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Committee on Legal Affairs and Human Rights

Report of the Group of Wise Persons on the long-term effectiveness of the European Convention on Human Rights control mechanism

Memorandum for the attention of the Bureau of the Assembly[1]

Rapporteur: Mrs Marie-Louise Bemelmans-Videc, Netherlands, EPP/CD

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I. Introduction

1. On 17 January 2007 the Ministers' Deputies *"decided to transmit the report* [of the Group of Wise Persons] *to the European Court of Human Rights, the Parliamentary Assembly, the Commissioner for Human Rights and the Secretary General, inviting them to submit their views on it by 20 April 2007, including, as appropriate, impact and cost assessments."*[2] On 26 January 2007, the Bureau of the Assembly, in turn, forwarded the Wise Persons report to the Committee on Legal Affairs and Human Rights (AS/Jur) in order to obtain its views, without prejudice to the opinion which the Assembly might formulate at a later stage.

2. At its meeting held in Strasbourg on 12 March 2007 the AS/Jur requested me, as Rapporteur on the implementation of the Third Summit Declaration and Action Plan, to prepare an information memorandum on the Wise Persons' report for the Committee's next meeting. At the same meeting the Committee also decided to invite the new President of the European Court of Human Rights, Mr Jean-Paul Costa, to an exchange of views on this subject, which is scheduled for 17 April 2007.[3]

3. As neither the AS/Jur nor the Assembly have yet had the opportunity to analyse the Wise Persons' report in depth, the aim of the present memorandum is limited to the Rapporteur's own initial observations on the Wise Persons report, without prejudice to the position the AS/Jur and the Assembly will take on this subject in due course.

[1] Approved and declassified by the Committee at its meeting on 17 April 2007.
[2] See full text of the Ministers' Deputies decision, taken at its 984th meeting. Copies of the Wise Persons Report can be found in document CM (2006) 203.
[3] See AS/Jur Synopsis of the meeting, No 2007/02, dated 14 March 2007.

II. Overview of the present situation

4. The European Convention on Human Rights (ECHR) protection mechanism confers on the European Court of Human Rights (the Court) both a role of individual supervision and a "constitutional" mission. The former consists in verifying the conformity with the ECHR and its protocols of any interference by a state with individual rights and freedoms and making findings as to any violation by the respondent state. Its "constitutional" function leads it to lay down common European standards relating to human rights and to determine the minimum level of protection which states must observe.

5. Given the explosion in the number of cases and despite the various measures taken, including the establishment of a single full-time Court in Strasbourg since 1998, the ECHR system is in danger of collapsing. In 1999, 22,650 applications were lodged and nearly 3,700 disposed of judicially. In 2006 over 50,000 applications were lodged of which 30,000 were disposed of judicially. Today, the Court in Strasbourg has more than 90,000 pending applications, of which about 25,000 are awaiting "regularisation", while about 22,000 are awaiting decision at chamber level

6. The Court is a victim of its own success. The long-term effectiveness of the ECHR control mechanism is now contingent on the successful implementation of the so-called "2004 reform package" and related measures[4] which, in accordance of the principle of subsidiarity places primary responsibility upon States Parties to secure the rights and freedoms contained in the ECHR and its protocols and on the need to reform the Strasbourg control mechanism without undermining the judicial character of European supervision and the right of individual application before the Court.

7. To enable it to perform its essential functions, the Court must find an appropriate way in which to deal with cases which are manifestly inadmissible or repetitive (totalling approximately 95% of applications brought before it) and, at the same time, concentrate its work on the most important cases and to deal with them as quickly as possible. Whether the so-called "2004 reform package", including entry into force of Protocol No 14 (see below) will suffice, is difficult to know right now. In the short term it should suffice, but not in the long run. Hence the decision of the Heads of State and Government, at the 2005 Warsaw Summit, to set-up a Group of Wise Persons *"to consider the issue of the long-term effectiveness of the ECHR control mechanism, including the initial effects of Protocol 14 and other decisions taken [by the Committee of Ministers] in May 2004."*[5]

8. Protocol No 14 to the ECHR, designed to give the Court the necessary procedural means for processing all applications within a reasonable time, while enabling it to concentrate on the most important cases, was adopted by all member states in May 2004. It seeks, in particular, to reduce the time spent by the Court on manifestly inadmissible and repetitive cases. Unfortunately, however, the protocol still needs to be ratified by one country (the Russian Federation) for it to enter into force.[6]

9. Discussions of the Group of Wise Persons' proposals have recently commenced at European and national levels. An important colloquy was held on this subject in San Marino on 22 and 23 March 2007, organised by the San Marino Chairmanship of the Committee of Ministers. This colloquy, at which I represented the Assembly, provided an opportunity to various partners concerned - including representatives of the governments, the Court and civil society – to discuss the Wise Persons' proposals as well as steps taken by member states to deal with the influx of applications.

10. The full text of my intervention at the colloquy can be found in Appendix I, and that of the Council of Europe's Deputy Secretary General's "Synthesis" of discussions, in Appendix II.

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[4] For more information on the "2004 reform" package see my memorandum, document AS/Jur (2006) 15, entitled "Implementation of the Third Summit Action Plan" and Committee of Ministers document CM(2006)39 final entitled " Ensuring the continued effectiveness of the ECHR – The implementation of the reform measures adopted by the Committee of Ministers at its 114th Session (12 May 2004)".

[5] Warsaw Action Plan, Part I Promoting common fundamental values : human rights, rule of law and democracy.

[6] For more details see document AS/Jur (2007) 09, "Non-ratification by the Russian Federation of Protocol No 14 to the ECHR: background information".

III. Rapporteur's views on the Wise Persons' main proposals

11. In the Rapporteur's view, discussion of the ECHR's long-term effectiveness is contingent on the successful implementation of the "2004 reform package". Also, the Group of Wise Persons proposals presuppose the entry into force of Protocol No 14 which, according to the Court's President, Jean-Paul Costa, will enable the Court to increase its productivity by at least 25%. Hence the need for the Council of Europe, including its Assembly, to monitor closely for a number years both the impact of Protocol No 14 as well as the effects of the "2004 reform" package and related measures before determining how best the present system should be overhauled. Discussion of the proposals of the Wise Persons has just begun and they will inevitably take several years to implement.

12. The report's main proposals are:

► ***Greater flexibility of the procedure for reforming the judicial machinery*** (see §§ 44-50 of the report). Making it possible for the Committee of Ministers to carry out reforms by way of unanimously adopted resolutions without an amendment to the Convention being necessary each time.

The Rapporteur considers that this idea merits further reflection. The proposal of instituting a more flexible system, contingent on the Court's approval is interesting, but would still need to be seen from another angle, namely the likely diminution of the role of parliamentarians in a situation where the classical ratification process might be abandoned.[7]

► ***Establishment of a new judicial filtering mechanism*** (see §§ 51-65 of the report). This new filtering body, which would be called the Judicial Committee, would perform functions which, under Protocol No 14, when it enters into force, are to be assigned to single judges (who would deal with clearly inadmissible applications) and committees of three judges (which would deal with repetitive cases) [8] This new judicial filtering body would ensure, on the one hand, that all individual applications result in a judicial decision and, on the other, that the Court – in its present composition - is able to deal more efficiently with the large number of clearly inadmissible and manifestly well-founded cases, enabling it to focus on its essential role.

The Rapporteur has strong reservations concerning this proposal: see §§ 17-19 in Appendix I for details.

► ***Enhancing the authority of the Court's case-law*** (see §§ 66-75)**.** Since the Convention forms part of the national law of the member states, the remedies available at national level must be effective and well known and accessible to citizens. Indeed, they form the first and – in the spirit of subsidiarity – the most important line of defence of the rule of law and human rights. Initially, it is for national courts to protect human rights within their domestic legal systems and to ensure respect for the rights safeguarded by the Convention. The Court's case-law should therefore be more widely disseminated.

The Rapporteur cannot but endorse this proposal. That said, further consideration should be given to see how best to ensure that the Court's "judgments of principle" can be implemented by domestic courts (see § 21 in Appendix I).

► ***Advisory opinions – co-operation between the Court and national courts*** (see §§ 76-86 of the report). Domestic courts could in future 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 would always be optional and the opinions given by the Court would not be binding.

The idea is interesting and of potential value, but the Rapporteur feels that this proposal needs further serious reflection, as indicated in her San Marino presentation (see §§ 17-19 in Appendix I).

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[7] See K. Drzewicki "Remodeling of the treaty-based system of European human rights protection" in The European Court of Human Rights. Agenda for the 21st century (Information Office of the Council of Europe, Warsaw, 2006), pp. 97-106, at p.103.

[8] For details, see document AS/Jur (2007) 09, referred to in footnote 5.

► ***Improvement of domestic remedies for redressing violations of the ECHR*** (see §§ 87-93 of the report)**.** 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 an improvement here. The Wise Persons have noted that the majority of states do not have domestic procedures for redressing damage resulting from the length of procedures and that there is a need to provide remedies to potential applicants at domestic level before they submit an application to the Court.

The Rapporteur fully endorses this idea. Indeed, in so far improvement of domestic remedies is concerned, she also draws the Committee's attention to Erik Jurgens' report in which explicit reference is made to the existence of major structural deficiencies and/or lack of such remedies in several countries (PACE Doc 11020, and Resolution 1516 (2006), §§ 18- 20).

► ***Award of "just satisfaction" by national courts*** (see §§ 94-99 of the report). Article 41, ECHR, needs to be changed whereby "just satisfaction", presently afforded by the Court, could be carried out more effectively by national bodies.

The Rapporteur has strong reservations concerning this proposal (see § 26 of Appendix I).

► ***Promotion of the "pilot judgment" procedure*** (see §§ 100-105 of the report)**.** With a view to facilitating the most speedy and effective resolution of problems in the relevant national legal order, the Court may designate a case for "pilot-judgment" procedure. This system is meant to prevent it being overloaded with large numbers of repetitive cases.

The Rapporteur finds this new procedure to be potentially very important, but like the Committee's First Vice-Chairman, Mr Jurgens, she feels that the manner in which "pilot judgments" develop still necessitates close scrutiny (see §§ 20-21 in Appendix I)[9].

► ***Possibility of friendly settlements and encouragement of mediation*** (see §§ 106- 108 of the report)**.** In order to reduce the Court's workload still further and to assist both victims and member states, the report encourages recourse to mediation at national or Council of Europe level with a view to achieving friendly settlements.

The ideas expressed on this subject by the Wise Persons are sensible and merit follow-up by states.

► ***Extension of the duties of the Commissioner for Human Rights*** (see §§ 109-113 of the report)**.** The Commissioner could promote the setting up of bodies with responsibility for resolving human rights violations through mediation at national level. Under his mandate, the Commissioner facilitates the activities of national ombudsmen and similar institutions. However, these are not always responsible for human rights matters.

This idea is likely to be discussed at the 10th Round table of European Ombudsmen to be held in Athens on 12-13 April 2007, to which national human rights institutions have been invited to participate by Mr Thomas Hammarberg, the Human Rights Commissioner. The exact manner in which the Human Rights Commissioner can play a more active role – perhaps as a "facilitator" - in the Convention's control system, including in the execution of the Court's judgments, needs to be carefully assessed in the context of the institution's present mandate (Committee of Ministers Resolution R(99)50) and the Commissioner's likely more pro-active role upon the entry into force of Protocol No 14, ECHR (see Article 13 of Protocol 14 and §§ 86-89 of the protocol's Explanatory Report).

► ***The institutional dimension of the ECHR control mechanism*** (see §§ 114-124 of the report)**.** The report discusses the 'legal framework' and greater operation autonomy for the Court, the need to ameliorate election procedures and to ensure candidates possess the necessary qualifications, including knowledge of languages, and the particularly sensitive issue of the reduction of the number of judges.

[9] See also, in this connection, Judge L Garlicki's article "Broniowski and after : on the dual nature of ' pilot judgments' " , in Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg views (eds. L. Caflisch and others, N.P. Engel, 2007), pp. 177-192.

As concerns "institutional issues", the Rapporteur agrees that these matters necessitate further reflection, in particular in the light of the Assembly's recent Recommendation 1763 (2006) on "The institutional balance at the Council of Europe".[10]

In so far as the subjects of election procedures and the number of judges are concerned, the Rapporteur's views on these issues can be found in her oral presentation at the San Marino Colloquy (see Appendix I, §§ 30-33 and § 17).

[10] Adopted by the Assembly on 2 October 2006. See, in particular, §§ 24-27 of the Recommendation which specifically concern the Court. This Recommendation, Doc 11017, is based on the report of the Assembly's Committee on Rules of Procedure and Immunities, Rapporteur Mr Scheider.

APPENDIX I

Colloquy on Future Developments of the European Court of Human Rights in the light of the Wise Persons' Report[1]
(San Marino, 22-23 March 2007)

Contribution
presented by Marie-Louise Bemelmans-Videc, member of the Parliamentary Assembly, Chairperson of Ad-hoc Sub-Committee for the election of judges to the ECtHR of the Committee on Legal Affairs and Human Rights

1. I am honoured to be invited here, to present my views in a personal capacity, without prejudice to the position the Parliamentary Assembly or its Committee on Legal Affairs and Human Rights might adopt on the proposals of the Wise Persons.

The diagnosis

2. I cannot but agree with the diagnosis presented by the Wise Persons in paragraph 37 of their report:
"*that there is a fundamental conflict between the size of the population who have access to the Court with the right to lodge an individual application and the Court's responsibility as the final arbiter in human rights matters for so many different states*."

3. Maybe the term "diagnosis", which makes us think of a patient, a sick person, is not quite fitting: whilst the Court is in a certain way becoming a victim of its own success, we must not loose sight of the fact that we are talking about a success story. The very fact that so many of our citizens find it worth their while, despite all the shortcomings of the system, to make use of the Court to ensure the respect of their rights under the Convention, is a resounding success. It is simply our responsibility now to provide the right conditions to enable the Court to continue this success story. Clearly, the Wise Persons have made an important contribution to this endeavour.

The Court's double role

4. I agree with the basic analysis of the Group of Wise Persons that the Court has a double role – a "constitutional" mission of "*laying down common principles relating to human rights and to determine the minimum level of protection which states must observe*", and a role of individual supervision and adjudication.

5. In my view, the Court's two functions are inextricably joined together, very much like the functions of those of many national constitutional courts which, in addition to their jurisdiction over disputes between organs of the state on the interpretation of constitutional provisions determining their powers, also have the function of deciding on "constitutional complaints" of individual citizens, who claim that their fundamental rights as guaranteed in the constitution have been violated by decisions of the executive, or even by ordinary civil or administrative courts that have rejected their claims. These constitutional courts have likewise been confronted with the need to develop strategies to avoid becoming a "fourth instance" and to deal effectively with huge numbers of obviously inadmissible or substantively unjustified applications – but to my knowledge, none of them have abandoned the adjudication of constitutional complaints of individual citizens to "lesser" judges. For the highest judges of the land to continue facing the flood of ordinary citizens' grievances is seen by them not so much as a burden, but as a useful and necessary link with reality, a direct link with the individual.

6. I am convinced that this link with the grievances of a large number of ordinary individuals from all 46 member states must be preserved. The Court is unique because of its direct "link" to the individual, who under the Convention is a fully fledged party before this international judicial body, reminding governments of their promises and pledges. This direct link also creates the dynamics in the Court's judgements where social change is reflected in the cases brought before the Court.

[1] See Doc CM (2006) 203, dated 15 November 2006.

7. The Court has a pioneering role in trying to find a consensus on the values incorporated in the Convention and its protocols, which have often, with the passing of time, acquired a new meaning. The Court is a 'living instrument' which must keep pace with social change and translate new orientations into specific, binding decisions.

8. Which brings me to a role that I find crucial in the Court's functioning and which is explicitly recognised in the Wise Persons' report: the role the Court plays in the cultural dialogue, that is the dialogue on values, which represent "the common good", the '*bonum commune'* of a conglomerate of nations. As Mr Luzius Wildhaber, Mr Jean-Paul Costa's distinguished predecessor as President of the Court, has explained in an interview with a Dutch journalist: "*Fundamental freedoms and human rights are guaranteed in very wide formulas which are utopian, programmatic and ideal, and which require someone to give them a concrete shape. Judges have the 'final say' in this*."

9. Yes, the Court has the 'final say', but this 'say' will be rooted in a (growing) consensus, nourished and legitimised through dialogue.

10. The need for a dialogue among cultures on the rights of all people and of the human being in its fullness seems to have never been more urgent. This dialogue can only be successful if countries are not only involved but also *feel* involved, and their cultures have an attitude that allows for self-criticism.

11. The same direct link to the citizen is also a basic feature of the Parliamentary Assembly. In the words of the Belgian Prime Minister Guy Verhofstadt: "*The Council of Europe is particularly well equipped to listen to the voices of citizens. Members who sit in the Assembly have a double mandate to represent citizens at their national parliaments as well as the Council of Europe. They are therefore in an ideal position to represent the views of European citizens*." Intercultural and indeed also interreligious dialogue is one of the priorities set by the President of the Parliamentary Assembly, René van der Linden, in the following terms: "*The members of our Assembly directly represent 800 million citizens, 800 million people with different cultures, different nationalities, a wide range of political views and religious beliefs, but who are united by common values. Values that can strengthen social cohesion in our societies and further peace and stability on our continent*."

12. For me as a member of the Parliamentary Assembly, four comments on the Wise Persons' report flow directly from this analysis of the Court as a privileged *locus* of dialogue:

13. Firstly, I welcome the different proposals aimed at improving dialogue between the European Court of Human Rights and the national courts, e.g., placing more emphasis on human rights training for national judges, maintaining and expanding working relations between the Strasbourg Court and the highest national courts. Here, as we have heard from Ms Ingrid Siess-Scherz this morning, the full implementation of the 2004 "reform package" accompanying Protocol 14, at the national level, will make a significant contribution to alleviating the Court's case law. As a national parliamentarian, I am aware of my and my colleagues' responsibilities in this respect.

14. In this connection, it is indeed worth reflecting upon the idea of creating the possibility for national courts to request the European Court of Human Rights to give advisory opinions on questions of the interpretation of the Convention. While I agree with the Wise Persons that requests for such opinions should be optional, and that the Court should have the discretion to refuse to answer a request for an opinion, the counter-argument concerning this idea still merits further reflection. For, as the Wise Persons themselves recognised, the proliferation of requests for opinions may have adverse effects on the Court's workload and resources.

15. Secondly, I welcome the Wise Person's support for the improvement of dialogue by the extension of the role of the Council of Europe's Commissioner of Human Rights and the network of national ombudspersons and national human rights institutions, referred to by Mr Thomas Hammarberg as "National Human Rights Structures". These alternative or complementary means of resolving disputes could indeed help reduce the Court's workload by addressing systemic problems at national level before they trigger a large number of applications to the Court. I very much look forward to tomorrow's contribution of Mr Thomas Hammarberg on this subject.

16. Thirdly, I welcome very much the Wise Persons' support for the right of individual application and its rejection of various proposals for the establishment of filter mechanisms at the national level, or of a US-style procedure of "*certiorari*". The Assembly has expressed its attachment to the right of individual application so often and so clearly that I cannot afford to go into any more detail here without creating the impression of weakening this commitment in any way.

17. And fourthly, and for the same reasons, I feel a bit uncomfortable with the Wise Persons' statement (para. 35) that the Court should be "*relieved*" of manifestly inadmissible applications or repetitive cases which "*distract*" it from its essential role. Adjudicating individuals' applications complaining about violations of their Convention rights by States Parties *is* the Court's essential role, which creates the unique link between the Court and individuals whose importance I tried to explain before.

18. I therefore think that the proposal of the creation of a "judicial committee" composed of somewhat "lesser" judges - although the Wise Persons did not say so, the proposed modalities do imply a clear hierarchy - to deal with clearly inadmissible or repetitive cases needs further serious reflection. Can we still justify the unusually high number of judges, by comparison with other international courts, if they are to deal exclusively with the Court's "constitutional" function? Would the authority of decisions in "repetitive" cases not suffer from being decided by the lower tier of a two-tier system of judges? We are, after all, talking about cases in which member states are found to violate Convention rights of large numbers of individuals, in such vital - often in the literal sense of the term - cases as inhuman conditions of detention, overtly long or otherwise unjustified pre-trial detention (often also in inhuman and degrading conditions), etc. Repetitive cases, rather than being a "distraction", may often be indicative of a systemic problem within a state that needs to be addressed urgently.

19. No doubt it is necessary, and quite feasible, to deal with such cases in an efficient manner – very much in the interest of the victims of violations themselves. The rule of "justice delayed is justice denied" applies also at the European level. The Strasbourg Court cannot, without losing its credibility, take five or six years to decide that domestic legal proceedings lasting the same amount of time are too long and in violation of Article 6 of the Convention!

20. While I tend to agree that the "pilot judgment procedure" is a significant development, I should like to express a note of caution. The definition and criteria for this procedure have yet to be defined, and the weakness of its legal basis has already been pointed out by Judge Zagrebelsky. In two partly dissenting opinions[2], Judge Zagrebelsky recalled that this procedure, although approved by the Committee of Ministers, is not yet reflected in the text of the Convention. He considers that the Grand Chamber is the proper forum for identifying the existence of systemic problems and drawing the necessary consequences therefrom[3]. Please also allow me to refer, in this connection, to the report on the "Implementation of judgments of the European Court of Human Rights" of my Dutch parliamentary colleague, Mr Jurgens, in which he pointed out that this procedure deals with complex systemic problems on the basis of a single case without necessarily revealing possible other related aspects in similar but not identical cases. Hence the danger that "pilot judgments" may not allow for a comprehensive assessment of a systemic problem. And – in the meantime - all other related cases may be 'frozen', further delaying their determination by the Strasbourg Court[4].

[2] in *Hutten-Czapska v Poland* (judgment of 19 June 2006), he stated on the one hand that the arguments set out by the Committee of Ministers in Resolution Res(2004)3 and Recommendation Rec(2004)6 of 12 May 2004, which are addressed to governments, "are undoubtedly of much importance and must be taken into account by the ECtHR with a view to ensuring that the reasons given in its judgments are as clear as possible". On the other hand, he disputed that the "fact that the proposals to which the ECtHR refers in paragraph 233 of the judgment were not included in the recent Protocol No. 14 amending the ECHR" cannot be overlooked.

[3] Partly dissenting opinion of judge Zagrebelsky in the case of *Lukenda v. Slovenia* (judgment of 6 October 2005).

[4] Parliamentary Assembly doc. 11020, of 18 September 2006, "Implementation of Judgments of the European Court of Human Rights.". See also, on this subject, Assembly Resolution 1516 (2006) and Recommendation 1764 (2006).

21. Pilot judgments would in most instances concern principally, but not necessarily, the same member state. This leads us to the question of whether Grand Chamber judgments should have some form of "precedent value", not to say an *erga omnes* effect. This issue concerns a complex interplay between Articles 46§2, 1, 13 and 19 of the Convention. The Group of Wise Persons refrained from making any proposals concerning such "judgments of principle" (see paragraphs 66 to 69 of the Report). Yet this aspect of the Court's authoritative interpretation of the Convention and its protocols deserves deeper reflection, especially when one looks at such "judgments of principle" as the *Marckx case* [5] and the Court's *obiter dictum* in the case of *Ireland v UK*.[6]

22. Also, before rushing to another stage of the process of the Court's reform, after Protocols 11 and 14, let us allow the Court to fully implement reforms that have already been decided upon.

23. The 14th Protocol - whose entry into force is now contingent on ratification by Russia - and with respect to which our Committee chair Dick Marty and his colleague of the Monitoring Committee, Eduard Lintner, will in early April be travelling to Moscow to discuss this subject with their colleagues of the Russian State Duma - holds a number of possibilities to streamline and simplify the Court's procedures. The single judge empowered to dispose of evidently inadmissible cases as well as the committee of three judges for handling manifestly well-founded cases have the potential of ensuring speedier resolution of such cases and increasing the Court's capacity. Before acting upon any further proposals that may alter the very essence of the unified Court, the effects of these reforms, and of the additional admissibility criterion laid down in Protocol 14, ought to be monitored for some time. They should be assessed in a transparent way, associating the Assembly as well as non-governmental institutions representing the interests of all stakeholders, including applicants and potential applicants.

The Court's role and the principle of subsidiarity

24. As you know, the political party I belong to strongly believes in the principle of subsidiarity – allowing the lower level of society, closer to the individual, to deal with problems before the next higher level takes over – the family before the local community, the local community before the region, the region before the country, the country before Europe. This principle should also apply to the resolution of legal issues. But it must be tempered by the need to protect the equality of treatment and the application of uniform standards - or at least common minimum standards - of human rights protection for all 800 million individuals served by the European Court.

25. I therefore agree with the Wise Persons that improving domestic remedies for redressing violations of the Convention is essential, especially as concerns the length of proceedings. In this respect, our Committee has recently broken new ground by including, in the list of commitments to be made by Montenegro in joining the Council of Europe, the establishment of a new remedy for individuals who consider themselves victims of excessively lengthy court proceedings.

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[5] Judgment of 13 June 1979. Interestingly enough, on 18 January 1980 the Dutch Supreme Court (*Hoge Raad*), basing itself on the Strasbourg Court's judgment, decided to follow the Strasbourg Court's reasoning concerning the negative legal consequences of maintaining the legal, discriminatory, distinction between 'legitimate' and natural children.

[6] *"[T]he Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19)"* (judgment of 18 January 1978, § 154). See also, in this connection, e.g., Section 2(1) of the UK Human Rights Act, 1998, which obliges courts to "*take into account*" the Strasbourg Court's case-law, and the German Federal Constitutional Court's judgment, of 14 October 2004, in the *Görgülü case*, www.bundesverfassungsgericht.de.

26. But I am not so sure whether we should take subsidiarity so far as to delegate to national courts the determination of "just satisfaction" in the case of a Convention violation determined by the Strasbourg Court. This threatens to undermine the equal treatment of victims of human rights violations, and places yet another potentially time-consuming procedure in the path of applicants before they can finally obtain satisfaction. From the point of view of the applicant, the procedure is already too long and cumbersome, and as a parliamentarian, I have certain reservations to the idea of adding another layer of procedure (not to mention possible 'appeals' to Strasbourg if the amount of "just satisfaction" is considered insufficient).

The Assembly's role

27. As I made clear in the beginning, I have made these brief comments in my personal capacity. In due course, I will present a more elaborate version of my views to the Committee on Legal Affairs and Human Rights, which will adopt a position that will also need to be discussed by the Assembly as a whole. In due course, the Committee of Ministers will be informed of the position of the Assembly, which takes the Court and its future development much too seriously to come up with quick answers or proposals that have not been thoroughly considered.

28. The Assembly has consistently shown its support for the Court, as demonstrated by the recent reports of my compatriot Erik Jurgens on the Implementation of the Court's judgments and of my EPP colleague Christos Pourgourides on member States' duty to cooperate with the Court[7]. As our Committee stressed in adopting Mr Pourgourides' report, this duty includes protecting applicants and their lawyers from undue pressure, and the need to fully cooperate with the Court in establishing the facts of the cases before it.

29. Please permit me to draw your attention to the fact that Mr Pourgourides' report touches upon Article 38 of the Convention. In this connection, it would be interesting to ponder over how the Court is able to reconcile the need to clearly establish the facts where they are disputed and at the same time limit the need for *in loco* investigations? The Court's fact-finding procedures consume an enormous amount of time and energy of the judges and registry officials. That said, the Court must nevertheless continue to address human rights violations in "trouble spots" in a meaningful way, even – and I would even say: especially! - when underlying facts are disputed.

30. You can count on the Assembly, and in particular its Legal Affairs and Human Rights Committee, to help maintain the authority of the Court. The reports by Messrs Jurgens and Pourgourides bear witness to this. But this authority of the Strasbourg Court also depends on the irreproachable moral and professional qualities of the judges elected by the Assembly, on the advice of the Sub-Committee that I have the honour of chairing.

31. This prompts me to devote my final comments to this issue. I am well-placed to assure you, first of all, that the Assembly already applies to the best of its ability an 'election procedure' summed-up so ably by the Wise Persons, including the need for states to propose candidates of the highest professional and moral standing, with appropriate linguistic abilities.

32. The Wise Persons refer to the selection process at the European level, recommending the involvement of "prominent personalities" to advise the Assembly on the professional qualities of candidates, a proposal which merits consideration. In my own experience, it is especially important to ensure the best possible and above all transparent selection procedures at national level.

33. A report on this subject is presently under preparation. In this connection, it will be interesting to find out how many states already now operate open and transparent procedures like those in the United Kingdom and (if I may) in the Netherlands. These procedures involve a public announcement of the vacancy followed by a transparent pre-selection procedure by a panel of recognised experts, making it very hard for politicians to deviate from objective criteria in order to place a less qualified "political friend" on the list. Such a transparent and 'objective' procedure at national level supports the work in finalizing the selection in my Sub-Committee and in the Assembly.

[7] See Parliamentary Assembly Doc. 11183 of 9 February 2007

34. Please permit me a last, but important remark. At its forthcoming part-session in April the Assembly will devote a day to the subject of the "situation of human rights and democracy in Europe" which will no doubt underline the significant work of all the Organisation's core human rights institutions and monitoring bodies. Here, one proposal that is likely to emerge from discussions necessitates, in my view, renewed priority treatment, namely accession of the European Union/European Community to the European Convention of Human Rights. The implementation of any proposals to safeguard the remarkable *acquis* of the Strasbourg Court must be seen in a wider context. Hence the need, first and foremost, to ensure that there are no unnecessary competing and potentially conflicting systems of human rights protection in Europe.

I thank you for your attention.

APPENDIX II

Colloquy on "Future developments of the European Court of Human Rights in the light of the Wise Persons' Report" (San Marino, 22-23 March 2007)

Synthesis of the Colloquy

Speech by Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe

…

Let me start by thanking again the San Marino authorities for having taken the initiative to organise and host this Colloquy to reflect, at a high technical level, on the fundamental question of the future development of the European Court of Human Rights in the light of the Report of the Wise Persons. Let me also thank all participants for their active participation, their useful insights as well as for the many constructive ideas put forward.

My role this morning is not to provide you with conclusions but to give you a synthesis which does not close the discussions as these should and will continue. The Colloquy has indeed provided interesting food for thought for further work which will help preparations for the 117th Ministerial Session which will be held in May 2007. The Committee of Ministers and the intergovernmental committees of the Council of Europe will reflect further on the important proposals put forward by the Group of Wise Persons and the extremely rich discussions at this Colloquy. It is important not to lose this momentum.

I count on your understanding that it is simply impossible for me to do justice to all the speakers and thought-provoking interventions which have contributed to animated debates over these two days not only in the room but also during our social gatherings. I will merely try to extract from these debates some elements which in my view emerge as pointers for our priorities in the immediate, short and long term. In other words, a picture of where we stand today and some broad indication of where we should go from here.

In the immediate term, there is not a shadow of a doubt that everything should be done to ensure that Protocol 14 enters into force without delay. We have all heard President Costa's solemn appeal to the Russian Federation to ratify the Protocol before 1 July, and he is absolutely right in stressing that the different organs and institutions of the Council of Europe are ready to work with our Russian friends to achieve this. Let's give Protocol 14 a chance !

Many of you have underlined that the entry into force of Protocol 14, and acquiring some experience with its operation and effects, is a precondition for any further reform of the Convention system in the future. It is simply not yet possible to make a full assessment today of the kind or scale of reform which should be contemplated. This of course also constituted a real handicap for the work of the Wise Persons and the fact that they produced such a high-quality report under these circumstances is testimony to the collective wisdom assembled in the Group doing justice to its title.

However, waiting for Protocol 14 does not mean that we are bound to remaining passive. On the contrary, there was general agreement that it is urgent to start considering measures, not dependent on Protocol 14, which could be implemented in the short term. I will highlight just a few of the ideas mentioned in our discussions, some of which are among the Wise Persons' proposals or Lord Woolf's recommendations, without claiming that they all received universal support.

Many interventions stressed the potential of the Court's developing practice of adopting pilot judgments and suggested that its use and its potential be kept under close review in order to reflect on any flanking measures which could be adopted at national and/or European level. The idea of CoE monitoring of compliance with pilot judgments could be one such measure. It would indeed make a big difference if we could achieve a situation where the Court would no longer be required to deal with the merits of repetitive cases.

Furthermore, as Lord Woolf has recommended it was suggested that the Court should redefine what constitutes an application. As the Secretary General put it, one may wonder whether it is really necessary to systematically count each and every piece of paper reaching the Court as an application.

Support was also expressed for equipping CoE Information Offices in high case-count countries with an information desk to provide practical assistance to applicants, although some pointed out that this should not lead to provision of legal advice.

Translation and wider dissemination to target groups of the Court's key judgments in languages other than French or English is a further example of a short term-measure. While this is primarily a responsibility of each member state, the Council of Europe already supports some activities of this kind and we should examine how we can work together more systematically to make the case-law more easily accessible in all countries, including, but not exclusively, electronically.

Similarly, support was expressed for the important efforts of the Commissioner for Human Rights to work in cooperation with national human rights institutions and Ombudsmen, whilst fully respecting their respective independence. This enhanced cooperation covers areas such as better dissemination of European standards, addressing systemic problems, promoting execution of judgments, encouraging recourse to pilot judgments and promoting full implementation of the 2004 Recommendations of the Committee of Ministers. This work will be all the more effective in that the European Convention is now part of the law of the Land in all member States.

Part of the short term measures is what the Secretary General described as "accompanying measures": the first of which is ensuring that the Court will continue to be surrounded by a crucially important supporting environment of Council of Europe activities : standard-setting, monitoring and capacity-building. I cannot but warmly welcome President Costa's very important statement that increases for the Court's budget should not be at the expense of the Council of Europe. Such approach would be extremely short-sighted indeed. Let's not put in danger the very activities that will in the long term be the only ones which will take away the root-causes of the Court being overburdened.

In the same category falls the full implementation of the 2004 Committee of Ministers reform package and the Recommendations adopted by the Committee of Ministers concerning measures to be taken at national level. This work of the CDDH is crucial, but it is worrying to hear that there are some difficulties, especially in assessing the existence and real impact of national measures taken. There seems to be a need to reinvigorate this process and to mobilise support for it, from NGOs and national human rights structures, but also in-house, from the Human Rights Commissioner, the Venice Commission, the CEPEJ, and possibly other bodies. Perhaps one should try to be more inventive in addressing this issue.

I will now move on to what one could call long-term measures. To be absolutely clear about what I mean here: these are measures which would take considerable time to elaborate and even more time to take effect. But precisely because they will take time, it will be important to initiate consideration of them in the short term.

It is here, of course, that the Wise Persons' Report offers interesting perspectives, even if not all their proposals received unreserved support at this colloquy.

Our debates have shown that two proposals in particular proved controversial. Several participants saw important disadvantages in the just satisfaction proposal, arguing that it would risk complicating and prolonging the procedure, creating divergent standards, or that it would not fit in well with domestic judicial infrastructure for dealing with damages. It might be interesting to explore whether it some of these concerns could be accommodated along the lines suggested by Judge Thomassen, distinguishing between pecuniary and non-pecuniary damage.

Many interventions addressed the proposal to institute a judicial committee which would be responsible for filtering applications. While it was made clear that this proposal differed in important respects from earlier proposals for a separate filtering body, several participants believed that some critical questions remained unanswered. I will not go into detail here, but merely recall that some concerns were expressed about whether this change would make a real difference in terms of the effectiveness of the Convention system whilst others criticised the suggested departure from the practice so far of one State, one judge. Such departure was felt to sit ill with the idea of equality of States in the Convention system and with the notion that the legal systems of all States Parties should be represented on the Court the addition of an ad hoc national judge being regarded as insufficiently covering the need for coherence in the Court's case-law.
An interesting variant was suggested which might avoid at least some of these disadvantages, since it would involve rotation among the current judges, alternating filtering tasks and adjudication on the merits. Another idea voiced is the possibility to increase the number of judges, for example by adding judges at the expense of the states concerned, or a creative use of the ad hoc judge provision.

In any case, major structural changes, like the introduction of a judicial committee, would need to be reconsidered as part of a much broader reflection should the need for radical reform arise, including on the functioning of the Court: today and in the light of the operation of Protocol 14.

The proposal concerning advisory opinions received mitigated support. While many thought it intellectually sound, the main objections raised against it were that it would not necessarily reduce the workload of the Court (rather the opposite), that it might be difficult to reconcile with the Court's contentious role and with the responsibility of the national judge under the Convention.

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Some other proposals of the Wise Persons were largely welcomed as useful avenues for further work, which could start soon.

First, the proposal to make it easier to adapt the Convention machinery received broad support. Making this possible however would require an amendment to the Convention empowering the Committee of Ministers to so and would be without prejudice to the power of the Court to adopt its own rules of procedure. It was recognised that this proposal did not receive sufficient attention during the drafting of Protocol 14 simply for lack of time.

Second, several participants expressed support for the proposal to adopt a new Council of Europe Convention containing obligations for member States as regards the availability, functioning and effectiveness of domestic remedies, in particular concerning excessive length of proceeding cases. The relevant Committee of Ministers Recommendation could serve as a starting point for this work.

There is no reason why these last two proposals could not already now be studied in greater detail by the Steering Committee on Human Rights.

Ladies and Gentlemen,

This Colloquy is part of a much broader process, triggered off by the Wise Persons' Report. Without prejudging the decisions to be taken by the Committee of Ministers, the next steps in this process will probably include preliminary discussions among governmental experts in the Steering Committee for Human Rights next month and, a month later, the 117th Ministerial Session of the Committee of Ministers of the Council of Europe. On that occasion, decisions will undoubtedly have to be taken to set the framework for future follow-up to the Wise Persons' Report, a process which I trust will be open to all the ideas expressed during these two days and give a rightful place to all relevant stakeholders: governments, the Secretary General, the Parliamentary Assembly, the Human Rights Commissioner, the NGOs, and national structures, and, last but not least, the Court itself.

I trust that the San Marino Colloquy will mark a new phase in the reflection on measures to secure the long-term effectiveness of the Court and, as such, give a fresh impetus to the whole process. I should like to thank and congratulate our hosts, the government of San Marino, not only for their excellent initiative to organise this Colloquy but also for the warm hospitality they have extended to all of us, which witnesses, once more, the excellent way in which your country chaired the Committee of Ministers of the Council of Europe.

Grazie a tutti e grazie a San Marino.