessary for the exercise of the function of judge of an international court, whose decisions have consequences for all States Parties.

2. Article 22 of the Convention states that “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”. The Parliamentary Assembly has exclusive competence for electing Court judges, but the quality of those judges depends in the first place on the quality of the candidates that are nominated by the States Parties. If a list is not composed of qualified candidates, the most that the Assembly can do is reject it.

3. The Declaration adopted at the Interlaken Conference, organised by the Swiss Chairmanship of the Committee of Ministers (Interlaken, Switzerland, 18-19 February 2010), called on the States Parties to ensure “the full satisfaction of the Convention’s criteria for office as a judge of the Court, including knowledge of public international law and the national legal systems as well as proficiency in at least one official language”.¹

1. It should be noted that following the Interlaken Declaration, the Committee of Ministers adopted Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights (doc. CM(2012)40 & Addendum), which go further than the Interlaken Declaration on the question of linguistic competence (“candidates must, as an absolute minimum, be proficient in one official language of the Council of Europe ... and should also possess at least a passive knowledge of the other”), referring to Parliamentary Assembly Resolution 1646 (2009), para. 4.4.

4. Following the Interlaken Declaration, the then-President of the Court, Jean-Paul Costa, by letter dated 9 June 2010 addressed to the Chairperson of the Ministers' Deputies, called on the States Parties to set up a panel of independent experts to ensure the quality of the candidates for election. He recalled that the Group of Wise Persons had already made such a proposal in its 2006 report on the reform of the Court and that the Secretary General of the Council of Europe had made a similar proposal in his contribution to the Interlaken Conference.
5. On 10 November 2010, the Committee of Ministers adopted Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights ("the Advisory Panel"). Referring to "the responsibility of the High Contracting Parties to the Convention to ensure a fair and transparent national selection procedure", the Committee of Ministers stated its conviction that "the establishment of a Panel of Experts mandated to advise on the suitability of candidates that the member States intend to put forward for office as judges of the Court would constitute an adequate mechanism in this regard". This underlines the fact that the principle role of the Advisory Panel is to provide advice to States Parties during the process of selection of candidates.
6. According to the Resolution, which is appended to this report, the Advisory Panel's mandate is confidentially to advise the States Parties whether candidates for election as judge to the Court meet the criteria stipulated in Article 21 of the Convention ("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").
7. Paragraph 5 of the Resolution concerns the functioning of the Advisory Panel and reads:

Before submitting a list to the Parliamentary Assembly as provided for in Article 22 of the Convention, each High Contracting Party will forward to the Panel, via its secretariat, the names and curricula vitae of the intended candidates. On the basis of these written submissions, the Panel shall perform its function in accordance with the operating rules appended to this resolution.

Where the Panel finds that all of the persons put forward by a High Contracting Party are suitable candidates, it shall so inform the High Contracting Party without further comment.

Where it is likely that the Panel may find one or more candidates not suitable for office, the chair of the Panel shall contact the High Contracting Party concerned to inform it and/or to obtain any relevant comments. If, in the light of the written submissions and any comments obtained, the Panel considers that one or more of the persons put forward by a High Contracting Party are not suitable, it shall so inform the High Contracting Party, giving reasons for its view, which shall be confidential. The Panel shall in a similar manner consider one or more new candidates who would subsequently be presented by the High Contracting Party.

When a list of three candidates nominated by a High Contracting Party is being considered in accordance with Article 22 of the European Convention on Human Rights, the Panel shall make available to the Parliamentary As-

sembly in writing its views as to whether the candidates meet the criteria stipulated in Article 21§1 of the Convention. Such information shall be confidential.

8. The relevant excerpts of the Operating Rules provide the following on the functioning of the Advisory Panel:

[...]

(iii) The Panel's procedure shall be a written one. Members shall transmit their views on candidates to the chair in writing.

(iv) The Panel may hold a meeting where it deems this necessary to the performance of its function.

[...]

(vi) It shall inform the High Contracting Parties of its views no later than four weeks after the High Contracting Parties have submitted the names and curricula vitae of the intended candidates to the Panel's secretariat.

(vii) It shall assess the suitability of candidates on the basis of the information provided by the High Contracting Party, which shall be in one of the official languages of the Council of Europe.

(viii) It may seek additional information or clarification from the High Contracting Party in relation to any candidate under its consideration.

(ix) It may in exceptional circumstances decide to hold a meeting with representatives of a High Contracting Party in the exercise of its function. It shall be for the Panel to decide whether a meeting is necessary.

(x) The Panel's proceedings shall be confidential. Any meeting with representatives of a High Contracting Party shall take place in camera.

[...]

(xiii) The Panel may adopt such internal working methods as it deems necessary to the exercise of its function.

9. Further to paragraph (xiii) of the Operating Rules appended to the Resolution, the Advisory Panel has issued Supplementary Operating Rules (Advisory Panel(2011-II)3Erev(2)) which read as follows:

(1) The quorum is reached when five of the seven members of the Advisory Panel are present in the case of a meeting. If a written procedure is being followed, the quorum will be reached when five members reply.

(2) The time limit of four weeks as set out in point (vi) of the Operating Rules shall only begin to run if the list of candidates is submitted in due form, i.e. using the model CV form as supplied by the Parliamentary Assembly.

(3) The members shall give their opinion on a list of candidates within five working days following the receipt of the list from the Secretariat.

- (4) Additional information from the Government concerned shall be requested, if necessary, within ten working days following the receipt of the list of candidates from the Secretariat.
- (5) To assess the qualifications of candidates, the Panel may use also other sources of information than the information provided by the government.

10. The Declaration adopted at the Brighton Conference, organised by the United Kingdom Chairmanship of the Committee of Ministers on 19-20 April 2012, “[welcomed] the establishment of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights [and noted] that the Committee of Ministers [had] decided to review the functioning of the Advisory Panel after an initial three-year period” (see paragraph 25.b).

11. Following the 23 May 2012 CM Session, the Committee of Ministers instructed the CDDH “to submit its conclusions and possible proposals for action to follow up” this decision, for which the deadline has been set as 31 December 2013.

12. At its 3rd meeting (13-15 February 2013), the Committee of experts on the reform of the Court (DH-GDR) considered that its Drafting Group E (GT-GDR-E) “should analyse and assess apparent difficulties that had arisen in the past and make constructive proposals for the future to the Committee of Ministers”.

13. At its 77th meeting (19-22 March 2013), the CDDH decided that the scope of the review should cover not only the internal working methods and procedures of the Panel but also its interaction with the States Parties to the Convention and the Parliamentary Assembly respectively, without extending to the internal procedures of the latter two.

14. The present report constitutes the CDDH’s response to the instruction given by the Committee of Ministers. The report provides factual information on the functioning of the Advisory Panel, also in relation to the other actors in the selection and election procedure of judges to the Court, i.e. the States Parties and the Parliamentary Assembly. The report then identifies certain challenges in the current working procedures, before concluding with proposals for action, some of which relate to the Advisory Panel, others to the States Parties.

II. THE FUNCTIONING OF THE ADVISORY PANEL

15. Article 22 of the Convention reads: “the judges shall be elected by the Parliamentary Assembly [...] from a list of three candidates nominated by the High Contracting Party”. From the outset, one should therefore realise that the Advisory Panel’s role is situated in a process involving two principal actors, the States Parties to the Convention and the Parliamentary Assembly. Whilst the Panel’s advice, if any, is addressed to the State Party concerned, paragraph 5 of the Resolution specifies that its views are transmitted in writing to the Parliamentary Assembly. An evaluation of the functioning of the Advisory Panel cannot therefore be done without examining its interaction with both of these actors.

16. The selection procedure for the post of judge at the Court is initiated by a letter of the Secretary General of the Parliamentary Assembly to the Ambassador of a State Party, requesting a list of three candidates. Generally speaking, the letter is now sent to the national authorities nearly fourteen months before the election is due. At the same time, an electronic version of the letter is sent to the national authorities so as to facilitate immediate transmission of the letter to the

country's capital and to permit the authorities to have hyperlink access to all relevant background documents; copies are immediately sent by electronic means also to the Secretary General of the Council of Europe, the head of the relevant national delegation to the Parliamentary Assembly and the Chair of the Advisory Panel. In the Secretary General's letter a standard reference is made to the work of the Advisory Panel. Currently,² the text included in the letter reads as follows:

"I would also like to draw your attention to the establishment, by the Committee of Ministers, of an advisory panel of experts on candidates for election as judge to the Court (Resolution CM/Res (2010) 26). Therefore, before submitting your list of candidates to the Parliamentary Assembly, you are invited to submit it to the advisory panel in time for the latter to be able to provide an opinion on whether the candidates included in the said list meet the requirements stipulated by the European Convention on Human Rights. I understand that the Secretariat of the advisory panel will be contacting you on this matter."

17. Following the letter of the Secretary General of the Parliamentary Assembly, a letter is sent to the Ambassador by the Chair of the Advisory Panel. The lapse of time between both letters can be up to two months, so that in recent cases, there will be at least twelve months between the date of the letter from the Chair of the Advisory Panel and that on which the election is due. This letter includes a passage on the need to submit a list of three candidates timely:

"In order to allow the Advisory Panel to exercise its functions effectively, I would therefore, recommend providing the Secretariat with the names and curricula vitae at least six weeks before the time-limit set by the Parliamentary Assembly for submission of the national list of candidates. This would leave your Government sufficient time to provide additional information on any of the candidates, if necessary. Furthermore, in case the Advisory Panel expresses doubts as to the qualifications of any of the candidates, your government would have additional time to present a new candidate."³

18. The selection process itself is conducted on the domestic level, which is outside the scope of this report. Having said that, reference should be made to the Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights and its explanatory report, which includes examples of good practice, as well as the standards set out in the various Parliamentary Assembly texts, notably Resolution 1646 (2009). It is the responsibility of the State Party concerned to submit its list of three candidates in due time to the Secretariat of the Advisory Panel.

19. The Advisory Panel carries out its task of assessing the proposed candidates in the light of the fundamental criteria stipulated in Article 21 § 1 of the Convention. During its meetings, the Advisory Panel has discussed substantive and reliable interpretation of these criteria for the evaluation of the candidates' qualifications. The Panel has chosen to make reference to Article 255 of the Treaty on the functioning of the European Union, which evokes the following criteria: "the candidate's legal expertise, the professional experience the candidate has

2. As of 2012. Previously, the letter only included the first sentence cited above.

3. The current wording of this letter might lead to some confusion should the impression be given that the Advisory Panel is unilaterally competent to extend the duration of the election process, which is not the case.

acquired (characterised by both its length and nature), the suitability of the candidate to exercise the role of judge, the guarantees of independence and impartiality that the candidate presents, the linguistic abilities and suitability to work as part of a team within an international environment in which several legal traditions are represented”⁴ Further clarifications have been laid down in the written contribution by the Advisory Panel in the preparation of the current report (GT-GDR-E(2013)004), as appended to this report. The Advisory Panel’s contribution does not in this context mention the Committee of Ministers’ Guidelines on the selection of candidates for the post of judge.

20. In performing its task the Advisory Panel relies primarily on the information provided by the State Party (see Operating Rules (vii) and (viii)), i.e. the curricula vitae of the proposed candidates (using the model curricula vitae form as supplied by the Parliamentary Assembly; see Supplementary Operating Rule 2) and any additional information or clarifications in relation to any of the candidates if so requested by the Advisory Panel. The Advisory Panel itself does not interview the candidates.

21. However, Supplementary Operating Rule (5) clarifies that the Advisory Panel also uses “other sources of information” when assessing the qualifications of candidates. The Advisory Panel explained that it (pro-actively) uses its network of professional contacts (mainly judges) in order to obtain information on the candidates involved. Likewise, it may receive and take account of unsolicited information from (undisclosed) sources.

22. Although the Operating Rules foresee the Advisory Panel’s procedure to be a written one (Operating Rule (iii)), a practice of more regular meetings has developed, which the members of the Advisory Panel consider necessary for effective consultations.

23. The members shall give their opinion on a list of candidates within five working days following the receipt of the list from its Secretariat (see Supplementary Operating Rule 3). This should ensure that there is sufficient time to request additional information from the government concerned, if necessary. Within four weeks after the State Party submits the names of the proposed candidates and their curricula vitae (using the model CV form as supplied by the Parliamentary Assembly), the Government is informed of the views of the Advisory Panel (see Operating Rule (vi) in combination with Supplementary Operating Rule 2). Given the fact that governments are requested to provide the necessary information to the Advisory Panel six weeks before the time-limit set by the Parliamentary Assembly for submission of the national list of candidates, this then leaves only two weeks to present a new candidate in case the Advisory Panel expresses doubts as to the qualifications of any of the candidates. Before the State Party submits the list to the Assembly, the newly proposed candidates’ qualifications should also be assessed by the Advisory Panel.

4. See the Written Contribution by the Advisory Panel, doc. GT-GDR-E(2013)004REV, section 5), p. 3. It must be borne in mind that the two panels operate in very different contexts: the EU’s panel advises the governments of the EU member States, before they make appointments to the Court of Justice, on the qualifications of individual candidates proposed by member States; the Advisory Panel advises individual governments – after national selection procedures – on the suitability of lists of candidates they intend transmitting to the Parliamentary Assembly, whose election procedure provides an additional guarantee of democratic legitimacy.

24. The opinion of the Advisory Panel is communicated to the government. Where the Advisory Panel finds that all the proposed candidates are qualified, it does not state reasons for doing so.

25. If, however, the Advisory Panel considers that one or more of the persons put forward by a State Party are not qualified, reasons will be given to the State Party, which shall remain confidential. The latter is a direct consequence of the primary function of the Advisory Panel, as enshrined in Resolution CM/Res(2010)26, i.e. to provide advice to the States Parties when the list of candidates is not yet submitted to the Parliamentary Assembly.

26. The Committee of Ministers' Resolution also provides for transmission of the opinion of the Advisory Panel to the Parliamentary Assembly. The Advisory Panel will provide in writing its views "as to whether the candidates meet the criteria stipulated in Article 21 § 1 of the Convention". Such information shall be confidential. A copy of the Advisory Panel's opinion, including an indication, with summary reasons, of which candidate(s) it may have found not to be qualified, is given in confidence to all members of the Sub-Committee on the Election of Judges present during its meetings.

27. Although the Advisory Panel suggested early in its existence that it might publish an annual report to the Committee of Ministers on its activities, it has so far not been done. The activities of the Advisory Panel have, however, twice been discussed during exchanges between the Chair of the Panel and the Ministers' Deputies (on 4 April 2012 & 30 January 2013: see DH-GDR(2013)005). In addition, it is worthwhile mentioning that there have been informal meetings between the Chair of the Panel and representatives of the Parliamentary Assembly, such as the Chairperson of the Sub-committee on the Election of Judges, the President of the Parliamentary Assembly and the Secretary General of the Parliamentary Assembly.

III. EVALUATION OF PREVIOUS EXPERIENCES

28. From the outset, it should be noted that all stakeholders involved in the election procedure have indicated that they consider the work of the Advisory Panel as a useful additional safeguard to guarantee that proposed candidates for the post of judge at the Court are of the highest standards. Furthermore, it should be recalled that in the overwhelming majority of cases, the Advisory Panel has interacted with the other actors as foreseen in Resolution CM/Res(2010)26.

29. However, it should be borne in mind that the establishment of the Advisory Panel is fairly recent; some adjustments still need to be made to the Advisory Panel's working relationships with the States Parties and its contacts with the Parliamentary Assembly. This is clear from the fact that the members of the Advisory Panel "shared in general a feeling of frustration, exacerbated by the perceived lack of co-operation, or even interest on the part of the other stakeholders in the election procedure" (GT-GDR-E(2013)004, p. 6). This report aims to identify difficulties that have occurred in the past and to make concrete proposals for improvement.

i. The Advisory Panel's opinion is not followed by the government concerned and/or the Parliamentary Assembly

30. Although neither is the government concerned required to follow the Advisory Panel's advice, nor is the Parliamentary Assembly required to act consistently with it, it was noted that there was an instance in 2012 when despite the

Advisory Panel's view that a candidate was not qualified, the Government concerned maintained that person on the list of candidates and the Parliamentary Assembly subsequently elected that person to the Court.

31. CM Resolution (2010)26 reflects the fact that competence for the election of judges to the Court is attributed under the Convention to the Parliamentary Assembly. This implies that the (Sub-Committee of the) Parliamentary Assembly is free to conduct the election procedure according to its internal working procedures and enjoys a certain discretion when it wishes to create additional criteria for the assessment of the candidates' qualifications,⁵ and that its assessment of a candidate's qualifications is autonomous and independent.⁶ The Parliamentary Assembly may weigh the qualifications of a particular candidate differently from the Advisory Panel. This is so as the Sub-Committee conducts interviews with the candidates, which the Advisory Panel is not empowered to do.

32. While the opinion of the Advisory Panel is non-binding, it may be assumed that the Sub-Committee of the Parliamentary Assembly gives due consideration to an opinion of the Advisory Panel on a particular list of candidates.

ii. The list is transmitted by the government to the Parliamentary Assembly without awaiting the opinion of the Advisory Panel

33. There have been instances in which State Parties have submitted lists of candidates to the Parliamentary Assembly and the Advisory Panel simultaneously, or only to the Parliamentary Assembly, without awaiting the Advisory Panel's opinion and despite the Advisory Panel having requested additional time for examination of the curricula vitae concerned. In two instances, the Advisory Panel requested the Parliamentary Assembly not to proceed with the election process before it had been able to issue an opinion.

34. The CDDH considers such practices by States Parties to be incompatible with the *raison d'être* of CM Resolution (2010) 26. States Parties are reminded of the need to submit lists of candidates well before the deadline by which they must submit their list to the Parliamentary Assembly. Likewise, the Parliamentary Assembly is invited not to proceed with the election process without allowing the Advisory Panel a reasonable time within which to inform the State Party concerned of its views on the intended candidates. Where a list of candidates has already been transmitted to the Parliamentary Assembly, the Advisory Panel should simultaneously transmit its views to the latter.

35. The CDDH also considers that, in the spirit of the Advisory Panel's existence, it could be advisable, if possible, for the State Party concerned not to make public the list of candidates or at least not finally to approve it until the Advisory Panel's views on it have been taken into account. Combined with keeping confi-

5. See the Court's Advisory Opinion on certain questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights, 12 February 2008, para. 43, and its Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No. 2), 22 January 2010, para. 43; see also the Explanatory Memorandum to the Committee of Ministers' Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, doc. CM(2012)40 addendum final, paras. 10-11.

6. In 2012, a list of candidates that had previously been considered qualified by the Advisory Panel was rejected by the Parliamentary Assembly.

dential the Advisory Panel's views, this would allow for further reflection on and, if necessary, revision of the list without risk of public embarrassment to candidates.

36. In order to avoid such practical problems, it might be advisable to revise the various timetables and deadlines for submission of lists. The letter by the Secretary General of the Parliamentary Assembly is now sent to the State Party almost fourteen months before the actual election is due, with a copy sent by electronic means to the Advisory Panel. Following that letter, a letter is sent to the State Party by the Chair of the Advisory Panel, usually almost immediately but occasionally after a delay of up to two months. In its letter, the Advisory Panel recommends providing the Secretariat with the names and *curricula vitae* at least six weeks before the time-limit set by the Parliamentary Assembly for submission of the national list of candidates.

37. The CDDH notes that these timetables and deadlines are not fixed. It would appear, however, that the timetable foreseen generally leaves too little time to remedy any deficiencies perceived by the Advisory Panel with regard to the original list of candidates, taking into account the possible complexity of the selection procedure that needs to be carried out on the domestic level, which may require involvement of a national body after a public call for candidatures, and interviews of the applicants.

38. In light of the above, the CDDH welcomes the Parliamentary Assembly's practice of writing to the relevant State Party's permanent representative well over a year in advance of the election. It is suggested that the Advisory Panel should endeavour always to write to the State Party concerned immediately upon receipt of a copy of the Parliamentary Assembly's letter, and that lists of candidates should be submitted to the Advisory Panel *at least three months* before the time-limit set by the Parliamentary Assembly for submission of the list of candidates.

39. It has also been suggested to have at least one "reserve" candidate standing by in case the original list meets with objections from the Advisory Panel. Whilst recognising that this may not always be acceptable to legal personalities of high repute within their jurisdictions, the CDDH nevertheless recommends that States Parties consider adopting such a practice should circumstances allow.

iii. Limitations set by the Operating Rules

40. The Advisory Panel indicated that it found the original Operating Rules too restrictive, i.e. with respect to the holding of meetings and the use of information from sources other than the government. In its view, this warrants a re-evaluation of the Operating Rules in place.

41. In the Operating Rules (see (iii) and (iv)), a primarily written procedure is foreseen. The Advisory Panel can decide to hold a meeting "where it deems this necessary to the performance of its function". In practice, seven meetings of the Advisory Panel were convened between January 2011 and October 2013 which seems to suggest that meetings have become the rule and not the exception. The Advisory Panel suggests making meetings the norm, considering that a purely written procedure does not allow for a meaningful discussion based on direct exchange of views. The CDDH recalls that the Resolution foresees flexibility to accommodate the need for a meeting, assuming this is necessary for effective consultations on lists of candidates. However, when organising meetings, due account must be taken of budgetary constraints.

42. The Operating Rules (see (vii) and (viii)) foresee an assessment of the candidates' qualifications on the basis of information provided by the governments concerned. The Advisory Panel introduced a Supplementary Operating Rule which states that the Advisory Panel may also use "other sources of information". The Advisory Panel receives unsolicited information from undisclosed sources. Likewise, it pro-actively uses its "judicial network" in order to obtain information on the candidates involved. The Advisory Panel itself does, however, not interview the candidates.

43. As for the use of non-official sources of information, it is understandable that the Advisory Panel wishes to avail itself of as much background information on the candidates concerned in order to fulfil its assessment as thoroughly as possible. There is however an inherent risk in taking into account materials from undisclosed sources concerning individual candidates without those candidates having the possibility of responding to, or even being aware of that information. In particular, the pro-active use of a "judicial network" may lead to unjustified considerations influencing the Advisory Panel's opinion. In general, where the Advisory Panel envisages making greater use of other (undisclosed) sources of information, it should give the government concerned an opportunity to reply. The possible deterrent effect on potential candidates of yet another level of interview should also not be neglected. The CDDH would therefore propose that this issue needs careful further discussion.

iv. Extent of reasons given in the opinions of the Advisory Panel

44. There have in the past been expressions of dissatisfaction over the degree of reasoning given in an Advisory Panel's opinion. In response, the Advisory Panel now seems willing to provide a more detailed opinion on a candidate's qualification. Nevertheless certain concerns persist.

45. CM Resolution (2010) 26 essentially requires provision of confidential advice to the government concerned. The CDDH would therefore draw a distinction between the provision of information by the Advisory Panel to the government concerned on the one hand, and to the (Sub-Committee of the) Parliamentary Assembly on the other hand. In order to enhance the authority of the Advisory Panel's opinion that a particular candidate does not meet the required criteria, the government should be confidentially provided with a reasoned written opinion stating the exact reasons why a particular candidate is not deemed to fulfil the necessary criteria for election. In the view of the CDDH this information should be treated with the greatest care, given the potential repercussions on a person's reputation. For those reasons, the CDDH would take the view that the Advisory Panel should carefully consider what information to provide to the Sub-Committee of the Parliamentary Assembly and measures would have to be taken to ensure that the information is treated confidentially. What is essential is that the Advisory Panel continues its practice of informing the (Sub-Committee of the) Parliamentary Assembly when the government submits a list featuring a candidate who was not deemed qualified by the Advisory Panel, including the name(s) of the candidate(s) concerned.

46. The interests of the candidate concerned should not be overlooked. The CDDH therefore suggests that the government inform a particular candidate of the Advisory Panel's opinion that he/ she is not qualified for office, thereby giving the opportunity for the candidate to withdraw.

47. It has also been suggested to transmit the assessments made by the Advisory Panel stating reasons – subject to the maintenance of confidentiality – to all Governments of the States Parties. This would enable governments to exert (albeit non-public) political peer pressure on a government disregarding a negative assessment of the Advisory Panel. As the Panel was set up in light of the shared responsibility of the States Parties for the effective operation of the Convention system, the nomination of a candidate who is not qualified in accordance with the Convention is a matter of concern to all States Parties. One option would be for the Committee of Ministers to consider the possibility of amending its Resolution to permit an assessment by the Panel that a candidate is unqualified to be transmitted, on a strictly confidential basis, to all States Parties, if after a specified and reasonable time the nominating State has not withdrawn the candidate in question.⁷ However, views in the CDDH were divided.

48. The CDDH proposes to amend the Committee of Ministers' Resolution to indicate that the Committee of Ministers' Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, alongside the Convention itself, form the basis of the Panel's assessment. It takes note that the Advisory Panel draws useful inspiration for a substantive and reliable interpretation also from other sources, including the practice of the panel instituted by Article 255 TFEU. It is important for the functioning of the Advisory Panel and in particular its interaction with the government concerned that the assessment of the qualification of the candidates be based upon foreseeable and commonly shared criteria.

v. Flow of information between the various stakeholders

49. As mentioned above, the activities of the Advisory Panel are regularly discussed during exchanges of views between its Chair and the Ministers' Deputies. Likewise, the Chair of the Advisory Panel has held informal meetings with representatives of the Parliamentary Assembly. The CDDH welcomes these regular contacts with other stakeholders in the election procedure, whom it recommends should be informed of the content of the Advisory Panel's Supplementary Operating Rules.

vi. Perceived lack of visibility/ low profile of the work of the Advisory Panel

50. The Advisory Panel has the impression that its work lacks visibility. To date no annual report of the Panel's activities to the Committee of Ministers has been published. In order to increase the visibility of the useful work conducted by the Advisory Panel, it is suggested that it periodically report to the Committee of Ministers. It would be important that this report focus on providing an account of the Panel's work. Furthermore, the CDDH notes that certain governments have mentioned the Advisory Panel's opinion in their letters officially submitting the list of candidates to the Parliamentary Assembly.⁸

7. This would not permit any public comment to be made about the candidate's qualifications, thus protecting the interests of the candidate as noted above.

8. See for example the transmission letters of Iceland and the United Kingdom (respectively <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19696&Language=EN> at p. 3 and <http://assembly.coe.int/Documents/WorkingDocs/2012/COE.PACE.WD.COM.12936.2012.EN.pdf> at pp. 125-126).

51. Besides the obvious need for mutual respect and constructive dialogue between all partners involved, the CDDH cannot overlook the fact that a panel of such pre-eminent legal personalities has been entrusted with an understated, whilst in its consequences nevertheless very important task.

IV. CONFIDENTIALITY

52. The issue of confidentiality is central to the Advisory Panel. It is a key principle in the functioning of the mechanism as envisaged by the Committee of Ministers, being mentioned on three occasions in the Committee of Ministers' Resolution:

- ▶ In relation to any negative view given by the Advisory Panel to a State Party on a list of candidates.
- ▶ In relation to the views made available by the Advisory Panel to the Parliamentary Assembly, bearing in mind that the list of candidates should by now have been published by the State Party concerned.
- ▶ In relation to the Advisory Panel's proceedings, with the stipulation that any meeting with representatives of a State Party be *in camera*.

53. Furthermore, confidentiality extends also to the Advisory Panel's contacts with the Committee of Ministers. During exchanges of views between the Chair of the Advisory Panel and the Ministers' Deputies, no specific States Parties or individual candidates have been disclosed.

54. Any changes to the provisions on confidentiality, however, may have significant repercussions for the Advisory Panel, the nature of its work and its relations with States Parties and/ or the Parliamentary Assembly; there may even be repercussions for the effectiveness of the Advisory Panel in its relations with States Parties during the process of drawing up a list of candidates. Careful consideration would have to be given to any change in the confidentiality requirements surrounding the Advisory Panel's contacts with the Parliamentary Assembly. In particular, should the information provided by the Advisory Panel to the Parliamentary Assembly be made public, this could change the relationship between the two bodies. There may be some outside expectation that the Parliamentary Assembly would follow the Advisory Panel's views; this may impact on the autonomous freedom enjoyed by the Parliamentary Assembly to elect judges, especially since the Advisory Panel was created and is appointed by the Committee of Ministers and despite its having no legal basis in the Convention. Furthermore, publicising a negative view of the Advisory Panel on an individual candidate may have detrimental consequences for the person concerned; the risk of this happening may discourage potential candidates. This risk could however be mitigated by creating an opportunity for a candidate to withdraw instead of a negative view from the Advisory Panel being made public.

V. CONCLUSIONS AND PROPOSALS FOR FOLLOW-UP

55. There is general agreement that the work of the Advisory Panel is a useful additional safeguard to guarantee that proposed candidates for the post of judge at the Court are of the highest standards. The present report is itself indicative of the Committee of Ministers' keen interest in the process and its desire to see the Advisory Panel play an effective, constructive role. As for the Parliamentary Assembly, it has already taken several significant steps to integrate the work of the Panel into its procedures, with the result that fruitful working relations have

been the general rule and misunderstanding or disagreement the rare exception. The CDDH welcomes this and encourages the Assembly, in its on-going reflections on strengthening the election process, to continue taking advantage of the contribution of the Advisory Panel.

56. It is clear from the foregoing that some adjustments need to be made in the Advisory Panel's working relationships with the States Parties and its contacts with the Parliamentary Assembly. The issues identified are: (a) the government concerned not following the Advisory Panel's opinion and/ or the Parliamentary Assembly acting inconsistently with it, (b) transmission of the list by the government to the Parliamentary Assembly prior to receipt of the Advisory Panel's opinion, (c) limitations imposed by the Operating Rules, (d) the extent of reasons given in the opinions of the Advisory Panel, (e) the flow of information between the various actors, and (f) the perceived lack of visibility of the work of the Advisory Panel.

57. The CDDH would propose giving further careful consideration to the (non)use of non-official sources of information by the Advisory Panel.

58. It would also propose amending the Committee of Ministers' Resolution to indicate that the Committee of Ministers' Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, alongside the Convention itself, form the basis of the Panel's assessment.

59. The Advisory Panel was created for the purpose of giving confidential advice to States Parties. The idea was that the Advisory Panel would most likely be more effective if the attention of governments was drawn confidentially to unqualified candidates, so that a government could change the list before it was officially submitted to the Parliamentary Assembly. The Advisory Panel's written contribution shows that it considers the current confidentiality rules to be an impediment. There are two possible responses to this issue:

- a. the Advisory Panel is likely to be more effective if it remains the confidential advisor of Governments in an early stage of the proceedings (in which a list has not been officially submitted to the Parliamentary Assembly), which would seem to imply keeping the current confidentiality rules; or
- b. the Advisory Panel is likely to be more effective if it is not bound by strict confidentiality rules. As a consequence, the purpose of the opinion of the Advisory Panel would no longer be principally the provision of confidential advice to the governments concerned but would instead shift in emphasis towards providing relevant information and advice to (the Sub-Committee of) the Parliamentary Assembly. Although such a change may create some outside expectation that the Parliamentary Assembly would act consistently the Advisory Panel's advice (see para. 56 above), it would have no status in the legal order governing the Parliamentary Assembly's competence to elect judges and may thus risk being ineffective unless it were to be reflected by amendment in the text of the Convention itself.

The CDDH was in favour of the first approach.

60. There are also several measures not requiring revision of the Resolution that can be envisaged:

- a. the Panel is expected to write to the State Party immediately upon receipt of a copy of the Parliamentary Assembly's letter, and it is suggested that lists of candidates be submitted to the Advisory Panel *at least three months* before the time-limit set by the Parliamentary Assembly for submission of the national list of candidates.
 - b. it is suggested that a particular candidate be discretely informed by the government concerned of an Advisory Panel opinion that he/ she does not fulfil the criteria for office, thereby giving the opportunity for the candidate to withdraw.
 - c. it is suggested that the Advisory Panel provide the government concerned with a confidential written opinion stating specific reasons why it considers a particular candidate not to fulfil the criteria for election.
 - d. it is suggested that the Advisory Panel report periodically to the Committee of Ministers, focusing on the Advisory Panel's work.
61. It is assumed that States Parties and the Sub-Committee of the Parliamentary Assembly give due consideration to an opinion of the Advisory Panel on a particular list of candidates. This could be facilitated by the following:
- a. States Parties should consider neither finalising nor, if possible, making public a list of candidates until after having received the Advisory Panel's views.
 - b. States Parties should consider adopting the practice of selecting reserve candidates, should circumstances allow.
 - c. The Parliamentary Assembly is invited, if possible, not to proceed with the election process without allowing the Advisory Panel a reasonable time within which to inform the State Party concerned of its views on the intended candidates.

APPENDIX

Excerpt from GT-GDR-E(2013)004

“Article 21§1 of the Convention insists that Judges be of a “high moral character”. In the Panel’s discussions, qualities such as integrity, a high sense of responsibility, courage, dignity, diligence, honesty, discretion, respect for others and absence of conviction for crimes were mentioned as key components of this requirement, as well as (obviously) independence and impartiality. Most of these qualities are also enumerated in the Resolution on Judicial Ethics, which was adopted by the Plenary of the European Court of Human Rights in 2008. Since – contrary to the situation in the European Union – the Panel is not empowered (at least not expressly) to convoke the candidates for interviews, it is difficult, or delicate, to make judgments concerning the character of candidates unless it is manifestly apparent. The absence of interviews makes it also very difficult to assess the candidates’ language skills.

“Qualifications for appointment to high judicial office”: judges of the Court can issue judgments which in effect depart from or even implicitly overrule judgments of the highest national courts. Those courts may nonetheless be obliged, in accordance with national laws implementing the Convention, to respect and follow the decision of the European Court of Human Rights. The Panel has of course to base its views on the wording of Article 21§1 of the Convention, i.e. on the expression “high judicial office” (rather than “highest”). This expression would seem to include judges who have held office in national supreme and constitutional courts, whereas it would seem to exclude judges of lower national first-instance courts. The provision must be given a substantive interpretation consistent with its purpose and not a purely formal one. Even in the case of candidates holding office in a highest national Court, the Panel’s view is that such persons should not, for that reason alone, be automatically considered qualified to be candidates for election to the Court.

Additional factors may constitute key elements in qualification for election as judge, such as a significant length of service at a high level, service on international tribunals, together with publication of important books or articles. In this context it should be borne in mind that national judicial structures vary considerably. For example, in some countries a person may be nominated to a Supreme Court (often consisting of many members) at a relatively young age because of his or her innate ability, but nonetheless with limited judicial experience. This limited experience can be accommodated in various ways in a national structure and over time the judge will acquire standing within the national court as his or her judicial skills and experience will mature. On the other hand, the European Court of Human Rights, by its nature, status and pan-European role assumes that its members already have, on election, all the fully developed judicial qualities that come from long experience. It would appear unlikely to find such qual-

ities in a candidate of a relatively young age. However, in countries with a small population it might prove to be difficult to find three candidates of an equally long professional experience.⁹

This is of particular importance in an international court where its members are elected for one fixed term of just nine years. Moreover, it takes significant time for even the most experienced judge to induct him or herself into the practices and day to day functions of a judicial institution such as the Court.

For present purposes the foregoing considerations have been necessarily expressed in the most general terms, but they do indicate that High Contracting Parties when presenting a list of candidates, and the PACE when deciding which candidate to elect as a member of the Court, should acknowledge that their decisions in this regard are of quite a momentous importance requiring careful and thorough consideration so as to ensure that candidates of mature professional experience and unquestionable qualifications are put forward or elected.

Article 21§1 of the Convention also looks for “jurisconsults of recognised competence”: in his letter to the Ministers’ Deputies, then President Jean-Paul Costa wrote: “To be a “jurisconsult of recognised competence” requires extensive experience in the practice and/or teaching of law, the latter generally entailing publication of important academic works. One objective indication of this requirement would be the length of occupation of a professorial chair”.

Once again, inherent in these observations, is the importance of electing to the Court persons of mature professional experience. In accepting the description of the former President of the Court the Panel would consider that the level of “recognised competence” of a jurist is normally reached when a person has been a professor at a well-known university for many years and has published important works, including work relating to the protection of human rights and the relationship between those rights and the constitutional functions of states. Also relevant would be any experience which such jurists have in advising or appearing in cases involving the protection of such rights or other constitutional cases before national or international tribunals. However, the selection of persons other than professors, such as advocates, legal professionals in the public (including political) or private domains, particularly where they have, through long experience, professional intimacy with the functioning of courts, is also possible as long as those persons by virtue of mature experience qualify as “jurisconsults of recognised competence”.

Requirements not expressly mentioned in Article 21§1 of the Convention: As the Court has explained in its Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the Court of 2008, “there is nothing to prevent Contracting Parties from taking into account additional criteria or considerations” (§ 42). As illustrations the Court mentioned “a certain balance between the sexes or between different

9. Another subsidiary, but nonetheless important consideration, is the implications which the election of relatively young judges to the Court of Human Rights may potentially have for judicial independence, since he or she may, in some cases, be dependent on the national authorities of his country for the continuation of his or her judicial career when they are still at a relatively young age at the completion of their nine year term at the Court.

branches of the legal profession” (§ 47). The aim of achieving a certain balance between the sexes has been discussed at length in recent years. The Panel has taken into account these new rules with respect to gender balance when it had to advise on an all-male list”.

CDDH REPORT ON THE QUESTION OF WHETHER OR NOT TO AMEND THE CONVENTION TO ENABLE THE APPOINTMENT OF ADDITIONAL JUDGES TO THE COURT

Adopted by the CDDH on 29 November 2013

I. INTRODUCTION

1. The Declaration adopted at the High-level Conference on the future of the European Court of Human Rights, organised in Brighton in 2012 by the United Kingdom chairmanship of the Committee of Ministers, noted that “to enable the Court to decide in a reasonable time the applications pending before its Chambers, it may be necessary in the future to appoint additional judges to the Court; further notes that these judges may need to have a different term of office and/or a different range of functions from the existing judges of the Court” and invited the Committee of Ministers “to decide by the end of 2013 whether or not to proceed to amend the Convention to enable the appointment of such judges following a unanimous decision of the Committee of Ministers acting on information received from the Court” (para. 20.e)).

2. The Committee of Ministers subsequently instructed the Steering Committee for Human Rights (CDDH) “to submit conclusions and possible proposals for action in response to this invitation”. The deadline for this work was fixed at 31 December 2013.¹ The CDDH conferred the task on the Committee of experts on the reform of the Court (DH-GDR) and work was begun within the Drafting Group “E” on the reform of the Court (GT-GDR-E).

3. The present debate concerning the question of additional judges has its origins in the discussions that took place before the Interlaken Conference, organised in 2010 by the Swiss Chairmanship of the Committee of Ministers. These discussions were reflected in para. 6.c)ii) of the Interlaken Declaration, which recommended, “with regard to filtering mechanisms, ... to the Committee of Ministers to examine the setting up of a filtering mechanism within the Court going beyond the single judge procedure and the procedure provided for in i)”² Furthermore, para. 7.c)i) of the Interlaken Declaration had called upon “the

1. The initial deadline of 15 October 2013, set by the decisions of the Ministerial Session in May 2012, was extended to 31 December 2013 by the Ministers’ Deputies at their 1159th meeting (16 January 2013).

2. Sub-paragraph (i) recommends that “the Court put in place, in the short term, a mechanism within the existing bench likely to ensure effective filtering”.

Committee of Ministers to consider whether repetitive cases could be handled by judges responsible for filtering”. As a result, the CDDH was in 2011 given terms of reference to elaborate “specific proposals for measures requiring amendment of the Convention, including proposals, with different options, on a filtering mechanism within the European Court of Human Rights ...”.

4. Before the end of 2011, in the context of the work leading to the CDDH Report on measures requiring amendment of the Convention,³ the Court’s Registry provided information on developments concerning the number of pending applications, indicating that it now expected to resolve the backlog of clearly inadmissible cases by the end of 2015. The Court’s new structures and working methods for filtering, put in place since June 2010 following the entry into force of Protocol No. 14, had in fact had an impact greater than the already considerable one originally foreseen. The Court also attributed the increase in the number of decisions to the restructuring of the Registry, in particular the effective co-operation between the single judges and the non-judicial rapporteurs, the creation of a filtering section devoted to applications brought against countries concerning which there were the largest numbers of applications found inadmissible, and to improvements made to working methods, most especially by the filtering section. The Registry then envisaged not only the possibility of dealing with most newly arriving, clearly inadmissible applications within a period of at most a few months after their receipt, but also, by extending the new working methods to the entire Registry, the possibility between 2012 and 2015 of gradually resolving all the applications currently pending before a single judge.

5. In June 2013, during an exchange of views with the CDDH, the President of the Court, Mr Dean Spielmann, recalled that “the results for 2012 had been excellent and that the number of pending cases, which, in September 2011, had reached over 160,000, had fallen to just over 128,000 by the end of 2012” and indicated that “we are half way through 2013 and the very good results of last year have been confirmed”.⁴ The Registry also presented to the Ministers Deputies its results for the first six months of 2013. During this period, the Court allocated 35,500 new applications to a judicial formation and disposed of almost 50,000 applications, which represented an increase of 25% as compared with 2012. The number of applications on which judgment had been delivered had increased by 129% and the number of application communicated to Governments by 32%. Furthermore, the Registry indicated that on 1 July 2013, 41,600 applications were pending before single judges and that those making up the backlog, in the sense of the Brighton Declaration,⁵ being 34,000, would be dealt with by the end of 2015. According to the Registry, the aim had already been achieved for many States, for example Poland, Romania and Turkey. As regards Russia, the backlog will disappear during the course of 2014 and as regards France and Germany, already this autumn. It was also indicated that, insofar as the Court will soon have dealt with the backlog of single judge cases, the number of decided cases will necessarily decrease and the focus of the Court’s work will shift from single judge and repetitive cases to priority and normal cases.⁶ The factual analysis that preceded the Brighton Conference, which had led to the conclusion that the

3. See doc. CDDH(2012)R74 Addendum I, of which the Ministers’ Deputies took note at their 1135th meeting (23 February 2012); see in particular paragraphs 33 to 42 and Appendix IV, section I.

4. See doc. CDDH(2013) R78, Appendix IX.

5. See the Brighton Declaration, section D., paragraph 20. h).

introduction of a new filtering mechanism was not necessary, thus remains unchanged. It should also be noted that some thought at the time that the bottleneck was probably situated at the level of the Registry.

II. PREVIOUS CDDH WORK ON THE ISSUE

6. The Registry's information concerning the number of pending applications and the Court's expectations for the future treatment of clearly inadmissible applications (see para. 4 above) had implications for the CDDH's work in 2011. Discussion of filtering revealed a growing concern that a more important question may in fact be the growth in the Court's backlog of Committee and Chamber cases. The initial emphasis put by the CDDH on possible measures to increase the Court's filtering capacity was therefore shifted towards possible measures to increase the Court's general case-processing capacity.

Previous CDDH work aimed at increasing the general case-processing capacity of the Court

7. Concerning the increase in the Court's general case-processing capacity, in particular of Committee and Chamber cases, two proposals were made by the CDDH during its previous work.⁷

8. The first proposal consisted in establishing a group of "temporary judges", which would allow reinforcement, when necessary, of the general capacity of the Court to take decisions on the treatment of cases.⁸ The CDDH considered that such judges should:

- a. satisfy the criteria for office of Article 21 of the Convention;
- b. be nominated by the High Contracting Parties and, possibly, approved or elected to the pool by the Parliamentary Assembly;
- c. be appointed from the pool by the President of the Court for limited periods of time as and when needed to achieve a balance between incoming applications and disposal decisions (subject to the Court's budgetary envelope);
- d. when appointed, discharge most of the functions of regular judges, other than sitting on the Grand Chamber or Plenary Court;
- e. when appointed, be considered as elected in respect of the High Contracting Party that had nominated them.

9. For the CDDH, an alternative proposal would be to introduce a new category of judge (originally proposed as a new filtering mechanism), which would deal exclusively with repetitive cases and with single judge cases.⁹ This would enable the regular judges to devote more time to chamber cases. The number of judges would vary according to the Court's needs and their term of office would be considerably shorter than that of the regular judges. These judges would have

6. See the intervention of Mr Erik FRIBERGH, Court Registrar, at the GT-REF.ECHR meeting on 9 July 2013. It can also be noted that on 24 October 2013, the Registrar issued a press release again confirming the trend and indicating that on 1 October 2013, there were 38,200 cases pending before a Single Judge, with the total number of pending cases being 111,350.

7. See doc. CDDH(2012)R74, Appendix IX, section I), paragraphs 12-23.

8. Concerning the advantages and disadvantages of such a proposal, see doc. CD-DH(2012)R74, Appendix IX, section I), paras. 12-20.

9. Concerning the advantages and disadvantages of such a proposal, see doc. CDDH(2012)R74, Appendix IX, section I), paras. 12-20.

to possess the qualifications required for appointment to judicial office and be subject to the same requirements as the regular judges with regard to independence and impartiality. However, since the essential nature of their work would not require that they “possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence”, as is required of regular judges by Article 21(1) of the Convention, they could be at an earlier stage in their career and their remuneration could be lower. The judges could be elected by the Parliamentary Assembly or by the Court itself from a list of candidates submitted by the Member States. It would be in the Court’s discretion how the three-judge committees will be composed, for example two regular judges sitting with one new judge or one regular judge sitting with two new judges.

Previous CDDH work on a new filtering mechanism

10. The CDDH had envisaged two situations in which it may prove necessary to have recourse to additional judges: if the expected results concerning the treatment of cases pending before single judges were not achieved, or if the time taken by the Court to deal with other cases became too long. As to the first situation, the positive tendencies in the treatment of clearly inadmissible applications have now been confirmed. As regards the second, however, some considered even then that, whatever the effects of the single judge system and the related internal reforms of the Court, the time taken by the Court to deal with other cases had already become too long; this does not necessarily imply, however, that these States had thus concluded that the moment had arrived to introduce additional judges.

11. In this context, the CDDH had retained three possible options for a filtering mechanism,¹⁰ namely: (i) authorising experienced Registry lawyers to take final decisions with regard to clearly inadmissible cases; (ii) entrusting filtering to a new category of judge,¹¹ whose main function, however, would be to deal with repetitive cases (see para. 9 above); and (iii) a combined option,¹² giving specific members of the Registry competence to deal with certain categories of applications that have been provisionally identified as clearly inadmissible and creating a new category of filtering judge for the others.¹³ In the two options involving a new category of judge, the CDDH had considered that these judges could also sit on committees of three judges to deal with repetitive applications.¹⁴

10. See doc. CDDH(2012)R74, Appendix IX, section I), paragraphs 24–45.

11. Concerning the advantages and disadvantages of such a proposal, see paragraphs 29, 36 and 37.

12. Concerning the advantages and disadvantages of such a proposal, see paragraphs 29, 39 and 40.

13. Article 35(1) of the Convention sets out the admissibility criteria concerning exhaustion of domestic remedies and the six-month rule; Article 35(2) of the Convention excludes applications that are anonymous or that have previously been examined by the Court or already submitted to another international body. Article 35(3) of the Convention excludes applications that are incompatible with the Convention, manifestly ill-founded or an abuse of the right of individual application, or which imply no significant disadvantage for the applicant.

14. “Repetitive applications” means those that are dealt with by committees of three judges in accordance with well-established case-law of the Court (see Article 28 of the Convention).

12. The CDDH recalls that views were clearly divided on whether to introduce any form of additional judge, for whatever purpose, with various arguments having been presented for and against the different proposals.

Previous CDDH work on the issue of the number of cases pending before Committees of the Court (repetitive cases)

13. The CDDH has recently transmitted to the Committee of Ministers two reports touching upon the issue of repetitive cases, one containing conclusions and possible proposals for action on ways to resolve the large number of applications arising from systemic issues identified by the Court.¹⁵ It can be noted that amongst the various proposals made in this report, that of introducing additional judges in order to address the backlog of this category of case does not appear. This does not mean that the CDDH now considers this proposal no longer to be of value or relevance as a potential means of confronting this challenge. It is rather a case of the various initiatives and proposals examined were of quite different degree and had structural and budgetary consequences that were clearly less significant than those of the proposal to introduce additional judges; in particular, they did not imply amendment of the Convention, which is not the case for the latter. As a consequence, it is clear that, in this context, other, less radical approaches should be further explored or even exhausted before concluding on the necessity of introducing additional judges.

14. That said, it can be noted that the Registrar considered that the work of the Court will in the near future shift from single judge cases and repetitive cases to priority and normal cases (see paragraph 5 above). In the face of such a situation in constant evolution, the question of which type of case would be most appropriate for treatment by additional judges will remain fundamental to any future debate. For the time being, it remains a question on which there is no consensus.

III. CONCLUSIONS AND POSSIBLE PROPOSALS FOR ACTION

15. The CDDH's work on the question of whether or not to amend the Convention to enable the appointment of additional judges to the Court leads it to the following three findings:

- ▶ The tendencies identified during preparation of the earlier report have been confirmed (see paragraphs 4 and 5 above).
- ▶ The CDDH notes that there is no consensus on this issue, as regards either the necessity of appointing additional judges or the competences that such judges could exercise.
- ▶ Any measure to increase the Court's capacity, whether for filtering or the treatment of cases in general, will clearly have budgetary consequences. The CDDH does not consider it possible to envisage the necessary increases in the current circumstances.

15. See doc. CDDH(2013)R78 Addendum III. The other report, less relevant in the present context, was on the advisability and modalities of a "representative application procedure" (see doc. CDDH(2013)R77 Addendum IV).

16. The CDDH thus concludes that, in the present circumstances, there is no basis for amending the Convention in order to allow the appointment of additional judges to the Court. It may nevertheless prove justified to re-examine this issue in future, on the basis of objective elements.

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The present volume contains the main instruments and texts produced during the period 2010-2013 concerning the reform of the European Court of Human Rights. It covers the Interlaken, Izmir and Brighton High-level Conferences, including preparatory and follow-up work as well as the proceedings of the conferences.

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