The European Convention on Human Rights and the Court of Human Rights: issues and reforms

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Section IADS

The European Convention on Human Rights requires states parties - Council of Europe Member States - to comply with rulings of the European Court of Human Rights and to implement judgments by amending national laws and/or practices where a breach of the Convention has been identified. On many occasions, national authorities have been slow to implement changes to comply with Court decisions.

The Committee of Ministers, made up of ministers or their deputies from the 47 Council of Europe Member States, supervises the implementation of Court judgments. As the Council of Europe has expanded over the last 10-15 years, giving over 800 million people the right to petition the Court about alleged breaches of the Convention, ever increasing numbers have complained to the Court, and it has come under severe strain.

Reform measures to tackle shortcomings in the judicial and enforcement mechanisms have been adopted in two Protocols to the Convention (Protocols 11 and 14).

In 2010 another reform process began, the Interlaken process, which aims to tackle in particular the management of the Court's increasing case-load and the execution of judgments through the domestic implementation of remedies.

Contents

1 European Court of Human Rights: general principles

1.1 Introduction

Britain was influential in the creation of the European Convention on Human Rights (the European Convention or ECHR). In the late 1940s British promotion of post-War human rights guarantees came from Conservatives such as Winston Churchill, Harold Macmillan and David Maxwell-Fyfe, and Liberals such as Lord Layton. In March 1943 Churchill called for a Council of Europe and on 19 September 1946, in his famous Zurich speech, he said "We must build a kind of United States of Europe... The first step is to form a Council of Europe". When he addressed the Hague Congress (as honorary president of the Congress) in 1948, Churchill spoke of “the eventual participation of all European peoples whose society

and way of life are not in disaccord with a charter of human rights and the sincere expression of free democracy".[1]

The Attlee Government ratified the European Convention in 1951, the Churchill Government ratified the First Protocol in 1953, the Wilson Government accepted the right of individual petition in 1966, and the Liberal peer, Lord Wade, campaigned for a human rights act, with the support of Conservatives such as Sir Edward Gardner, Lord Broxbourne and Lord Rippon, and Cross-benchers, including Lord Scarman.

The Labour Government under Tony Blair introduced the Human Rights Bill in 1998 with Liberal Democrat support.[2] The *Human Rights Act 1998* incorporated the Articles of the European Convention into UK law.

1.2 The compulsory jurisdiction of the European Court of Human Rights

All 47 Council of Europe Member States, including all European Union Members, have ratified or acceded to the European Convention on Human Rights, thereby accepting the compulsory jurisdiction of the Court.

When the European Convention first came into force, both the jurisdiction of the European Court of Human Rights (the European Court or ECtHR) and acceptance of the right for individuals to petition the Court (via the then Commission of Human Rights) were subject to each State accepting an optional clause. When the UK Government ratified the European Convention in March 1951 it accepted neither of these optional clauses. The UK accepted the optional clauses in 1966, and renewed them every few years, until Protocol 11 made the right of individual petition compulsory in 1994. By 1958 nine States had accepted the Court's jurisdiction and for those states it came into being in 1959.

Accepting the Jurisdiction of the Court is also now mandatory under Article 32 of the European Convention, which states:

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 37.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

1.3 The obligations of States Parties to the European Convention

The fundamental principle governing the obligations of States Party to the European Convention is that: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties" (Article 46(1)). The wording of this provision has remained the same since 1950 and it has been clarified and reinforced by the general principles of international law, the practice of States in the execution of judgments and the indications of the Committee of Ministers and the European Court.

States cannot simply ignore a Court ruling that they are in breach of the Convention. Something must be done to remedy the situation, but the Court does not prescribe the

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1 See CoE website

2 See Joint Committee On Human Rights Sixth Report "The Case for a Human Rights Commission", 3 March 2003

remedy (beyond sums payable as "just satisfaction" to the applicant) or how it should be applied.

The Court's rulings are not binding on national courts, but on governments. As Rosalind English says, in the UK the only "binding" effect of the ECtHR "is limited to section 3(1) of the Human Rights Act, which compels a court dealing with a case concerning a human rights question to interpret it in line with the provisions of the ECHR".[3]

The following extract from the Court's website sets out the obligations of States to comply with judgments, including legislative changes when necessary:

> Under Article 46 § 1 of the Convention, states "undertake to abide by the final judgment of the Court in any case to which they are parties". This undertaking entails precise obligations for respondent states. On the one hand they must take measures in favour of the applicants to put an end to violations and, as far as possible, erase their consequences (restitutio in integrum), and, on the other hand, they must take the measures needed to prevent new, similar violations.
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> A first obligation is therefore the payment of just satisfaction (normally a sum of money), which the Court may award the applicant under Article 41 of the Convention and which covers, as appropriate, pecuniary and non-pecuniary damage and/or costs and expenses. The payment of such compensation is a strict obligation which is clearly defined in the judgment.
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> However, the adverse consequences of the violation suffered by an injured party are not always adequately remedied by the payment of just satisfaction. Depending on the circumstances, the execution of the judgment may also require the respondent state to take individual measures in favour of the applicant, such as the re-opening of unfair proceedings, the destruction of information gathered in breach of the right to privacy or the revocation of a deportation order issued despite the risk of inhumane treatment in the country of destination. It may also require general measures – such as a review of legislation, rules and regulations or judicial practice - to prevent new, similar violations. [...]
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> Indeed, under the Convention, states have considerable freedom in the choice of the individual and general measures they take to meet these requirements. However, this freedom goes hand in hand with the monitoring by the Committee of Ministers (assisted by the Department for the execution of judgments), which ensures that the measures taken are appropriate and actually achieve the outcome sought in the Court's judgment [...]. Where the notion of a choice of measures is in practice theoretical, since it is constrained by the nature of the violation, the Court can itself directly require certain steps to be taken. It has made use of this possibility for the first time in 2004 in two cases, ordering the release of applicants who were being arbitrarily detained in breach of Article 5 of the Convention (see the Assanidze v. Georgia judgment and the Ilascu and others v. Russia and Moldova judgment). Recently, in response notably to a Resolution by the Committee of Ministers on judgments revealing an underlying systemic problem, Res (2004)3, the Court has also started to provide better identification of systemic problems underlying violations found and also to give indications as to the execution measures required. […][4]

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3 *UK Human Rights blog* "It's time we packed our bags at Strasbourg, says report", 9 February 2011

4 Execution of Judgments of the European Court of Human Rights

On 10 - 11 January 2001 the Committee of Ministers (CM), which is responsible for monitoring the implementation of Court decisions, adopted rules for the application of Article 46(2) of the Convention.

The Court adheres to the principle of proportionality[5] and takes into account a "margin of appreciation", which means it allows some room for manoeuvre by national authorities in fulfilling some of their main obligations under the European Convention. In “The Margin of Appreciation Doctrine and the Principal of Proportionality in the ECHR”, Yutaka Arai-Takahashi describes the principle of proportionality as “inherent in evaluating the right of an individual person and the general public interests of society”,[6] which “means that a fair or reasonable balance must be attained between those two countervailing interests”.

1.4 Implementing and monitoring Court judgments

The basic implementation mechanisms were established in 1950 and were based on inter-state complaints before the Committee of Ministers, which decided (under former Article 32) whether the Convention had been breached. If a violation was established, the CM, assisted by the European Commission on Human Rights, supervised the follow-up action taken by the respondent State and could also decide what effect should be given to CM decisions.

The CM has always been responsible for establishing violations, supervising the execution of Court judgments, or accepting “friendly settlements”. States increasingly accepted the right of individual petition and the compulsory jurisdiction of the Court, and the system was thereby improved. The CoE website describes the CM’s monitoring procedures as follows:

> Once the Court’s final judgment has been transmitted to the Committee of Ministers (Article 46 § 2 of the Convention), the latter invites the respondent state to inform it of the steps taken to pay the amounts awarded by the Court in respect of just satisfaction and, where appropriate, of the individual and general measures taken to abide by the judgment (see the Rules adopted by the Committee of Ministers on this subject). Once it has received this information, the Committee examines it closely. After establishing that the state concerned has taken all the necessary measures to abide by the judgment, the Committee adopts a resolution concluding that its functions under Article 46 § 2 of the Convention have been exercised.
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> The Directorate General of Human Rights assists the Committee of Ministers in exercising this responsibility under the Convention. In close co-operation with the authorities of the state concerned, the Directorate considers the measures that should be taken to comply with the Court’s judgment. At the Committee of Ministers’ request, the Directorate offers its opinion and advice, which are based on the experience and practice of the Convention bodies.
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> In accordance with its well-established practice, until the state in question has adopted satisfactory measures, the Committee of Ministers does not adopt a final resolution striking the judgment off its list of cases, and the state continues to be required to provide explanations or to take the necessary action. During the examination of the case, the Committee may take various measures to facilitate execution of the judgment. It may adopt interim resolutions, which usually contain information concerning the interim measures already taken and set a provisional calendar for the

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5 “The doctrine of proportionality is at the heart of the Court’s investigation into the reasonableness of the restriction”, Judicial Professions – the Lisbon Network.

6 Yutaka Arai-Takahashi, “The Margin of Appreciation Doctrine and the Principal of Proportionality in the ECHR”, 2001

> reforms to be undertaken or encourage the respondent state to pursue certain reforms or insist that it take the measures needed to comply with the judgment.
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> If difficulties are encountered in executing the judgment, the Directorate General of Human Rights often examines possible solutions in greater detail with the authorities concerned.
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> The Committee of Ministers may fully exercise its influence to persuade the state concerned to comply with the Court's judgments, not least by noting its failure to comply with the Convention and taking appropriate action. In practice, the Committee of Ministers very seldom needs to exert political and diplomatic pressure but functions rather as a forum for constructive dialogue, thus helping states find satisfactory solutions enabling them to execute the Court's judgments.[7]

The CM has commented on moves by national courts towards giving "direct effect" to European Court judgements, which means that a judgment of the Court is accepted as the law by the State it concerns.

> The direct effect more and more frequently accorded the judgments of the ECtHR by domestic courts and authorities largely facilitates both providing adequate individual redress and the necessary development of domestic law and practices to prevent similar violations. Where execution through such direct effect is not possible, other avenues will have to be pursued, most frequently legislative or regulatory.[8]

The CoE has noted that:

> ... in States where the Convention and its case-law enjoy direct effect and are therefore directly applied by the Courts, it has sometimes been possible to invalidate through judicial procedures legal provisions that ran contrary to the ECHR. In such States, you will notice that the mere publication of a judgment may often be accepted as a sufficient execution measure as it is assumed that national courts will not fail to adapt their interpretation of the law in accordance with the ECHR judgments.[9]

In deciding on an award of "just satisfaction", the Court lays down the 'execution conditions' in detail in its judgment, regarding deadline, recipient, currency, default interest and so on. In accordance with the principle of subsidiarity,[10] the Court leaves it to the State concerned, under the supervision of the CM, to identify the nature and scope of other execution measures, whether individual or general. The CM explains:

> 19. This situation is explained by the principle of subsidiarity, by virtue of which respondent states have freedom of choice as regards the means to be employed in order to meet their obligations under the ECHR. However this freedom goes hand in hand with the CM's control so that in the course of its supervision of execution the CM may also, where appropriate, adopt decisions or interim resolutions to express concern, encourage and/or make suggestions with respect to the execution. [...]

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7 CoE website, Execution of Judgments of the European Court of Human Rights

8 Committee of Ministers' annual report, 2009, published April 2010

9 CoE Execution of Judgments of the European Court of Human Rights Q&A

10 "The state should itself decide democratically what it's appropriate for itself", Judicial Professions – the Lisbon Network

> 21. When evaluating the need for specific execution measures and their scope, as well as the adequacy of execution measures adopted, the CM and the respondent state are assisted by the Directorate General of Human Rights and Legal Affairs, represented by the Department for the Execution of Judgments of the ECtHR.[FN16]
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> FOOTNOTE 16. In so doing the Directorate continues a tradition which has existed ever since the creation of the ECHR system. By providing advice based on its knowledge of execution practice over the years and of the ECHR requirements in general, the Directorate in particular contributes to the consistency and coherence of state practice in execution matters and of the CM supervision of execution. [11]

2 Reforming the Court procedures

2.1 Introduction

The workload of the European Court of Human Rights has increased steadily and at times dramatically since it was established in 1959. After 1991, as the Cold War in Eastern Europe came to an end, many of the former Soviet bloc countries applied for and were given membership of the Council of Europe. As the organisation has expanded and the Court's case load has increased, the Court's procedures and the CM's supervisory mechanisms have come under increasing strain and backlogs have grown.

The CoE launched a reform process in 1994 that resulted in the adoption of Protocol 11, which simplified the application and judicial procedures, merging the Commission of Human Rights with the Court of Human Rights to form a single, full-time Court. The CM remained the main supervisory body. Protocol 11 entered into force in November 1998.[12] However, from 1999 to 2001 the Court's case-load grew considerably. A second reform process to tackle this had begun in 2000, by which time another 18 countries had joined the CoE. By 2007 a further six countries had joined.

The number of applications registered rose from 5,979 in 1998 to 13,858 in 2001, an increase of around 130%. Thereafter, applications continued to rise, and there were around 39,000 new applications in 2003 and 44,100 in 2004. By the beginning of 2006, 81,000 cases were pending before the Court and 7,000 cases had been pending for at least 3 years. The number of cases pending was projected to rise to 250,000 by 2010[13]

In its annual report on 2009 the CM noted continuing problems with compliance and the implementation of Court rulings, and tension between States wanting the CM to apply the principle of subsidiarity and the need for states to improve their implementation of effective remedies:

> 33. This obligation to comply with the judgments of the ECtHR concerns not only the ECtHR's judgment in the particular case even though that is central to the obligation, account must also be taken of its more general case-law in the field in question. This aspect has always been part of the relevant considerations in assessing the effectiveness of execution[7] and was also highlighted by the ECtHR whenever it itself had occasion to interpret the requirements of Article 46[8]. It is only by proceeding in this way that the authorities may ensure that the measures taken or the reforms adopted provide

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11 Committee of Ministers' annual report, 2009, published April 2010

12 For information on this Protocol, see Research Paper 98/109, "Protocol 11 and the New European Court of Human Rights", 4 December 1998

13 Lord Woolf, "Review of the Working Methods of the European Court of Human Rights", December 2005 .

appropriate reparation for the violations in question and effectively prevent other similar violations.

34. In many countries national dissemination of the ECtHR's case-law seems to be geared excessively towards cases involving the country itself, which may make it more difficult for the country in question to adopt a proactive approach, placing it in a position to deal in good time with problems already addressed by the ECtHR. The experience acquired before the Committee of Ministers shows that many cases reveal systemic problems on questions for which there has long been clear and precise case law (for example the obligation to provide sound reasons for decisions on pre-trial detention, the obligation to accept *exceptio veritatis* in cases of defamation or to enforce court decisions), without the respondent state having taken measures before proceedings were brought before the ECtHR.

35. Strengthening the implementation of the principle of subsidiarity, as called for by the participants at the Interlaken Conference, would appear to depend to a large extent on this improvement in effective remedies and the matter still remains a priority for supervision of execution.

FOOTNOTES: 7. This aspect was already reflected in the case-law of the ECtHR, see for example the Ireland v. United Kingdom judgment of 18 January 1978, § 154

8. See, for example, the Broniowski v. Poland (22 June 2004, § 194), Scordino (1) v. Italy (29 March 2006, §§ 240 and 247) and Ramadhi v. Albania (13 November 2007, § 97) judgments.[14]

2.2 Rome Ministerial conference

A CoE Ministerial Conference on Human Rights in Rome in November 2000 (which marked the 50th anniversary of the European Convention) launched a new reform process which focused on three areas: the efficiency of the Court procedures; the domestic implementation of the European Convention; and the execution of Court judgments.

Much of the implementation work was carried out by the Steering Committee on Human Rights (CDDH), which since 2000 has presented several proposals. These have resulted in:

- Protocol 14, which aims to improve the procedures before the Court and provide the CM with new powers to supervise execution (including the possibility of lodging with the Court requests for the interpretation of judgments and bringing infringement proceedings in case of refusal to abide by a judgment)

- the CM adopting seven recommendations to States on measures to improve national implementation of the Convention

- new rules for the supervision of the execution of judgments and friendly settlement

- the development of new working methods in the Court.

In November 2002 the CM issued terms of reference to the CDDH to draw up a set of concrete and coherent proposals for measures that could be implemented immediately, as well as possible amendments to the Convention which would take longer to implement. In April 2003 the CDDH issued its report, which focused on the three main areas. The CDDH proposed amendments to the Convention in these areas and the preparation of

[14] Committee of Ministers' annual report, 2009, published April 2010

recommendations by the CM to Member States. In May 2003 the Committee of Ministers endorsed this approach, instructing the CDDH to prepare a draft amending protocol and three draft recommendations to Member States on other aspects of the reform package.

The CDDH reported again in April 2004. The CoE Parliamentary Assembly produced an Opinion on the draft Protocol on 28 April 2004.[15] On 13 May 2004 the CM adopted a Declaration "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels", the text of a new Protocol 14 to the Convention and three Recommendations to Member States to ensure the effective implementation of the European Convention at national and European levels.[16]

2.3 Protocol 14 and Protocol 14 *bis*

Protocol 14 was opened for signature by Council of Europe Member States on 13 May 2004 and required all Member States to ratify it in order to come into force. Universal ratification took a long time, held up mainly by Russia which did not approve ratification until January 2010. Because of the delay, an interim Protocol, Protocol 14 bis, was adopted, which provided that two main elements of the reform package could have immediate effect from 2009 until Protocol 14 came into effect. A single judge, rather than a committee of three judges, could declare clearly inadmissible applications inadmissible; and committees of three judges, instead of seven, were allowed to issue judgments.

Protocol 14 entered into force on 1 June 2010.[17] It aimed to guarantee the long-term effectiveness of the Convention by streamlining the filtering and processing of applications, and to improve the execution of the Court's judgments. It also changed the control mechanism of the European Convention. The CoE has summarised the aims of the Protocol as follows:

> For a more effective operation of the European Court of Human Rights, this Protocol makes the following main changes to the Convention:
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> – Clearly inadmissible cases: inadmissibility decisions in these cases, which are now taken by a committee of three judges, will be taken by a single judge, assisted by non-judicial rapporteurs. The idea is to increase the Court's filtering capacity, i.e. its capacity to filter out the "hopeless" cases.
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> – Repetitive cases : where the case is one of a series deriving from the same structural defect at national level, the proposal is that it may be declared admissible and decided by a committee of three judges (instead of a seven-judge Chamber at present) under a simplified summary procedure.
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> – New admissibility criterion: with a view to allowing the Court a greater degree of flexibility, a new admissibility condition is foreseen (in addition to existing conditions such as exhaustion of domestic remedies, six-month

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15 Opinion No. 251 (2004), 28 April 2004

16 A more detailed account of the background to Protocol 14 can be found in the Council of Europe's Explanatory Report

17 For further information on this Protocol, see the Information document prepared by the Department for the Execution of Judgments of the European Court of Human Rights, "Entry into force of Protocol No. 14: consequences for the supervision of the execution of judgments of the European Court by the Committee of Ministers" 18 May 2010.

time-limit). Under this condition the Court could declare inadmissible applications where the applicant has not suffered a significant disadvantage provided that "respect for human rights" does not require the Court to go fully into the case and examine its merits. However, in order to ensure that applicants even with minor complaints are not left without any judicial remedy, the Court will not be able to reject a case on this ground if there is no such remedy in the country concerned.

Under the Protocol the Committee of Ministers will be empowered, if it decides by a two-thirds majority to do so, to bring proceedings before the Court where a State refuses to comply with a judgment. The Committee of Ministers will also have a new power to ask the Court for an interpretation of a judgment. This is to assist the Committee of Ministers in its task of supervising the execution of judgments and particularly in determining what measures may be necessary to comply with a judgment.

Other measures in the Protocol include changing the judges' term of office from the present six year renewable term to a single, nine year term and a provision in view of possible accession by the European Union to the Convention.[18]

2.4 Committee of Ministers recommendations

The CM's seven recommendations on "the domestic implementation of the Convention and the Court's case-law, notably in response to judgments against the country concerned" were:

- Recommendation Rec(2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights
- Recommendation Rec(2002)13 of the Committee of Ministers to member states on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights
- Recommendation Rec(2004)4 of the Committee of Ministers to member states on the European Convention on Human Rights in university education and professional training
- Recommendation Rec(2004)5 of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights
- Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies
- Recommendation CM/Rec(2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings
- Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem[19]

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[18] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS no. 194)

[19] The Committee of Ministers' supervision of execution of the judgments of the European Court of Human Rights: collection of basic texts, December 2010

The implementation of the first five recommendations was subject to a follow-up, which included contributions from civil society, and the results were published by the CDDH in April 2006.[20] An additional follow up was published by the CDDH in 2008.[21]

2.5 UK scrutiny of Protocol 14 and the CM recommendations

In the UK Protocol 14 was laid before Parliament on 15 November 2004 pursuant to the Ponsonby Rule.[22] The Joint Committee on Human Rights (JCHR) published a report on 8 December 2004, in which it broadly welcomed the new Protocol, which, in its view, included "many positive aspects which should improve the functioning of the control system of the Convention".[23] It also criticised, however, the requirement that an applicant must have suffered "a significant disadvantage" as a restriction on the right to individual petition:

> The Committee advises Parliament that this restriction on the right of individual petition places at a premium the various measures to improve implementation of the ECHR at the national level which are the subject of a number of Recommendations by the Committee of Ministers. It draws Parliament's attention to the interdependence of Protocol 14 and the other measures required at national level (paragraphs 34-47).[24]

The Committee had asked the Government for its opinion of this new requirement, to which the then Foreign Secretary, Jack Straw, had replied in May 2004 that "the introduction of this new criterion will not restrict the right of an individual petition". Jack Straw thought "the terms used in this new criterion are capable of definition by the Court by way of judicial interpretation in its case law" and that the Court was "well used to interpreting general wording in the Convention". He assured the Committee that:

> Applications will not be declared inadmissible simply because there has been no "significant disadvantage", the Court will also need to be satisfied that respect for human rights does not require an examination of the application on the merits and (as provided in the latest version of revised Article 35(5) ECHR) that the case received due consideration before a domestic tribunal.

Mr Straw acknowledged that "the significant disadvantage element refers to the individual situation of the applicant. It may include situations in which, if the application were allowed to proceed to a judgment, the Court would make no award, or a nominal award, by way of just satisfaction". He clarified the type of cases that would be declared inadmissible under the new proposals and the improvements to efficiency that could be achieved:

> ... an assessment carried out by a study group of the Court's Registry gave examples of cases concerning the length of civil proceedings involving less than €500; disputes between neighbours; and disputes about the place to which a pension should be sent. The application of this criterion to individual cases would, however, be a matter for the Court to decide.

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20 CDDH(2006)008, Reform of the European Convention on Human Rights –Declaration of the Committee of Ministers "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels" + Addendum I, Addendum II and Addendum III

21 CDDH(2008)008

22 Cm 6370. For further information on treaty ratification in the UK and the Ponsonby Rule, see Standard Note 4693, "Parliamentary Scrutiny of Treaties: up to 2010", 25 September 2009, and FCO website

23 HL Paper 8, HC 106, Summary, p.3, 1 December 2004

24 Ibid

> The same study found that some 5% of currently admissible cases might be rejected under the new criterion. Bearing in mind that the number of admissible cases currently pending before the Chambers of the Court is over 16,000, the resulting saving of some 800 cases, more than the number of judgments given in 2003, is clearly significant.[25]

The Committee did not accept the Government's argument that the introduction of the new admissibility requirement would not restrict the right of individual petition the CoE Explanatory Report to the Protocol had explicitly acknowledged this effect on the grounds that some restriction was necessary to reduce the Court's case load. The Committee therefore thought the new requirement was acceptable "only in light of the national implementation measures which are also required".[26] The Explanatory Report also emphasised the importance of improving efforts at national level to prevent Convention violations in order to reduce the Court's work load. The Joint Committee concluded therefore:

> We draw Parliament's attention to the interdependence of Protocol 14 and the other measures required at national level. We agree with the Council of Europe that the ever-increasing number of applications to the Court jeopardises the long-term effectiveness of the Convention system and therefore calls for a strong reaction from member states. We aim to ensure that Parliament is properly informed about and involved in the implementation of the national measures which are required.[27]

With regard to the CM Recommendation on "the verification of the Convention compatibility of draft laws, existing laws and administrative practice",[28] the JCHR concluded that it would review the way in which the Government carried out its functions. It noted that the Department for Constitutional Affairs (DCA) was also conducting a strategic review of departmental procedures for ensuring Convention compatibility and it would also scrutinise the outcome of that review in the light of the CoE Recommendation, reporting further to Parliament on both matters in due course.[29]

On the CM Recommendation "on the improvement of domestic remedies",[30] the JCHR noted that it already scrutinised all primary legislation which affected Convention rights to ensure that it provided effective remedies in respect of arguable Convention violations and would "consider carefully the best way in which to implement the recommendation that the effectiveness of existing remedies for Convention violations be ascertained".[31]

Commenting on the third CM Recommendation, "in university education and professional training",[32] the Committee welcomed government recognition that more needed to be done to foster respect for human rights and the review across central government of departmental arrangements for implementing the *Human Rights Act 1998*, including more human rights training. The Committee would correspond with the DCA over the review and think about how best to implement this particular Recommendation, including whether improved training might be a task for a new Commission on Equality and Human Rights. It would provide the

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25 HL Paper 8, HC 106, Appendix 2, pp 23-4
26 Ibid, para. 39
27 Ibid, para 47
28 Rec (2004) 5
29 Ibid para 53
30 Rec (2004) 6
31 JCHR Report para 56
32 Rec (2004) 4

CM with a progress report on the implementation of the recommendations for its April 2005 report.

2.6 Oslo High level seminar

The Norwegian CM chairmanship in 2004 organised a high-level seminar in Oslo on 18 October 2004, which aimed to improve understanding of the reform agenda and identify practical measures to ensure that the May 2004 reform package was implemented effectively.[33] Norway focused on:

- taking the necessary steps to ensure the entry into force of the reform of the Convention, in particular Protocol No. 14
- taking the necessary steps to follow up the decisions of the declaration, in particularly those which the Committee of Ministers are to follow up
- taking specific and effective measures to improve and accelerate the execution of the Court's judgements, notably those revealing an underlying systemic problem
- monitoring the execution of the recommendations to member states
- assessing the necessary resources necessary for the rapid and efficient implementation of Protocol 14
- taking an initiative to organise a symposium on the reform of the Court[34]

The seminar published its conclusions in CM(2004)209 16 November 2004. Two main causes for the Court's overload were identified as:

- the very large proportion of cases which are declared inadmissible (in 2003, 96% of applications).

- the significant number of cases which concerned repetitive violations following an earlier judgment in a pilot case (in 2003, around 60% of the 703 judgments given by the Court concerned repetitive cases).

2.7 The Woolf Report

The CoE Secretary General and the President of the European Court commissioned a review of the Court. The review was headed by Lord Woolf, assisted by Michael McKenzie CB QC, Peter MacMahon, Dr Colm O'Cinneide and Laura Clarke. Its terms of reference were "To consider what steps can be taken by the President, judges and staff of the European Court of Human Rights to deal most effectively and efficiently with its current and projected caseload, and to make recommendations accordingly to the Secretary General of the Council of Europe and to the President of the Court".

Lord Woolf's "Review of the Working Methods of the European Court of Human Rights", published in December 2005, made 26 recommendations, including

- Clarifying the criteria for applications and dealing speedily with inadmissible ones

- Establishing "satellite offices" in member states with high numbers of applications and a friendly settlement unit in the Court Registry

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[33] The report on proceedings of the seminar on Reform of the Human Rights System can be accessed at http://www.coe.int/t/e/human_rights/reformeurhrsystem_e.pdf.

[34] Norway Mission to the Council of Europe at http://www.norway-coe.org/hr/echr/s%c3%b8nn.htm

- Encouraging more use of national ombudsmen and alternative dispute resolution
- Maximising use of the pilot judgment procedure
- Creating an "Article 41 unit" to help deal with compensation and publishing guidelines on rates of compensation
- Establishing a backlog secretariat, and prioritising potential pilot judgment cases and those raising serious points of human rights law
- Dividing post of Deputy Registrar into two, creating a judicial deputy registrar and a deputy registrar for management
- Reviewing the target system and developing more detailed and specific targets
- Creating a central training unit for lawyers
- Creating the post of supervising vice president to oversee the Court's work, ensure its consistency, monitor the leave of judges and ensure backlogs of inadmissible cases are cleared during holiday periods
- Introducing a formal induction programme, guidelines for judges, with language training for new judges.[35]

Lord Woolf concluded that these recommendations, if adopted, would not necessarily "transform the situation overnight", but they could achieve two important goals:

> First, they could enable the Court to stem the tide until a fundamental review of the Convention can take place. Second, they will provide a test bed for one way of achieving a long-term solution, that is having regional centres providing courts of first instance and allowing the existing Court to play a different role. A role whereby it ceases to be accessible as of right, but can instead control and select its own caseload.

Less radical reforms, such as requiring applicants to use qualified lawyers, could wait, but Lord Woolf urged the CM to provide the necessary financial support for the Court to implement reforms because "It would be tragic if an institution which has played such a critical role in promoting and protecting human rights in each Member State were not rescued. The citizens of Europe are entitled to continue to enjoy its protection".

2.8 Group of Wise Persons

The CoE Heads of State and Government met in Warsaw on 16 and 17 May 2005 and decided to set up a Group of Wise Persons to consider the issue of the long-term effectiveness of the Convention control mechanism, including the initial effects of Protocol 14 and the other decisions taken in May 2004. The Group was set up on 18 October 2005 and comprised the following:

Rona Aybay, Turkey
Fernanda Contri, Italy
Marc Fischbach, Luxembourg
Jutta Limbach, Germany

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[35] *Review of the Working Methods of the European Court of Human Rights*, December 2005

Gil Carlos Rodriguez Iglesias, Spain
Emmanuel Roucounas, Greece
Jacob Söderman, Finland
Hanna Suchocka, Poland
Pierre Truche, France
Lord Woolf of Barnes, UK
Veniamin Fedorovich Yakovlev, Russia

The Group and met eight times in 2005-6. It published an Interim Report on 10 May 2006.

Interim Report

The Group considered that the "survival of the machinery for judicial protection of human rights and the Court's ability to cope with its workload" were "seriously under threat from an exponential increase in the number of individual petitions".[36] While the Group acknowledged the potential usefulness of changes that would be introduced by Protocol 14, it was too early to make a final assessment of the effects of the new Protocol. However, it thought the reforms introduced by that Protocol would "not be sufficient for the Court to find any lasting solution to its problem of congestion".[37] The Group agreed that:

- The Court should be "relieved of a large number of cases which should not 'distract' it from its essential role" under Article 32(1) of the Convention.[38] but reform "should not affect the substance of the right of individual petition".

- The idea of setting up of "regional courts of first instance" should not be pursued.

- The Convention system should be more flexible and adaptable to new circumstances, with the CM authorised by the Court to carry out certain reforms relating to judicial organisation and the Court's operating procedures by means of resolutions adopted unanimously, without the need for amending the Convention.[39]

- A judicial filtering body – a judicial committee - could ensure effective filtering of cases brought to the Court beyond the reforms of Protocol 14. It would focus on applications that were inadmissible on formal grounds (e.g. failure to comply with time-limits or to exhaust domestic remedies) and might also consider cases where there was a well-established case-law finding no violation of the Convention.

- The Commissioner for Human Rights, an independent CoE institution established in 1997 to promote the awareness of and respect for human rights in the Member

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36 Council of Europe, 3 May 2006, SAGES(2006) 05 EN Fin Interim report of the Group of Wise Persons to the Committee of Ministers

37 Ibid

38 "the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the convention and the protocols thereto"

39 The EU provided examples of this flexibility in the Court of First Instance, for which the Treaty of Nice subsequently introduced the possibility for the Council to create "judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas". The European Union Civil Service Tribunal and the Statute of the Court of Justice, with the exception of Title I, may also be amended by the Council acting unanimously.

States,[40] should play a more active role in the Convention's control system, either alone or in co-operation with European and national non-judicial bodies.

- The Commissioner should extend co-operation and dissemination of information with national and regional ombudsmen in order to form an active network of ombudsmen in the future. This could help reduce the Court's workload by identifying problems likely to trigger large numbers of applications to the Court, and might also help to solve problems at national level.

- Under the present system, judgments in a particular case do not apply to other States, even if they establish a general principle. All States Parties to the Convention might be invited to intervene before the Court in order to enhance the 'constitutional' role of the Court's case-law on questions of principle and its authority *erga omnes* (in respect of everyone).

- The use of the "pilot judgment" procedure should be increased, so that once the pilot case had been designated by the Court, all similar applications against the same State, including those lodged subsequently, should be adjourned pending the adoption of general remedial measures at national level.

- The length of proceedings in civil, criminal and administrative cases and the length of detention pending trial were two of the main sources of litigation before the Court,[41] and therefore among the main areas requiring improvements in domestic remedies. A draft Convention text could be drawn up, obliging Member States to introduce legal mechanisms to redress these failings, which would reduce the Court's workload.

- In relations between the Court and national courts, an optional procedure could be explored, under which national supreme courts might apply to the European Court for a consultative opinion on legal questions relating to the interpretation of the Convention and its Protocols.[42]

- The Court should be able to remit appropriate applications, at least in part, to domestic courts. These might concern compensation issues under Article 41[43]and cases already governed by decisions of principle by the Court. If the domestic court failed to make an appropriate order, the case could still be restored to the Court.

- The CoE information offices set up under CM Resolution (99) 9 could host lawyers to perform a similar function to that of the lawyer at the Warsaw Information Office.[44]

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[40] Under Resolution (99)50 of the CM, the Commissioner for Human Rights functions independently and impartially to "identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe, promote the effective implementation of these standards by member States and assist them, with their agreement, in their efforts to remedy such shortcomings".

[41] This category of cases accounted for 25% of all judgments delivered in 2005.

[42] Similar to the preliminary reference procedure in the European Court of Justice

[43] The Court could decide that there should be an award of compensation and the domestic court could decide the amount.

[44] in December 2003, a trial scheme was agreed, whereby a lawyer would be employed in a Council of Europe Information Office in Warsaw in order to provide information to potential applicants on admissibility criteria. This lawyer, who started in October 2004, works at the Information Office and at the office of the Ombudsman.

These non-judicial offices could provide advice on existing domestic remedies and non-judicial remedies and completing an application form.

- Member States should ensure that national judicial and administrative institutions should have access to Court case-law in their respective languages. The CoE should provide and disseminate handbooks and summaries of Court texts in languages other than the official CoE languages (English and French).

Final Report

The Group published its final report on 15 November 2006, in which it proposed the following reform measures to "ensure the efficient functioning of the control mechanism in the long term":

> **1. Greater flexibility of the procedure for reforming the judicial machinery**
>
> 127 The Group believes that it is essential to make the judicial system of the Convention more flexible. This could be achieved through an amendment to the Convention authorising the Committee of Ministers to carry out reforms by way of unanimously adopted resolutions without an amendment to the Convention being necessary each time. This method would make the Convention system more flexible and capable of adapting to new circumstances, but would not apply to the substantive rights set forth in the Convention or to the principles governing the judicial system.
>
> 128 The system created would be structured around three levels of rules, namely:
>
> - the Convention itself and its protocols, for which the amendment procedure would remain unchanged;
>
> - the "statute" of the Court, ie a legal level whose content would need to be defined, comprising provisions relating to the operating procedures of the Court. This second level would be an innovation. The provisions of this statute could be amended by the Committee of Ministers with the Court's approval;
>
> - texts such as the Rules of Court, which could be amended by the Court itself.
>
> **2. Establishment of a new judicial filtering mechanism**
>
> 129 A judicial filtering body should be set up which would be attached to, but separate from, the Court, in order to guarantee, on the one hand, that individual applications result in a judicial decision and, on the other, that the Court can be relieved of a large number of cases and focus on its essential role.
>
> 130 The members of the Judicial Committee would be judges enjoying full guarantees of independence. Their number should be less than the number of member states. It would be decided – and could be modified – by the Committee of Ministers on a proposal from the Court. The composition of the Judicial Committee should reflect a geographical balance as well as a harmonious gender balance and should be based on a system of rotation between states. The term of office of its members would be limited in duration in accordance with rules to be laid down by the Committee of Ministers.
>
> 131 The members of the Judicial Committee, like those of the Court, should be of high moral character and possess the qualifications required for appointment to judicial office. They would be subject to the same requirements as the

members of the Court with regard to impartiality and meeting the demands of a full-time office. Candidates' professional qualifications and knowledge of languages should be assessed by the Court in an opinion prior to their election by the Parliamentary Assembly.

132 The Judicial Committee would have jurisdiction to hear all applications raising admissibility issues and all cases which could be decided on the basis of well-established case-law of the Court allowing an application to be declared either manifestly well-founded or manifestly ill-founded. The Judicial Committee's jurisdiction to decide cases on the merits would involve, where such cases are concerned, the exercise of the same powers as the Court in respect of just satisfaction.

133 Institutionally and administratively, the Judicial Committee would come under the Court's authority. It would be chaired by a member of the Court, appointed by the latter for a set period, and would draw on the support of the Registry of the Court, thus enabling it to make optimum use of the Registry's human resources. There would be no possibility of appealing against the decisions of the Judicial Committee, although the Court would have a special power allowing it, of its own motion, to assume jurisdiction in order to review any decision adopted by the Judicial Committee.

B. Concerning the relations between the Court and the States Parties to the Convention

3. Enhancing the authority of the Court's case-law in the States Parties

134 The dissemination of the Court's case-law and recognition of its authority above and beyond the judgment's binding effect on the parties would no doubt be important elements in ensuring the effectiveness of the Convention's judicial control mechanism. The Group recommends that judgments of principle and judgments which the Court considers particularly important be more widely disseminated in line with the recommendations of the Committee of Ministers.

4. Forms of co-operation between the Court and the national courts – Advisory opinions

135 The Group considers that it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto, in order to foster dialogue between courts and enhance the Court's "constitutional" role. Requests for an opinion, which would be submitted only by constitutional courts or courts of last instance, would always be optional and the opinions given by the Court would not be binding.

5. Improvement of domestic remedies for redressing violations of the Convention

136 Domestic remedies for redressing violations of the rights secured by the Convention should be improved. The length of proceedings in civil, criminal and administrative cases, which is one of the main sources of litigation before the Court, highlights the need for such an improvement, which would be achieved by means of a Convention text placing an explicit obligation on the States Parties to introduce domestic legal mechanisms to redress the damage resulting from any violation of the Convention, and especially those resulting from structural or general shortcomings in a state's law or practice.

6. The award of just satisfaction

137 Changes to the rules laid down in Article 41 of the Convention are necessary to relieve the Court and the Judicial Committee of tasks which could be carried out more effectively by national bodies (especially when expert reports are needed).

138 Where the Court or, where appropriate, the Judicial Committee holds that the victim must be awarded compensation, the decision on the amount of compensation would be referred to the state concerned. However, the Court or, as appropriate, the Judicial Committee would have the power to depart from this rule and give its own decision on just satisfaction where such a decision was found to be necessary.

139 The state should discharge its obligation to award compensation within the time-limit set by the Court or the Judicial Committee. It would be for the state to determine the arrangements for this, while complying with certain requirements. The amount of compensation should be consistent with the criteria laid down in the Court's case-law. The victim would be able to apply to the Court or to the Judicial Committee where the latter gave the decision finding a violation of the Convention, to set aside the national decision by reference to those criteria, or where the state failed to comply with the time-limit set for determining the amount of compensation.

7. The "pilot judgment" procedure

140 The Group encourages the Court to make the fullest possible use of the "pilot judgment" procedure. In the light of practical experience, consideration would need to be given in future to the question of whether the existing judicial machinery, including the Court's rules of procedure, will suffice for this model to be able to produce the desired results or whether a reform of the Convention should be contemplated in this connection.

C. Concerning alternative (non-judicial) or complementary means of resolving disputes

8. Friendly settlements and mediation

141 In order to reduce the Court's workload, recourse to mediation at national or Council of Europe level should be encouraged where the Court, and more particularly the Judicial Committee, considers that an admissible case lends itself to such a solution. Proceedings in the cases concerned would be suspended pending the outcome of mediation. This method of settlement would be subject to the parties' agreement.

9. Extension of the duties of the Commissioner for Human Rights

142 The Group considers that the Commissioner should have the necessary resources to be able to play a more active role in the Convention's control system, acting either alone or in co-operation with European and national non-judicial bodies. In particular, the Commissioner should respond actively to the announcement of Court decisions finding serious violations of human rights. The Commissioner could also lend his assistance to mediation machinery at national level. Under his mandate, the Commissioner facilitates the activities of national ombudsmen and similar institutions. The Committee of Ministers might consider adopting a recommendation aimed at assigning them competence in human rights matters in all cases. The Group notes with approval that the

Commissioner is extending his current co-operation with national and regional ombudsmen and national human rights institutes in order to form an active network of all these institutions. This network could help to reduce the Court's workload with the active support of the Commissioner.

D. Concerning the institutional status of the Court and judges

10. The institutional dimension of the control mechanism

143 The Group thought that the existing legal framework should offer all the guarantees that are essential to ensure the independence of judges. In this connection, it considers the setting up of a social security scheme (coverage for medical expenses and pension entitlement) to be of vital importance.

144 The professional qualifications and knowledge of languages of candidates for the post of judge should be carefully examined during the election procedure. For this purpose, before the Parliamentary Assembly considers the candidatures, an opinion on the suitability of the candidates could be given by a committee of prominent personalities possibly chosen from among former members of the Court, current and former members of national supreme or constitutional courts and lawyers with acknowledged competence. As regards the members of the proposed Judicial Committee, the prior opinion should be given by the Court.

145 The Group also looked at the particularly sensitive issue of the number of judges. In the Group's opinion, the logic underlying the new role proposed for the Court and the setting up of the Judicial Committee should lead in due course to a reduction in the number of judges.

146 Lastly, in the interests of enhancing the Court's independence and effectiveness, the Group recommends granting it the greatest possible operational autonomy, as regards in particular the presentation and management of its budget and the appointment, deployment and promotion of its staff.[45]

2.9 San Marino Colloquy

The San Marino chairmanship of the CoE in 2007 organised a Colloquy on 22-23 March 2007 on the future developments of the European Court in the light of the Wise Persons' report. The aim was to feed into discussions among experts in the CDDH which would lead to decisions on a framework for the follow-up to the Wise Persons' Report.

2.10 Reflection Group

In 2008 a Reflection Group of 18 specialist members was set up to consider the follow-up to the reform of the Court and to report by March 2009. Its terms of reference were to examine the follow-up to recommendations in the Woolf Report and the Group of Wise Persons' report and to present an interim report on "measures that could be implemented without amending the Convention", as this would take time. The Group would also take account of the proposals contained in other contributions to the reform debate, from the CoE Parliamentary Assembly, the Court, civil society, the San Marino Colloquy, for example, and earlier reform initiatives. It would present a further report with proposals requiring amendment of the Convention, and draw up an evaluation of the initial effects of Protocol 14 after its first year in force.

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[45] CM(2006)203 15 November 2006, 15 November 2006

A number of human rights organisations, including Amnesty International, the European Human Rights Advocacy Centre (EHRAC), Interights, Justice, Liberty, the International Commission of Jurists (ICJ) and the AIRE Centre, submitted comments to the Reflection Group.

The CDDH adopted the Reflection Group's report "Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights" on 24-27 March 2008.

2.11 Stockholm Colloquy

The Stockholm Colloquy on 9-10 June 2008 under the Swedish Chairmanship of the CM focused on better implementation of the European Convention at national level. Ministers' Deputies asked the CDDH to prioritise tackling domestic remedies, in particular the excessive length of domestic proceedings, ways of raising States' awareness of judgments relevant to all CoE Member States, including through third-party interventions, and helping States to take account of the relevant principles in their domestic law in order to avoid Convention violations.

3 Recent developments

3.1 Measures identified by the Committee of Ministers

The CM has identified a number of measures based on proposals from the CDDH:

- The rapid submission (within six months of a judgment becoming final) by CoE governments of 'action plans' as defined in document CM/Inf/DH(2009)29rev and/or action reports covering both individual and general measures
- Continuing to improve on-line accessibility of execution information in pending cases (in 2009 extended to encompass most cases that were in principle closed)
- Drafting of a handbook (*vademecum*) on practice and procedure in execution (e.g. work on payment of just satisfaction prepared in 2008)

Action plans setting out more detailed remedial measures had been suggested in relation to new working methods in 2004. In March 2010 the CM repeated this request, emphasising that "information on the mere payment of just satisfaction cannot be considered to constitute a satisfactory action plan, and that the total, unmotivated absence of any provision on the part of the respondent state within six months of the date upon which the judgment became final is liable to slow down the process of supervising the execution of the European Court's judgments".[46]

Since 2006 the CM has encouraged cooperation activities for the execution of Court judgments (e.g. legal expertise, discussions and training programmes) to help respondent states to adopt more quickly the measures required by Court judgments. The CM's Recommendation (2008)2 on efficient domestic capacity for the rapid execution of Court judgments and the follow-up to this recommendation have also been important elements of the CM's execution supervision. In 2009 the CDDH prepared a further draft recommendation to States on effective remedies for excessive length of proceedings, together with a guide of

[46] "Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – elements for a roadmap" Document revised in the light of the discussions at the 1086th "Human Rights" meeting of the Committee of Ministers (1-3 June 2010)

good practice. The CM adopted this recommendation on 24 February 2010 (Recommendation (2010)3).[47]

3.2 The pilot judgment procedure

The Court's "pilot judgment" procedure, which had been discussed during the drafting of Protocol 14,[48] was first used in the Polish case of *Broniowski* in 2004. The Court uses the pilot judgment procedure to deal with systemic and repetitive human rights problems which surface in a large number of similar applications. The Court selects a "pilot" case and decides in that specific instance, indicating what remedies are called for in the individual case and also how the problem should be dealt with more generally by the country concerned. Pending the outcome of the pilot State's reaction, all the other comparable cases are put on a hold.

The pilot judgment procedure thus combines individual and general redress. It has been summarised as follows by Antoine Buyse of the Netherlands Institute of Human Rights (SIM):

> A pilot judgment could be said to address a general problem by adjudicating a specific case. This is done by going beyond the mere determination that the ECHR has been violated: in a pilot judgment the Court also gives general indications on how a state should remedy the underlying problem. Often this will involve legislative changes, for example when a national remedy is non-existent or insufficient. In doing so, the state concerned is called upon to resolve comparable cases. The Court's former President, Luzius Wildhaber, has identified up to eight different features of a pilot judgment.[...]
>
> (1) the finding of a violation by the Grand Chamber which reveals that within the state concerned there is a problem which affects an entire group of individuals;
>
> (2) a connected conclusion that that problem has caused or may cause many other applications to be lodged in Strasbourg with the European Court;
>
> (3) giving guidance to the state on the general measures that need to be taken to solve the problem;
>
> (4) indicating that such domestic measures work retroactively in order to deal with existing comparable cases;
>
> (5) adjourning by the Court of all pending cases on the same issue;
>
> (6) using the operative part of the pilot judgment to "reinforce the obligation to take legal and administrative measures", as Wildhaber phrased it;
>
> (7) deferring any decision on the issue of just satisfaction until the state undertakes action;
>
> (8) informing the main Council of Europe organs concerned of progress in the pilot case. The latter would include the Committee of Ministers, as the responsible organ for the Supervision on the execution of the Court's

[47] For statistical information and background on the reforms, see Annual report of the Committee of Ministers 2009

[48] But not included in the Protocol

> judgments, the Parliamentary Assembly, and the Human Rights Commissioner.[49]

From 2005 onwards the Court started to issue pilot judgments and the trend has continued. A major merit in this procedure, says Buyse, is that "When an international obligation has been violated by a state, there is not only a duty to repair, but also a duty of non-repetition. The future-oriented aspect of the general measures ordered in pilot judgments relate to this latter duty".[50]

Laurence R. Helfer, Professor of Law and Director of the International Legal Studies Program, Vanderbilt University Law School, has described the pilot judgment procedure as "international law's first class action mechanism", which has saved the Court time and labour and "dramatically publicized its determination to find comprehensive solutions to systemic human rights problems". He continued:

> The Court has since applied the pilot judgment procedure to civil and political rights violations in other member states.141 And it has indicated that its review encompasses not only identifying structural violations but also scrutinizing the legislation and administrative regulations that national governments adopt to comply with its remedial orders and recommendations.142 Stated differently, the ECtHR has arrogated to itself the power to monitor compliance with its most far-reaching judgments, a power that was previously the exclusive province of the Council of Europe's political bodies.[51]

Helfer also outlined some of the drawbacks of the pilot procedure:

> The very name 'pilot judgment' signifies that the ECtHR uses the first application that comes before it to address systemic violations of the Convention challenged in other complaints. But there is no guarantee that that first case accurately reflects all of the factual and legal issues raised by such violations. In addition, the first applicant enjoys privileged status relative to other complainants. During the time that the first complaint is under review, the other applications remain in stasis.171 More troubling is the possibility that the first applicant will negotiate a friendly settlement that favours an individual damages award over systemic non-monetary remedies.172 If the pilot judgment procedure is to serve as an effective tool for improving compliance with the Convention, the ECtHR must pay greater heed to the procedure's legitimacy. The Court must develop safeguards to ensure that class-wide relief applies to all similarly situated applicants and is appropriate to the systemic human rights issues it has adjudicated on.

3.3 The Interlaken Process

The "High Level Conference on the Future of the European Court of Human Rights" at Interlaken, Switzerland, on 18-19 February 2010, adopted the Interlaken Declaration, which contains an Action Plan to "provide political guidance for the process towards long-term effectiveness of the Convention system". This Action plan, known as the Interlaken process,

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[49] .Antoine Buyse, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges", *Nomiko Vima (Greek Law Journal)*, November 2009

[50] Buyse cites Valerio Colandrea, "On the Power of the European Court of Human Rights to Order Specific Nonmonetary Measures", *Human Rights Law Review* vol. 7 (2007) pp. 396-411, at pp. 408-410.

[51] *European Journal of International Law* Volume19, Issue1 , February 2008, pp. 125-159, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime"

addressed amongst other things the implementation of the Convention by Member States and supervision of the execution of judgments.

> **B. Implementation of the Convention at the 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. [...]
>
> **F. Supervision of 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; 6
>
> 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.

As part of the Interlaken process the CM has introduced new working methods. At a meeting on 14-15 September 2010, the CM endorsed the principle of a twin-track approach with a new system for the supervision of the execution of judgments, as set out in document CM/Inf/DH(2010)37, with the aim of implementing it from 1 January 2011.[52] The twin-track approach involves a "simplified supervision" and an "enhanced supervision". The CM described the new system as follows:

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[52] See decision 2 December 2010

7. **Simplified supervision** would entail only formal involvement of the Committee of Ministers at the end of the execution phase in order to endorse the measures adopted by the state on the advice of the Execution Department, which would have followed, in close cooperation with the state, the whole execution process (for example, monitoring of prompt implementation of the action plan, and positive assessment of the results presented in the action report). This lighter procedure should also permit speedy closure of cases by a final resolution[4]. This would obviously require information on the progress of action plans and information contained in action reports to be promptly transmitted and easily accessible by all delegations at all times (see below para. 15).

8. **Enhanced supervision** would be applied to cases which, due to their nature or the type of issue concerned, require the Committee of Ministers' attention as a matter of priority. Cases which might automatically be subject to this supervision method are:

- inter-state cases,

- pilot judgments and other cases raising significant and/or complex structural problems that may give rise to numerous repetitive cases,

- judgments requiring urgent individual measures.[53]

The Turkish chairmanship of the CM has organised a High Level Conference on the Future of the European Court of Human Rights on 26-27 April 2011 in Izmir. The CoE reports that "It will provide an important opportunity to take stock of progress made since the Interlaken Conference and take essential decisions for further work, whilst also reflecting upon the long-term future of the Court".[54] The comments of Amnesty International, the International Commission of Jurists, the AIRE Centre and Interights on the Draft Declaration for the Izmir High Level Conference (Draft of 22 March 2011) can be found on the Amnesty International website.[55]

The UK Government, which holds the chairmanship of the CoE from November 2011 to May 2012, has appointed an independent Commission to investigate the case for a UK Bill of Rights and to provide it with advice on possible reform of the European Court of Human Rights as part of the Interlaken process.

4 Further reading

- Rules of Court, July 2009

- Council of Europe, Human Rights and Legal Affairs Working Documents

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[53] "Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – elements for a roadmap". Document revised in the light of the discussions at the 1086th "Human Rights" meeting of the Committee of Ministers (1-3 June 2010). For further information, see CM information document, CM/Inf/DH(2010)45, final 7 December 2010 and webpage of Execution of Judgments of the European Court of Human Rights. For further suggestions on efficiency reforms, see also: Court Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference, 3 July 2009, and CM/Inf/DH(2010)37, 6 September 2010

[54] CoE website. See also Conference website.

[55] AI Index: IOR 61/006/2011

- Steering Committee for Human Rights, documents on reform of the European Convention

- Committee of ministers' supervisions of execution of the judgments of the European Court of Human Rights: collection of basic texts, dghl-exec/Inf (2010)4, December 2010

- *Council of Europe Factsheet* "Protocol 14 The reform of the European Court of Human Rights"

- *Human Rights Law Review* Vol 6, Issue 3, 2006, pp 578-584, "Beyond Protocol 14", Alastair Mowbray

- *Human Rights Law Review* Vol 9, Issue 4, 2009, pp 647-656, "Crisis Measures of Institutional Reform for the European Court of Human Rights", Alastair Mowbray

- "Applying and supervising the ECHR: Future developments of the European Court of Human Rights in the light of the Wise Persons' Report", San Marino, 22-23 March 2007, Colloquy organised by the San Marino chairmanship of the Committee of Ministers of the Council of Europe

- "Responding to Systemic Human Rights Violations: an Analysis of 'Pilot Judgments' of the European Court of Human Rights and their impact within national systems", Pilot Judgments Seminar, Strasbourg, 14 June 2010, "A possible role for the Council of Europe Commissioner for Human Rights in the pilot judgment procedure", Anne Weber

- "Strengthening Subsidiarity: Integrating the Strasbourg Court's Case Law into National Law and Judicial Practice", Committee on Legal Affairs and Human Rights Contribution to the Conference on the Principle of Subsidiarity, Skopje, 1-2 October 2010, 24 November 2010

- *Council of Europe* "The Pilot-Judgment Procedure", Information note issued by the Registrar

- "The role of Government Agent in a pilot judgment' procedure", 2010, Jakub Wołasiewicz, Polish Government Agent

- *Harvard Law Record*, "A hopeful future for European human rights: New commitments will make Europe's human rights regime more inclusive and efficient", Mattias C. Kettemann, 12 February 2010