



AS/Jur (2011) 44

4 November 2011

ajdoc44 2011

Committee on Legal Affairs and Human Rights

Guaranteeing the authority and effectiveness of the European Convention on Human Rights¹

Report

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A. Draft resolution

1. The Parliamentary Assembly pays tribute to the extraordinary contribution that the European Court of Human Rights (the Court) has made to the protection of human rights in Europe. In so doing it recognizes the subsidiary nature of the supervisory mechanism established by the European Convention on Human Rights (the Convention), notably the fundamental role which national authorities, namely governments, courts and parliaments, must play in guaranteeing and protecting human rights.

2. The Assembly reiterates that the right of individual application, which lies at the heart of the Strasbourg machinery, has to be preserved in essence, and that the Court must be in a position to dispose of applications within a reasonable time, while maintaining the quality and authority of its judgments. It follows that priority must be given to difficulties encountered in states which do not appropriately implement Convention standards. Therefore, the Court should be encouraged to continue to prioritise cases in line with its recently adopted policy.

3. From this it transpires that, in order to ensure the long-term effectiveness of the Convention system, there is a need to strengthen and enhance the authority of Convention rights at the national level (including the *res interpretata* authority of the Court's case law); to improve the effectiveness of domestic remedies in states with major structural problems, and to ensure rapid and effective implementation of the judgments of the Court. National parliaments can play a key role in stemming the flood of applications submerging the Court by, for instance, carefully examining whether (draft) legislation is compatible with Convention requirements and by ensuring that states promptly and fully comply with the Court's judgments.

4. In this connection, the Assembly reiterates its call for parliaments to establish appropriate internal structures to ensure rigorous and regular monitoring of states compliance with international human rights obligations ([Resolution 1823 \(2011\)](#) National parliaments: guarantors of human rights in Europe) and, in particular, effective parliamentary oversight of the implementation of the Court's judgments ([Resolution 1516](#) (2006) on the implementation of judgments of the European Court of Human Rights, paragraph 22.1).

5. As the post-Interlaken debate on the future of the Convention system does not sufficiently take into account the role of parliaments ([Resolution 1823 \(2011\)](#), paragraph 5.2), the Assembly, as well as national parliaments, must ensure that they are provided with an opportunity to scrutinize reports which member states have been required to submit to the Committee of Ministers on national implementation of relevant parts of the Interlaken and Izmir Declarations.

¹ Draft resolution and draft recommendation adopted unanimously by the Committee in Paris on 16 November 2011.

6. Finally, the authority and effectiveness of the Convention system is contingent on the political will and commitment of member states to provide the Organisation with appropriate financial means to implement its human rights mandate. The difficult budgetary predicament in which the Council of Europe finds itself must be given urgent attention in member states, especially the legislative branches of state authority, given the latter's decisive role in the determination of state budgetary appropriations.

B. Draft recommendation

1. The Parliamentary Assembly, referring to its Resolution ... (2012) on Guaranteeing the authority and effectiveness of the European Convention on Human Rights, strongly urges the Committee of Ministers, as the statutory guarantor of the supervisory system's viability, to ensure that:

1.1. the Council of Europe's difficult financial predicament be tackled at the highest political level to permit the Organisation to implement its human rights mandate effectively;

1.2. the Parliamentary Assembly, as well as national parliaments, are fully involved in the implementation of the "Interlaken process," and are provided with the opportunity to scrutinise state reports submitted in this context.

2. The Assembly further urges the Committee of Ministers to address a Recommendation to the member states calling on them to reinforce without delay, by legislative, judicial or other means, the interpretative authority (*res interpretata*) of the judgments of the European Court of Human Rights.

C. Explanatory memorandum by Mrs Marie-Louise Bemelmans-Videc, rapporteur

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1. Introduction

1. Subsequent to the Parliamentary Assembly's current affairs debate held on 2 October 2007 on 'The looming crisis facing the European Court of Human Rights: urgent action needed',² the Bureau of the Assembly requested the Committee on Legal Affairs and Human Rights (AS/Jur) to present a report on this subject. I was appointed Rapporteur on 12 November 2007. On 6 March 2008, I presented an outline report to the Committee, in which I proposed a change in the title of the report. The Committee accepted this proposal, as it was agreed that there was a need to widen the scope of the topics to be covered in the report. Hence - as the report's new title suggests - in order to guarantee the authority and effectiveness of the Convention system, discussion of this subject must encompass not only issues directly connected to the Court's own functioning, but also closely linked subjects such as the Council of Europe's budgetary predicament, the domestic (non-)implementation of Convention standards and the need for prompt and full compliance with Strasbourg Court judgments.³

2. This report should be seen as a contribution to the longstanding debate on the future of the European Human Rights Convention (ECHR) system. It provides an overview of measures taken in recent years to try and respond to the call for reform of the system (**Part 2**),⁴ to ponder over how greater institutional efficiency and effective enforcement of Convention standards can be attained, and provides "food for thought" as to how the authority of the judgments of the European Court of Human Rights (the Strasbourg Court) can be consolidated and reinforced.⁵ I have, intentionally – and somewhat arbitrarily – decided to deal with "selected issues" (in **Part 3**) which, in my view, merit the particular attention of the Assembly.

² See PACE doc. AS (2007) CR 31, available at

<http://assembly.coe.int/Main.asp?link=/Documents/Records/2007/E/0710021500E.htm>.

³ See, in this connection, e.g., Assembly Resolution 1787 (2011) and Recommendation 1955 (2011) on Implementation of Judgments of the European Court of Human Rights, adopted on 26 January 2011, based on a report (doc. 12455) prepared by Mr C. Pourgourides, the AS/Jur's outgoing chairman, available at

<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1787.htm>,

<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/EREC1955.htm> and

<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12455.htm>, especially §§195 to 208 therein, in which reference to additional background information can be found.

⁴ When reference is made, in this report, to the Convention, this usually also encompasses the substantive rights guaranteed in the Convention's protocols.

⁵ In my view, the two "key" reports on this subject – since the entry into force of Protocol No.11 to the Convention in 1998 - are those of the Evaluation Group to the Committee of Ministers on the ECHR (2001), Chaired by Ambassador J. Harman, and the Report of the Group of Wise Persons to the Committee of Ministers (2006, doc. CM(2006) 203). Both texts can be found in Reforming the European Convention on Human Rights. Work in progress (2009, Council of Europe Publishing), pp.563-628.

3. Since the Ministerial Conference on Human Rights in Rome, in November 2000, several Council of Europe bodies, in particular the Committee of Ministers, principally through its Steering Committee for Human Rights (CDDH) and other working groups, have put substantial time and effort into dealing with these subjects.

4. Most recently, these efforts materialised in the Interlaken⁶ and Izmir⁷ Conferences in February 2010 and April 2011, respectively (as well as the entry into force of Protocol No. 14 to the Convention in June of 2010). These developments reflect substantial efforts that have been, and are still being, undertaken to attain the goals referred to above.⁸

5. The aim of this report is not to repeat, in detail, or even to summarise all the work undertaken on this subject. As indicated above, I believe that we, as parliamentarians, should focus our attention on issues which are of direct relevance to us in our work and which merit the special attention of the Assembly. That said, any work on this subject must be seen in the context of two major "impediments" which few leaders in Council of Europe member states are ready to openly confront: the issue of certain states' insufficient commitment to, not to say procrastination in, abiding by human rights standards set in the Convention⁹ and the Council of Europe's untenable budgetary predicament,¹⁰ to which can be added the need to strongly react to recent - often gratuitous and inappropriate - criticism of the Strasbourg Court's case-law.¹¹

2. Overview of the present situation

6. Since its entry into force in 1953, the ECHR system has rightly been heralded as one of, if not the most effective legal mechanism for the protection of international human rights.¹² However, it has also been recognized that the system's ability to meet the "challenges resulting from its own success" is vital to its continued viability, namely finding the means efficiently to manage the influx of cases that create a significant backlog in the Court's docket without losing sight of the ECHR's fundamental purpose as the collective guarantor of human rights in Europe.¹³ In 2006 the backlog stood at 86,000; now there are over 160,000 applications pending, increasing at a rate of 20,000 *per annum*. However, too much emphasis should not, in my view, be placed on this. It is important to re-focus discussions from obsessive concern with the rising backlog of applications (around 95% of which could be disposed of in just under two and a half years by single-judge formations, on the basis of current rates of output),¹⁴ accept the political reality that the Strasbourg Court must concentrate on the quality of its work and to deal with the most important, urgent cases relating to allegations of very serious human rights violations (see "the Court's priority policy"),¹⁵ and to

⁶ Interlaken Declaration, High Level Conference on the Future of the European Court of Human Rights (19 February, 2010).

⁷ Izmir Declaration, High Level Conference on the Future of the European Court of Human Rights (27 April, 2011).

⁸ Committee of Ministers, Report on the Future of the European Court of Human Rights: Follow-up to the Interlaken and Izmir Conferences, doc. CM(2011)57 final (3 May, 2011), available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1781899&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

⁹ See, for example, the comments of the Court's former President, L. Wildhaber, and F. Sudre, referred to in A. Drzemczewski's recent contribution to the *Liber Amicorum Peter Leuprecht* (O. Delas, & M. Leuprecht, eds, 2011), pp.105-115 at p.114 (footnote 22).

¹⁰ See, e.g., §10 in my report on "the Interlaken process" PACE doc. 12221, of 27 April 2010, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12221.pdf>.

¹¹ See, e.g., "Criticism of the European Court of Human Rights" available at http://en.wikipedia.org/wiki/Criticism_of_the_European_Court_of_Human_Rights. I moved a motion on this subject in the Netherlands Parliament, available at:

www.rijksbegroting.nl/2011/kamerstukken,2011/4/21/kst155514.html. *Motie van het lid Bemelmans-Vidéc c.s. (Motion by the (Senate) member Bemelmans-Vidéc c.s.)*, This motion was moved during the debate on the budget of the Ministry of Foreign Affairs, more specifically on the 'State of the European Union 2010-2011' on 19 April, and was adopted on 10 May 2011.

¹² See, e.g., E. Bates *The Evolution of the European Convention on Human Rights* (2010, Oxford UP), pp.1-2.

¹³ See M. O'Boyle, "The Legitimacy of Strasbourg Review: Time for a Reality Check?" in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa* (2011), pp.489-498.

¹⁴ See CDDH Interim Activity Report, doc. CDDH (2011) R72 Addendum I, of 1 April 2011, §8. That said, it would take almost 20 years for the Court to dispose of all the other applications pending before Chambers and Committees, assuming, artificially, that no new applications were to arrive (even though this group includes between 60 and 70% of "manifestly well-founded" cases of a structural nature!).

¹⁵ See the Court's website: Priority Policy:

<http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/Case+processing/>

and Rule 41 (order of dealing with cases) of its Rules of Procedure which specifies: "In determining the order in which cases are to be dealt with, the Court shall have regard to the importance and urgency of the issues raised on the basis of criteria fixed by it. The Chamber, or its President, may, however, derogate from these criteria so as to give priority to a particular application."

remind ourselves that the Strasbourg control system is subsidiary, in that human rights must first and foremost be guaranteed on the domestic plane by States Parties. In other words, if major structural/systemic problems were resolved in six states, namely Italy, Poland, Romania, the Russian Federation, Turkey, and Ukraine, which together provide for nearly 70% of all applications brought before the Court in Strasbourg,¹⁶ the Court would be able to spend much more of its time on its principal task as the judicial guardian of human rights in all of Europe. This point was clearly made, already back in 2009, by the AS/Jur's former chairperson, Mrs Däubler-Gmelin, when she wrote that "*it is impossible for the Court to render justice to all individuals (as recognised by the existence of committee and single-judge procedures, a 'fig-leaf' that maintains the legal fiction of a judicial determination of all applications); it is totally absurd for the Court and its staff to waste time and effort in dealing with repetitive applications [citing Italy, Moldova, Poland, Romania, Russia and Ukraine as 'persistent defaulters', and] failure of many states to provide appropriate effect to their Convention obligations, haphazard implementation of the 2000-2004 reform package and unacceptable delays in full execution of Strasbourg Court judgments*".¹⁷ Concentrating on the pros and cons of reforming procedures with respect to the manner in which the Court functions is – and I stress this point – not necessarily the most urgent problem. The Convention system is in danger of asphyxiation, and States, if they really wish to maintain the Court's principal role as the "guardian" of human rights standards in Europe, must concentrate their efforts on ensuring effective protection of human rights on the domestic, national plane. By so doing they would relieve the Court of a caseload of a magnitude that no other international court has been confronted with (and which it should not be required to handle), and thereby provide it with appropriate conditions to undertake its principal tasks, including the need to maintain and reinforce the quality and coherence of its case-law.

2.1. Role of the ECHR

7. The ECHR system currently ensures State Parties' conformity with the Convention's standards principally, but not exclusively, *via* individual applications. The original purpose of the right of individual petition, which was initially optional (as too was the Court's jurisdiction), was to help "*provide a collective, inter-state guarantee that would benefit individuals generally by requiring the national law of the contracting parties to be kept within certain bounds*",¹⁸ However, this understanding has evolved into the current "individualised approach" in which each meritorious complaint is specifically remedied. The entry into force of Protocol No.11 to the Convention made mandatory the right of individual application, enabling individuals direct access to the Court, while also providing the Court with jurisdiction over, in effect, all member states and all individuals under their jurisdiction. Today, the right of individual application is regarded as an indispensable tool for the maintenance of one of the strongest human rights enforcement mechanisms in existence, and has additionally served to focus the nature of the ECHR as a "type of European Bill of Rights".¹⁹

8. The ECHR can also be regarded as having a "quasi-constitutional" mission, with responsibility in laying down common European human rights standards and determining the minimum level of protection which all States Parties must observe.²⁰ In performing such a mission, the Convention's scope extends beyond traditional treaty law.²¹ The basic tenets of this view are that the rights guaranteed by the ECHR are practical

¹⁶ See "States with major structural/systemic problems before the European Court of Human Rights: statistics" doc. AS/Jur/Inf (2011) 05 rev 2, available at http://assembly.coe.int/CommitteeDocs/2011/ajinfdoc05%202011rev_EN.pdf, p.7. These statistics do not take into account many outstanding problems in the implementation of Strasbourg Court judgments in several other states (listed in footnote 4 of doc. AS/Jur/Inf (2011) 05 rev 2). Nor do they distinguish between repetitive cases of a less serious nature and those where non-derogable 'core rights' are at issue; the latter must always be given priority treatment by the Court.

¹⁷ "The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process" doc. AS/Jur (2010) 06, available on the AS/Jur's website http://assembly.coe.int/CommitteeDocs/2010/20100121_ajdoc06%202010.pdf, p.2 (§9).

¹⁸ E. Bates, *supra* note 11, p.147 (quoting D. Harris, M.O'Boyle & C. Warbrick Law of the European Convention on Human Rights (1st edition, 1995) p.33).

¹⁹ For a detailed survey, consult E. Bates, *supra* note 11, p.146. See also, *id.* p.149 ("[Protocol 11] 'fully judicialised and consecrated the right of individual petition as the motor of the enforcement machinery under the Convention,' so conforming that the Convention's mission was 'indissoluble from the right of individual petition ... [and] individual justice'" (quoting P. Mahoney "Thinking a Small Unthinkable: Repatriating Reparation from the European Court of Human Rights to the National Legal Order", in Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg views (L. Cafilisch & others, eds, 2007) p.263).

²⁰ See, e.g., Luzius Wildhaber Der Menschenrechtsgerichtshof für Europa - überlastet, überlastend oder gerade richtig? (2011, Österreichisches Institut für Menschenrechte), and S. Greer The European Convention on Human Rights: Achievements, Problems and Prospects (2006) *passim*.

²¹ The Convention is considered, by the Court as "a constitutional instrument of European public order (*ordre public*)": Loizidou v Turkey (Preliminary Objections) judgment, of 23 February 1995, §75; see also A. Drzemczewski European Human Rights Convention in Domestic Law: a Comparative Study (1983), pp.22 to 34.

and tangible, and the Court's application of the "living instrument theory" in the interpretation of the Convention and its protocols,²² allows it to keep pace with social change and the evolution of standards.²³ Moreover, although State Parties are not legally obliged to incorporate the Convention into domestic law, they have all, without exception, chosen to do so, and any domestic law decisions reached by domestic courts or state authorities found to be incompatible with the Strasbourg Court's case-law must be duly adjusted: see Articles 1, 13, 19, 32 and 46 of the Convention.²⁴

9. In recent years it has been argued that the Court should limit itself to a "constitutional" role, reviewing only those individual applications that apply generally and contribute to the establishment of a European public order based upon human rights, democracy and the rule of law.²⁵ However, non-governmental organisations (NGOs), academics and lawyers with extensive litigation experience, including a number of Strasbourg Court judges, are opposed to limiting individual access to the Court, arguing that such a reform would serve to undermine the legitimacy and fundamental purpose of the Convention,²⁶ the crucial link between the individual and the ECHR system.

10. If the reality faced by the ECHR system is considered, it becomes obvious that this dual function is necessary, especially for states that were admitted to the Council without having first developed functional democracies and implemented the rule of law,²⁷ and which in effect require the "hands-on" supervision available through the right of individual application. I strongly reaffirmed the position taken by the Assembly on this point when, back in March 2007, in San Marino, I stressed the need for the Strasbourg Court to preserve its dual task – a "constitutional" mission in laying down common principles relating to human rights (determining the minimum level of protection that states must observe), and its key role of adjudicating individual cases providing justice of last resort to applicants; the Court is unique because of its direct "link" to the individual which lies at the heart of the Strasbourg machinery.²⁸

2.2. Overload of the Court

11. It must be admitted that, the Strasbourg Court's dual role within the ECHR system, as explained above, has led to a proliferation of complaints, causing substantial difficulties for the Court. Such developments are, to a certain extent, inherent in any system of international and even national control. At present, there are over 25,000 cases pending before the Court, with more than 55,000 new applications allocated to a decision-making body each year, while the Court is at best able to deliver slightly less than 2,000 final judgments *per year*.²⁹ More than 90% of these complaints are declared inadmissible, mostly as manifestly ill-founded, and of the remaining admissible cases, more than 60% are repetitive, or derive from the same cause of action as in cases previously ruled to be in violation of the Convention. Given the volume of incoming complaints, the necessary filtering of inadmissible and repetitive cases has resulted in the diversion of the Court's scarce resources away from meritorious claims.

12. Moreover, the origin of applications is heavily unbalanced, with nearly 70% of pending applications originating from only six State Parties, Italy, Poland, Romania, the Russian Federation, Turkey, and Ukraine.³⁰ These states have significant structural or systemic problems linked to the dysfunctioning of their

²² See, e.g., *Airey v. Ireland*, 32 Eur. Ct. H.R. (1979), *Tyrer v. U.K.* 36 Eur. Ct. H.R. (1978).

²³ See, e.g., my comments on the Wise Persons' Report from the Perspective of the Parliamentary Assembly of the Council of Europe, Address to the San Marino Colloquy (22-23 March, 2007), doc. AS/Jur (2007) 25 available at http://assembly.coe.int/CommitteeDocs/2007/20070410_ajdoc25_2007.pdf.

²⁴ See §7 in my AS/Jur working document "The effectiveness of the ECHR at national level" doc. AS/Jur (2007) 35 rev 2, available at http://assembly.coe.int/CommitteeDocs/2008/20070726_effectivenessconvention.pdf.

See also H. Keller & A. Stone Sweet, eds, *A Europe of Rights. The impact of the ECHR on national legal systems* (2008), *passim*.

²⁵ Summarised by E. Bates, *supra* note 11, pp.500-502. See also footnote 18 *supra*. For recent comments on this subject see articles by R. Harmsen, S. Hennette-Vauchez, J. Christoffersen and L. Wildhaber in *The European Court of Human Rights between Law and Politics* (J. Christoffersen & M.R.Madsen, eds, 2011).

²⁶ *Id.*

²⁷ Democracy, as mentioned by the Preamble to the ECHR, is meant to be "political effective democracy".

²⁸ See §§4 to 7 of my address at the San Marino Colloquy, doc. AS/Jur (2007) 25, accessible at http://assembly.coe.int/CommitteeDocs/2007/20070410_ajdoc25_2007.pdf.

²⁹ Statistics from: http://www.coe.int/t/dghl/monitoring/execution/Reports/Stats/Statistiques_2009_EN.pdf, & statistical information available on the Court's website:

<http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year/>.

³⁰ Statistics available in "States with Major Structural/Systemic Problems before the European Court of Human Rights: Statistics" doc, AS/Jur/Inf (2011) 05 rev.2 available at

http://assembly.coe.int/CommitteeDocs/2011/ajinfdoc05%202011rev_EN.pdf. See also, European Court of Human Rights, *Pending Applications Allocated to a Judicial Formation* (June 30, 2011), available at http://www.echr.coe.int/NR/rdonlyres/92D2D024-6F05-495E-A714-4729DEE6462C/0/Pending_applications_chart.pdf.

domestic legal systems, including with respect to Convention standards. The disproportionate number of cases originating from these states also serves to perpetuate the backlog of cases pending before the Court.

2.3. *Report of the Group of Wise Persons,³¹ the Interlaken and Izmir Conferences*

13. The Group of Wise Persons was requested by the Committee of Ministers to analyse and propose reforms for the ECHR system's control mechanisms and to build upon Protocol No. 14 in order to remedy the issues discussed above. After a series of investigations and hearings, the Group made several recommendations in its November 2006 report which, it believed, would relieve the Strasbourg Court of the overload of complaints if implemented in concert.³²

14. These recommendations included: reforming the Convention to allow the Committee of Ministers to amend the provisions on the judicial system for greater flexibility in the reform procedure; creating a new filtering mechanism, a Judicial Committee composed of independent judges to serve as a buffer between petitioners and the current Court by making final admissibility decisions on applications referred to it by the Registry of the Court; bolstering "subsidiarity" and the role played by domestic courts in enforcing the Convention through the Court issuing advisory opinions on "fundamental questions of general interest", shifting the burden of remedying violations of the Convention to the member states; and promoting the use of alternative means of dispute settlement in lieu of judicial proceedings in appropriate cases.³³

15. There have been several additional efforts at expounding these proposals. Suffice it, for present purposes, for me to refer to the Assembly's participation in the San Marino Colloquy in March 2007 on 'Future developments of the European Court of Human Rights in the light of the Wise Persons' Report',³⁴ the Stockholm Colloquy in June 2008, entitled 'Towards stronger implementation of the ECHR at national level'³⁵ and the Skopje Conference in October 2010, on 'Strengthening subsidiarity: integrating the Strasbourg Court's case-law into national law and judicial practice',³⁶ and, of course, the Assembly's involvement in the two important High Level conferences on the Future of the European Court of Human Rights in Interlaken, in February 2010, and in Izmir, in April 2011.

16. The "Interlaken process", into which I have incorporated the follow-up conference in Izmir in the context of the present report, was debated by the Assembly in April 2010: see Resolution 1726 (2010).³⁷ The Interlaken Action Plan sets out obligations for the Committee of Ministers, States Parties, Court and Secretary General with regard to: (1) access to the Court and individual petitions, (2) domestic implementation of the Convention, (3) examination of new filtering mechanisms within the Court, reduction of repetitive applications, (4) improving the internal structure of the Court and application of the existing admissibility criteria for improved efficiency, (5) the effective, transparent supervision of the enforcement of the Court's judgments, and (6) simplifying the procedure for amendments of the Convention, to allow this to be done by the Committee of Ministers.³⁸ In June 2010, Protocol No.14 to the ECHR entered into force, facilitating the further consideration of certain reforms pursued in Interlaken and recommended by the Group of Wise Persons.

17. Thus far, the Committee of Ministers has adopted a recommendation to member states on effective remedies for complaints regarding excessively long domestic proceedings, and put into operation a "twin-track supervision system", in January 2011, that provides for continued supervision of state execution of

³¹ Group of Wise Persons "Report of the Group of Wise Persons to the Committee of Ministers" doc. CM(2006)203 (Nov. 15, 2006), available at [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM\(2006\)203](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM(2006)203).

³² See Gil Carlos Rodríguez Iglesias, Chair of the Group of Wise Persons, Presentation of the Wise Persons' Report, Address to the San Marino Colloquy (22-23 March 2007).

³³ *Id.*

³⁴ *Future Developments of the European Court of Human Rights in the Light of the Wise Persons' Report*, San Marino Colloquy, available at http://www.coe.int/t/e/human_rights/cddh/1_publications/SanMarino_en.pdf. See also *supra* note 22.

³⁵ Selected texts from the Stockholm Colloquy, including my speech on the "parliamentary dimension", can be found in doc. AS/Jur (2008)32 rev, available at http://assembly.coe.int/CommitteeDocs/2008/20080623_ajdoc32_2008_rev.pdf

³⁶ At which the AS/Jur's Chairman, C. Pourgourides, presented a paper on the interpretative authority (*res interpretata*) of the Court's case-law, see doc. AS/Jur/Inf (2010) 04, available at http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf.

³⁷ Available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1726.htm>.

This text, "Effective implementation of the ECHR: the Interlaken process", was based on a report of the AS/Jur, doc, 12221 (available at <http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc10/EDOC12221.htm>) for which I acted as Rapporteur.

³⁸ Interlaken Declaration, High Level Conference on the Future of the European Court of Human Rights (Feb. 19, 2010), available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1591969>.

Court judgments, while promoting subsidiarity.³⁹ The Strasbourg Court has also implemented certain reforms. These include the single-judge filtering system (with the creation of a filtering section for five states with respect to which most applications are filed) and three-judge committees (for certain states under Protocol No.14 *bis* and the Madrid Agreement on provisional application of Protocol No.14), the use of new admissibility criteria, all of which became mandatory with the entry into force of Protocol No.14, and an important priority policy to determine the order in which applications are dealt with, adoption of a new Rule 61 in the Rules of the Court regulating the pilot judgment procedure to deal with systemic and structural weaknesses and repetitive applications, and an information campaign by the Court Registry to provide potential applicants and their legal representatives with improved access to precedential case-law, including a practical guide on admissibility criteria available in four languages (with an additional eight language versions being prepared). The Court Registry and government representatives have also discussed potential measures to reduce the influx of applications. Despite this progress, the reforms implemented to date have not stemmed the flow of new applications and the growth of the backlog.⁴⁰

18. Most recently, at the follow-up conference in Izmir, it was determined that short, medium, and long-term strategies must be developed and implemented in order to advance and further develop the Interlaken process.⁴¹ A selected number of issues that, in my view, merit consideration will be discussed in **Part 3**, below. But before so doing, there is one puzzling aspect with regard to the Izmir Conference which needs to be highlighted. Despite the presentation made by the President of the Assembly at the conference, highlighting the importance of the “parliamentary dimension” in work undertaken on this subject by the Assembly and State legislative organs,⁴² the Izmir Declaration makes no mention whatsoever of the need to involve national parliaments, and only makes a passing reference to the Assembly when it refers to the creation of the advisory panel of experts on candidates for the election of judges to the Court. It is simply beyond my comprehension as to why a proposal to associate more closely a key statutory body of our Organisation, as well the legislative branch of state authorities in the Interlaken process was not included in the text adopted in Izmir.⁴³ This point was reiterated by the Assembly itself, in its Resolution 1823 (2011), adopted this June: “... the Assembly ... **regrets** that the post-Interlaken debate on the future of the Convention system does not sufficiently take into account the potentially important role of parliaments and **deplores** the silence of the Izmir Declaration in this respect” (emphasis added).⁴⁴ So when member states report to the Committee of Ministers, at the end of this year, on progress made in the implementation of the “Interlaken process”, we must ensure that national parliaments, as well as the Assembly, are also provided with the opportunity to scrutinise these reports.

2.4. Major stumbling-block: the Council of Europe's budgetary predicament

19. Despite arguments to the effect that the moment is not appropriate to discuss the Council of Europe's difficult budgetary predicament (when will it ever be?), I feel duty-bound to do so, especially in the context of the Organisation's now entrenched real zero-growth rate. As already indicated in my report on the ‘Interlaken process’ back in April 2010, we parliamentarians have an obligation to bring this matter to the attention of our

³⁹ Committee of Ministers, Report on the Future of the European Court of Human Rights: Follow-up to the Interlaken and Izmir Conferences, 121st session, doc. CM(2011)57 final (3 May, 2011), available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1781899&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>, see p.34, §87, for discussion of changes to the Committee of Ministers procedure for execution of judgments post-Protocol No. 14. An evaluation of these new working methods will be made in December 2011.

⁴⁰ *Id.* Also, it must be recognised that the resolution of certain types of issues raised in Strasbourg “can only be found at the political, intergovernmental level. The idea that the Court can provide a solution for the problems connected with post-war property issues appears quite unrealistic.” per Judge E. Myjer, “The European Court of Human Rights and armed conflict between High Contracting Parties; some general remarks,” in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa* (2011), pp.461-472 at p.471.

⁴¹ Izmir Declaration, High Level Conference on the Future of the European Court of Human Rights 27 April 2011, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1591969>

⁴² See Proceedings of the High Level Conference on the Future of the European Court of Human Rights, Izmir, 26-27 April (2011, bilingual, English/French version), pp.19-21.

⁴³ In a letter, dated 6 April 2011, addressed to the (Turkish) Chairman of the Ministers' Deputies, the Georgian Ambassador proposed the inclusion, in what is now point 6 of “Implementation [of the present follow-up Plan]” and in which reference is made to consultation with civil society - the addition of the words “*Invites the Parliamentary Assembly of the Council of Europe and parliaments of member states to contribute to the effective implementation of the Follow-up Plan*”. See also, in this connection, footnote 2 in A. Drzemczewski's “The Parliamentary Assembly's involvement in the supervision of the judgments of the Strasbourg Court” in Vol.28 Netherlands Quarterly of Human Rights (2010), pp.164-178, at p.165.

⁴⁴ §5.2 of Resolution 1823 (2011), available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1823.htm>.

respective countries' political leaders. The present situation is simply untenable, not to say suicidal.⁴⁵ I have undertaken some additional comparative research on this subject.

20. The yearly cost, within the Council of Europe's budget, of hiring a judge at the European Court of Human Rights is estimated to be €333,667,⁴⁶ which is more than the annual contribution made by 15 member states.⁴⁷ In other words, the contribution made by those states does not even cover the cost of their own judge!

21. Also of interest is a comparison of expenditure undertaken in respect of other international courts, (regional) bodies and institutions, with the Court's budget of €58.96 million and 630 staff members:

- The Fundamental Rights Agency (FRA) is an independent body of the European Union (EU), established to provide assistance and expertise to the EU and its member states, when they are implementing EU/Community law on fundamental rights matters. It employs around 70 members of staff⁴⁸ and its tasks are to collect data on fundamental rights, conduct research and analysis, provide independent advice to policy-makers, network with human rights stakeholders, and develop communication activities to disseminate the results of its work and to raise awareness of fundamental rights. It is **not** empowered to examine individual complaints, have regulatory decision-making powers, monitor the situation of fundamental rights in the member states for the purposes of Article 7 of the EU Treaty,⁴⁹ deal with the legality of EU/Community acts or question whether a member state has failed to fulfil a legal obligation under the Treaty. Its budget for 2009 was €17 million,⁵⁰ for 2010 it was €20 million,⁵¹ and for 2011 it was, again, €20 million.⁵²
- The Publications Office of the EU is an inter-institutional office whose task is to publish the publications of the institutions of the European Union. In 2010, it employed 672 staff members and its administrative budget was €90 million.⁵³
- The Court of Justice of the European Union (CJEU) is now composed of three courts: the Court of Justice, the General Court and the Civil Service Tribunal. In 2010, the total number of new cases for all three courts combined was 1,903, the total number of completed cases was 1,230 and the total number of pending cases was 2,284.⁵⁴ The total number of staff at the three courts was 1,927 in 2010 and 1,954 in 2011.⁵⁵ Its budget in 2010 was €330 million and in 2011 it was €341 million.⁵⁶
- The International Criminal Tribunal for the former Yugoslavia (ICTY) has concluded proceedings for 126 accused persons and has ongoing proceedings for 35 persons.⁵⁷ As of August 2011, it employed 919 staff members and its budget for 2010 - 2011 was €209 million.⁵⁸
- The International Criminal Court (ICC) had a budget of €103 million for 2010.⁵⁹ This was based on the assumption that the Prosecutor would conduct five active investigations and up to three trials during 2010.⁶⁰ A figure of 763 staff members was approved and it filled 686 of these.⁶¹

⁴⁵ See §10 of my report, doc. 12221, *supra* note 36, at p.4.

⁴⁶ Calculated by adding the cost - to the Organisation - of a judge (€225,000), plus the cost of one-third of a B3 staff member (€47,000/3) and the cost of one A2 staff member (€93,000).

⁴⁷ Figures, which are on file, have been obtained from the Programme and Budget Department within the Directorate of Programme, Finance and Linguistic Services at the Council of Europe.

⁴⁸ [Organisation of the FRA.](#)

⁴⁹ This article refers to the Council's power to apply penalties in case of a serious breach of fundamental rights in a member State.

⁵⁰ [FRA revenue and expenditure 2009.](#)

⁵¹ [FRA revenue and expenditure 2010.](#)

⁵² [FRA revenue and expenditure 2011.](#)

⁵³ [Publications Office - Key figures 2010.](#)

⁵⁴ Figures taken from [Statistics of judicial activity of the Court of Justice](#), [Statistics of judicial activity of the General Court](#) and [Statistics of judicial activity of the Civil Service Tribunal](#).

⁵⁵ [Budget of the European Union 2011](#), p.I/115.

⁵⁶ [Section IV of the European Union budget - Court of Justice](#), p.8. See also A. Lester "The European Court of Human Rights after 50 years" in [The European Court of Human Rights between Law and Politics](#), *supra* note 24, pp.98- 117, at pp.106-107.

⁵⁷ [ICTY - Key Figures.](#)

⁵⁸ [ICTY - About the ICTY](#). Note that the figure in euros is derived from \$301,895,900 at an exchange rate of 0.69.

⁵⁹ [Report on budget performance of the ICC as at 31 March 2010.](#)

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

These figures can be compared to the total number of applications decided by the Strasbourg Court in 2010 (41,183), the total number of pending applications (139,650) and the resources at its disposal (630 staff members, and a total budget in 2011 of €58.96 million) – far less than the entire budget of the Publications Office of the EU in 2010, less than a quarter of the budget of the Court of Justice of the EU in 2011, less than a third of the budget of the ICTY in 2011 and roughly half the budget of the ICC in 2010. These figures appear even more stark when one takes into account the number of cases being dealt with by the European Court of Human Rights when compared with the number of cases dealt with by the CJEU, the ICTY or the ICC.

22. And what makes matters worse is that every time the Court's budget increases (examples were provided in my explanatory memorandum in the report on the Interlaken process), money has, in the past, been transferred from the Council of Europe's Programmes of Activity budget to the Court, seriously curtailing and undermining the impact of the Council's other activities, including, for example, the work of other major monitoring mechanisms and human rights training programmes. Now that this policy of transfer has been stopped, the Organisation's budget may no longer be able to cope with the logistical needs of the Court.⁶² The Council of Europe's budget is very small, comparatively speaking; the Organisation's tasks are enormous. But there is not a word about these important issues in either the Interlaken or Izmir declarations. Instead of rigorously pursuing, in capitals, the urgent need to reinforce this – comparatively speaking - fragile budgetary situation, the Committee of Ministers does not appear to be too concerned. Hence the need for the Assembly, as the other principal statutory organ of the Council of Europe, to take a firm stand on this subject.

3. Selected issues which merit consideration

23. As explained in the **Introduction**, I do not consider it necessary, or indeed useful, to undertake an in-depth analysis of all work that has been undertaken on the Court's "authority" and its effectiveness, be it on the governmental or intergovernmental side, documents issued by the Secretary General, the Human Rights Commissioner, the Court itself, or others within or outside the Organisation, including contributions by NGOs; I refer the reader to material cited in the first two sections of this memorandum. Similarly, I have decided not to deal with a number of important issues that have been thoroughly dealt with, in particular, in previous reports presented by the AS/Jur to the Assembly. Here, I refer the reader to the AS/Jur's website - http://assembly.coe.int/Main.asp?link=/Committee/JUR/role_E.htm - in which this work can be consulted. A number of reports, ranging from the need to ensure the election of judges of the highest quality onto the Court, non-compliance with interim measures issued by the Court, EU accession to the ECHR, judicial corruption in certain State Parties to the need to eradicate impunity, are of particular relevance in this respect.⁶³

3.1. A reminder as to what "subsidiarity" means

24. Member states must shoulder full responsibility to ensure that human rights are respected and that their law and practice conform to the Convention, and execute fully and in good time judgments of the Strasbourg Court. Once human rights are efficiently and effectively protected at the national level, in State Parties to the Convention, the Strasbourg Court will receive fewer applications. If this cannot be achieved, in the long run the Court will not have the capacity to deal with the growing number of applications and this may well lead to a situation in which "obstacles" are placed on individuals' access to the Court. This would be highly detrimental to the right of individual application as we know it today. Hence the urgency in "convincing"

⁶² In its budget request for 2012-2013, the Court has requested 150 additional staff members.

⁶³ Consult AS/Jur reports, available at http://assembly.coe.int/ASP/Doc/ATListingCommittee_E.asp and AS/Jur documents and public statements, at <http://assembly.coe.int/Main.asp?link=/CommitteeDocs/ComDocMenuJurEN.htm>;

See also issues which I mooted in my 'outline' for this report, in 2008, but which I have decided not to discuss in detail in the present memorandum. This included a range of issues, such as the importance of pilot judgments (here, I refer to the new Rule 61 of the Rules of Court: see text by A.C. Buyse available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1514441; Mr Buyse's blog on the ECHR, entitled "*ECHR Blog*", is among the best that exists, available at <http://echrblog.blogspot.com/>), issues concerning the award of just satisfaction, issues relating to 'friendly settlements' (see H. Keller, M. Forowicz & L. Engi, *Friendly Settlements before the European Court of Human Rights*, 2010) and judges' social security and pension entitlement, which has now been provided for (see, in this connection, Committee of Ministers Resolution CM/Res (2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner of Human Rights, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1508697&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>; see also P. Mahoney, "The international judiciary - independence and accountability", in vol. 7 *The Law and Practice of International Courts and Tribunals* (a practitioners' journal, 2008), pp.313-349); doc. AS/Jur (2008) 07, esp. pp.6- 8.

those states in which major and numerous human right violations occur,⁶⁴ as well as in those in which major structural problems exist,⁶⁵ to undertake firm corrective measures. If this is not done, the Strasbourg Court will not be in a position to dispose of applications within a reasonable time, and at the same time to maintain the quality and authority of its judgments.

25. The ECHR places primary responsibility on State Parties to secure fundamental rights and freedoms to everyone within their jurisdiction (Article 1), and the Court should be seized only “after all domestic remedies are exhausted” (Article 35, §1). This is referred to as the principle of subsidiarity. Subsidiarity and, to an extent the related doctrine of a “margin of appreciation”⁶⁶ require that the Strasbourg Court plays a complementary role to domestic court decisions and legislation: states have the duty to integrate Convention standards, as interpreted by the Court, within their own legal systems.⁶⁷ In other words, the principle of subsidiarity has two aspects: one *procedural*, necessitating individuals to go through all the relevant procedures at national level before seizing the Court, and the other *substantive*, based on the assumption that States Parties are, in principle, better placed to assess the necessity and proportionality of specific measures. That said, a state can and often does guarantee a higher level of protection, and the Court obviously accords a certain latitude to the domestic authorities to strike their own balance regarding Convention rights, guided by the relevant European case-law; but the Court has the final say on the interpretation of the Convention in all cases brought before it.⁶⁸

3.2. *Absence of effective domestic remedies still a major problem*

26. At present, a number of State Parties have been unable - and in some instances have lacked the political will - to fulfil their duty effectively to remedy violations of the Convention within their domestic systems, as required by Article 13 of the Convention.⁶⁹ The Court and the Committee of Ministers have defined “effective domestic remedies” as being accessible and providing adequate redress for any violation that has already occurred or preventing the general continuation of a violation.⁷⁰ However, even when a Strasbourg judgment identifies a violation, the practice often persists and remedies are either not available at all or not applied to subsequent violations due to structural deficiencies in national legal systems or due to political controversy.⁷¹ This undermines the efficacy of the Convention system, and opens the door to repetitive/“clone” applications.

⁶⁴ Such major human rights violations are identified and documented in AS/Jur reports by, respectively, Mrs H. Däubler-Gmelin, in doc. 11934, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC11934.pdf>, and Mr C. Pourgourides, in doc. 12455, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12455.pdf>, both of which led to the adoption, by the Assembly, of Resolution 1675 (2009) on the state of human rights in Europe: the need to eradicate impunity, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/ERES1675.htm> and of Resolution 1787 (2011) on the implementation of judgments of the European Court of Human Rights, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1787.htm>.

⁶⁵ See doc. AS/Jur/Inf (2011)05 rev.2, *supra* footnote 29.

⁶⁶ The concept of a (national) margin of appreciation can be understood as a practice of allowing State Parties discretion in the manner in which they fulfil their Convention obligations with respect to, e.g., Articles 8 to 12 of the ECHR. This is a clear expression of the fact that the Convention does not command or even aspire to strict uniformity of human rights standards in Europe.

⁶⁷ Opinion of the Court for the Izmir Conference, adopted by the Court on 4 April 2011. See also “Interlaken Follow-up: principle of subsidiarity”, note by Jurisconsult of the European Court of Human Rights, doc. 3188076, dated 8 July 2011, and L. R. Helfer, “Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime”, Vol.19 European J. of Int’l. Law, (2008), pp.125-131.

⁶⁸ See Articles 19, 32 and 46 of the Convention. See also J.-P. Costa, “On the legitimacy of the European Court of Human Rights’ judgements” in vol. 7 European Constitutional Law Review (2011), pp. 173-182.

⁶⁹ Article 13, ECHR, reads: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

⁷⁰ See, e.g., Strasbourg Court judgment in *Surmeli v. Germany* (2006), §99, and two recommendations of the Committee of Ministers to member States: Recommendation on the improvement of domestic remedies, CM Rec. (2004)6, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=743317&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

and Recommendation on effective remedies for excessive length of proceedings, CM Rec. (2010)3, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1590115&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>. See also T. Barkhuysen and M. L. van Emmerik, “Legal Protection Against Violations of the ECHR: Improving (Co-)operation of Strasbourg and Domestic Institutions”, Vol. 12 Leiden J. of Int’l Law (1999), pp.833-851, at p.841.

⁷¹ See, in this connection, paper presented by E. Fribergh, the Court’s Registrar, “How to deal with repetitive applications in the future” at Round Table held in Bled, Slovenia, 22-23 September 2009, available on the Court’s website

27. The absence of effective remedies at the domestic level is not only the responsibility of governments (the executive), but also that of legislative organs. It is too easy to point the finger at others when we ourselves - parliamentarians - are (partly) to blame for not adequately dealing with the structural problems in our countries. The persistence of excessively long proceedings in civil, criminal and administrative cases, in violation of Article 6, §1, of the Convention, has been recorded in *inter alia*, Bulgaria, Greece, Italy, Moldova, Poland, Romania, the Russian Federation, Turkey and Ukraine.⁷² This category of cases has become one of the main sources of litigation before the Court since the *Kudła* case in 2000, in which the Court clearly reiterated that Article 13 requires domestic remedies for such violations.⁷³

28. Moreover, the proliferation of Article 6 cases may actually affect the quality of judgments issued by the Strasbourg Court. It has been suggested that, in the effort to stay afloat, the Court assesses such cases in a “quasi-automatic” manner, analysing each case “summarily” rather than providing a full, in-depth judicial examination of each case.⁷⁴ These problems are further compounded by the variation of domestic legal systems: newer democracies whose legal systems are confronted with serious structural problems and states with established democracies in which issues of the (in)efficient administration of justice are exposed.⁷⁵

29. States have found a variety of methods to comply with these obligations. For example, in the *Procaccini* case, the Court indicated that all State Parties could follow the practice of those states that have created dual domestic remedies for Article 6 violations, combining compensation for victims with methods for accelerating legal proceedings.⁷⁶ Likewise, recent Polish legislation formulated to improve compliance with the ECHR⁷⁷ has been deemed effective by the Strasbourg Court⁷⁸ by allowing individuals to sue for acceleration of proceedings, just satisfaction awards or to recover restitutionary damages for breach of the right to a trial within a reasonable time. Moreover, this law applies to applications that predate its drafting which were filed before the Strasbourg Court but are still awaiting admissibility decisions, allowing them to revert to the domestic courts for adjudication. Such legislation enables states to shoulder their own Convention obligations and reduce the number of applications before the Court.⁷⁹

30. Both Strasbourg Court judgments in the *Procaccini* and *Scordino*⁸⁰ cases demonstrate that State Parties enjoy “a margin of appreciation” in choosing the manner in which domestic remedies are implemented; but it is not absolute in that all remedies must fulfil certain generally accepted criteria. Despite identifying both preventive and compensatory measures as being the most appropriate, the Court also

<http://www.echr.coe.int/NR/ronlyres/F4E1DAB4-9382-4CF1-8407-EE82A92A275A/0/ErikFriberghBledspeech.pdf>, and C. Pourgourides, State of Human Rights and Democracy in Europe, AS/Jur report, doc. 11202 (28 March, 2007), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/EDOC11202.pdf>, *passim*.

⁷² See, for more details, Assembly Resolution 1789 (2011), based on a report (doc. 12455) prepared by Mr C. Pourgourides, *supra* note 1, *passim*. Also consult F. Edel. *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights* (2007), pp.83-84. Another way of presenting this information is the following: these types of cases account for more than one-third of violations found in judgments against each of the following States: Belgium, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary (82%!), Italy, Liechtenstein, Luxembourg, Poland, Portugal, Slovakia, Slovenia and ‘the former Yugoslav Republic of Macedonia.’ (Proportionally, this is not such a great problem in Bulgaria, Moldova, Romania, Russia, Turkey or Ukraine - see “Statistics on judgment by State: 1959-2010”, available at http://www.echr.coe.int/NR/ronlyres/E6B7605E-6D3C-4E85-A84D-6DD59C69F212/0/Graphique_violation_en.pdf).

⁷³ *Kudła v. Poland*, judgment of 26 October 2000, application no. 30210/96.

⁷⁴ *Per* K. Drzewicki, Address at the workshop on *The Improvement of Domestic Remedies with Particular Emphasis on Cases of Unreasonable Length of Proceedings* (Strasbourg, 29 April, 2005).

⁷⁵ *Id.* Drzewicki. He also suggests that the difference between states with a greater or lesser ability to comply with Article 6 requirements can also stem from the type of legal system they possess (common law v. civil law).

⁷⁶ See *Giuseppina and Orestina Procaccini v. Italy*, Grand Chamber judgment of 29 March 2006, application no. 65075/01, §§70- 96.

⁷⁷ *Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki* 2004, available at <http://www.abc.com.pl/serwis/du/2004/1843.htm> (in Polish).

⁷⁸ *Charzyński v. Poland* (decision of 1 March 2005), application no. 15212/03, (2005-V), §§36-42. See also *Krasuski v. Poland*, application no. 61444/00, judgment of 14 June 2005 (providing a translation of this law and discussing the Court’s approval of it as an effective remedy).

⁷⁹ See also, in this connection, R. Lawson’s proposal for a “bounce back procedure” for repetitive cases: “as soon as the Court has identified that a case only raises issues which it has already dealt with, it returns the case to a domestic court which will deal with it. This may be a special human rights court, or the Supreme Court, which should forward it to the appropriate judicial body. What matters is that there is a designated ‘counter-court’. One of the great advantages of this idea, apart from alleviating the Court’s burden, is that it forces the issue to be solved domestically. The learning effect for the domestic system may be larger than from an ‘outside’ judgment delivered in Strasbourg.” (R. Lawson, “Guaranteeing the authority and effectiveness of the ECHR”, doc. AS/Jur (2008) 5, available at <http://www.respoint.se/itp/event/europaradet/content/File/14PACE.report.Lawson.Eng.doc>).

⁸⁰ *Scordino v. Italy*, judgment No. 183 (2006).

acknowledged that states may choose to provide solely compensatory remedies, but that such remedies must be administered effectively and expeditiously.⁸¹ Moreover, states may not choose exclusively to put into place a mechanism for preventing delays in judicial proceedings without redressing the harm done to the individual complainant.⁸² States may also base their choice of which measures to take to provide domestic remedies, depending on which type of case they are dealing with. In criminal cases, the Court has determined that taking into account the length of proceedings during sentencing (as a mitigating factor) can be an appropriate way to provide redress for Article 6, §1, violations.⁸³

31. While several states have drafted laws similar to the Polish legislation that are aimed at complying with Article 6, this approach has not been uniformly adopted, or, in some cases, not effectively implemented.⁸⁴ For example, the Italian *Pinto* law, which is similar in purpose to the Polish legislation discussed above, is flawed to such an extent that it has done little to stem the flow of Italian applications to the Strasbourg Court for Article 6 violations, and has even given applicants cause to add additional Article 13 complaints to their cases for lack of a proper remedy.⁸⁵

32. At its recent meeting in Oslo, on 6- 7 June 2011, the Committee on Legal Affairs and Human Rights held a hearing on this subject, during which one of the experts, Mr D. Kotliar, conveniently summarised the situation. According to him, the main structural problems, principally due to states' lack of political will to solve them, are: excessive length of legal proceedings, non-enforcement or delayed enforcement of final court decisions, unlawful or extended detention on remand, deaths or ill-treatment which take place under the responsibility of state authorities and lack of effective investigation thereof, and poor conditions and overcrowding in detention facilities. As concerns the excessive length of legal proceedings, in principle, a reform of the whole judicial system is in many instances needed. Alternative dispute resolution and time-limits for completion of proceedings must also be envisaged. As regards deaths or ill-treatment under the responsibility of state authorities, new sanctions and changes in criminal legislation, as well as cultural changes within the law enforcement bodies, are often necessary. At a general level, he concluded that - in particular in a number of "new democracies" - effective national remedies (such as an action for violation of human rights or a civil compensation remedy) and oversight and preventive mechanisms must be established without delay. For example, the Strasbourg Court has held that a complaint submitted to a Constitutional Court about the length of legal proceedings may constitute an effective domestic remedy.⁸⁶

33. As my Committee colleague, Mr Kivalov (Ukraine, ALDE), will present a separate report on "Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties",⁸⁷ I have refrained from dealing with this important subject in detail in the present report. However, it would be inappropriate for me not to refer to one particular category of major structural problems, namely those relating to grave human rights violations. As explained by Mr Pourgourides: "it is simply unacceptable - for states belonging to a European Organisation which considers itself the 'Conscience of Europe' - not to take immediate and strong measures following deaths or ill-treatment suffered at the hands of law enforcement officials; the importance of eradicating impunity cannot be overstated, not only in the North Caucasus region of the Russian Federation, although this problem is the most virulent there, as shown by Mr Dick Marty's report [doc. 12276]. Failure to implement judgments of the Court in such instances gravely undermines the value of the protection system established by the Convention."⁸⁸ That said, on the basis of the list of problems enumerated by Mr Kotliar, it

⁸¹ *Procaccini* judgment, §§ 80-88.

⁸² *Id.*

⁸³ *Procaccini* judgment, § 75.

⁸⁴ For more information on individual member States' approaches to excessively lengthy proceedings, see my report AS/JUR(2007)35 rev 2, *supra* note 23 and D. Kotliar, "Solving Systemic Problems in States Parties: A Way to Ensure Viability of the Strasbourg Court", Address to the AS/Jur meeting held in Oslo, Norway (7 June, 2011), on file with the Secretariat.

⁸⁵ See *Procaccini* judgment (which lists several substantial flaws in the *Pinto* Act).

⁸⁶ *Debelić v. Croatia*, judgment (2007). See also Venice Commission, Study No. 538/2009, §79.

⁸⁷ Motion for a resolution, doc.12370 available at

<http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12370.pdf>. See also Secretariat background information note, doc. AS/Jur/Inf(2011)05 rev 2, *supra* note 29. For an excellent overview of problems encountered by the Committee of Ministers on these and related issues see Supervision of the execution of judgments of the European Court of Human Rights, 4th Annual Report of the Committee of Ministers, (for the year 2010, 2011), available at http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2010_en.pdf *passim*.

⁸⁸ § 212 of doc. 12455, report on Implementation of judgments of the European Court of Human Rights, available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12455.htm>. I trust that when Mr Kivalov writes his report, he will deal with this difficult subject, and possibly also the related subjects – in so far as the Court in Strasbourg is concerned – of the Court's fact-finding capacity: see C. Paraskeva, "Reforming the European Court of Human Rights: An Ongoing Challenge" 76 *Nordic J. Int'l. L.* (2007) 185- 215, pp.199-200 (when he proposes the creation

is obvious that a one-size-fits-all approach for improving domestic remedies (e.g., requiring state legislatures to draft similar laws) is not appropriate. The Court recognises that States Parties require flexibility to operate within the bounds of their diverse national conditions and legal frameworks. I should also like to draw attention to Mr. Kotliar's insight that lack of political will to solve certain structural problems (including those relating to grave human rights violations, when there has been flagrant non-compliance with a Strasbourg Court judgment), remains a major obstacle in certain instances.⁸⁹

3.3. *Need to enhance the authority of the Convention and Court's case-law on the domestic plane*

34. Considerable effort must still be made to have not only the text of the Convention and its protocols available in all the languages of the Council of Europe, but also that of the Court's case-law. There is also a substantial need to introduce and, where necessary, reinforce training programmes for, in particular, persons responsible for law enforcement and the administration of justice. But above all, in order to optimise the Court's effectiveness and authority, it is – in my view – now essential for the Committee of Ministers to adopt a Recommendation on the principle of *res interpretata* (the interpretative authority of the Court's Grand Chamber judgments of principle within the legal orders of states other than the respondent state in a given case).

35. The importance of *res interpretata* is a subject which was broached within the AS/Jur on a number of occasions,⁹⁰ as well as by the Court's outgoing President, J.P. Costa, when he wrote “[i]t is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system. The binding effect of interpretation by the Court goes beyond *res judicata* in the strict sense.”⁹¹ Hence the need to integrate the Strasbourg Court's case-law into national law and the judicial practice of States Parties beyond the (minimum) requirement of Article 46, §1, of the Convention.⁹²

36. The Interlaken Declaration of 2010 specifies, in its Preamble, “the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, i.e., governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level” (my emphasis). Also, the Interlaken Action Plan calls upon member states to commit themselves to 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.*” (Point B. Implementation of the Convention at the national level, §4.c).

37. It follows that, when the authorities in a State Party to the Convention (the executive, the courts, the legislature) are aware of standards stemming from the ECHR case-law in cases concerning not only their own country but also other states, and these standards are applied, this invariably has the potential for limiting the number of applications brought before the Strasbourg Court. An increasing number of examples exist in the practice of the States Parties of how the interpretative authority (*res interpretata*) of the Strasbourg Court is now taking root. I will limit myself to providing just a couple of examples of legislative initiatives taken in this context: the United Kingdom's 1998 Human Rights Act - Section 2, §1, of which specifies that national courts “must take into account” Strasbourg Court judgments - and Article 17 of Ukrainian Law No.3477-IV of 2006, which reads: “Courts shall apply the Convention [ECHR] and the case-law of the [Strasbourg] Court as a source of law”.⁹³ Hence, ECHR case-law - especially that of the Grand Chamber's judgments of principle - creates a body of law which encompasses “common European standards” by which states, and in particular their judicial authorities, are bound. This European supervision

of a fact-finding chamber within the Court), and P. Leach, C. Paraskeva & G. Uzelac *International human rights & fact-finding* (2009), available at http://www.londonmet.ac.uk/library/e40396_3.pdf *passim*.

⁸⁹ See, in this connection, for example, the Court's judgment in *Abuyeva v. Russian Federation* (2010), §§241-243, and P. Leach's indication that ‘infringement proceedings,’ by virtue of Article 46 §4, ECHR, may be necessary in this case (EHRAC Bulletin, 2011, issue 15), pp.1-3, available at <http://www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/EHRAC/Publications/EHRAC%20Bulletin%20Issue%2015%20ENG%20ONLINE.pdf>

⁹⁰ See pp.14-15 in doc. AS/Jur/Inf (2010)04 “Strengthening subsidiarity: integrating the Strasbourg Court's judgments case-law into national law and judicial practice” available at http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf

⁹¹ Memorandum presented at the Interlaken Conference, text available in doc. AS/Jur/Inf(2010), p.10.

⁹² Article 46, §1 reads “The high Contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties.”

⁹³ A few other examples can be found in doc. AS/Jur/Inf(2010)04, especially the compilation of background material at pp.5 -44, *passim*.

functions without prejudice to the advisability of ensuring higher standards of human rights protection, where possible (Article 53 of the Convention).

38. The issue of translation, publication and dissemination of the Strasbourg Court's case-law is also of primary importance and, indeed, often indispensable to ensure that the highest judicial organs of State are able to take it into account. The Court's case-law is available *via* the Court website's HUDOC database⁹⁴ and is also published in a wide variety of outside publications, in many languages, ranging from ministerial bulletins and other official state publications, documents issued by NGOs and a host of academic and commercial sources, to a growing series of (links to) websites and blogs of variable quality.⁹⁵ And although the use of only two official languages, English and French, can facilitate work in Strasbourg, for those who possess a good knowledge of at least one of these languages, reception of the Court's case-law is far from satisfactory at the domestic level. National judicial and administrative institutions, practising lawyers, academics and the public at large should all be able to have (better) access to the most important ECHR case-law in their respective languages.⁹⁶

39. I tend to agree with the Group of Wise Persons (see paragraphs 13 and 14 above), that it is principally incumbent upon state authorities to take responsibility for translation and distribution or publication of at least extracts of the Strasbourg Court's most important judgments in member states. In this connection, I find particularly interesting the idea of the production of an annual list of around five "must read judgments" supplemented by another five that are country specific.⁹⁷ The use of such a limited list of cases, which must be representative of the evolving case-law, would diminish the costs of translation significantly, irrespective of the question of who will carry the burden of so doing.⁹⁸ It follows logically that, if a state is required to translate a Strasbourg Court judgment as part of the "general measures" foreseen in the context of the execution of a Court judgment, by virtue of Article 46, §2, of the Convention, it is the defendant state itself which must bear the cost of translation and ensure appropriate dissemination of the text.

40. Renewed efforts are now also being undertaken in many states to provide professional training courses on the Convention and the Strasbourg Court's case-law to, in particular, judges, lawyers and persons responsible for law enforcement and the administration of justice. This work is often being undertaken in co-operation with the Council of Europe.⁹⁹ For instance, the HELP II Programme was launched in 2010 to assist national training institutions of judges and prosecutors to incorporate the ECHR into their curricula for initial and continuous training.¹⁰⁰ It focuses on, in particular, capacity-building of national training institutions. However, unlike the initial programme of which it is a follow-up,¹⁰¹ it is limited to a relatively small number of states.¹⁰²

⁹⁴ European Court of Human Rights HUDOC Database, available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/>.

That said, there now exists, on a number of Council of Europe websites (including that of the Court), material available in many other languages or hyperlinks to websites where such translations can be accessed.

⁹⁵ See, on this and related subjects, a compilation of replies from member states in Committee of Ministers doc. CM (2008) 52: CDDH Activity Report "Sustained action to ensure the effectiveness of the implementation of the ECHR at national and European levels" *passim* (in the context follow-up to the '2004 reform package' and Committee of Ministers Recommendation (2002) 13 on the publication and dissemination in the member states of the text of the ECHR and of the case-law of the European Court of Human Rights). One of the best blogs on the Convention is that of A.C. Buyse, "ECHR blog" available at <http://echrblog.blogspot.com/>

⁹⁶ See, e.g. S. Sedley "Speaking in Tongues. The dissemination of Human Rights judgments" in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa* (2011), pp.571-574 and C. Gusy "How can the role of the European Court of Human Rights be enhanced? Recommendations for Germany" (2009), available at <http://www.statewatch.org/news/2009/may/echr-germany-policy-paper.pdf> (written and published for the JURISTRAS project). See also, in this connection, the decision to undertake the translation of the principal Strasbourg Court judgements, in German, by the editor N.P. Engel: *Europäischer Gerichtshof für Menschenrechte. Deutschsprachige Sammlung*.

⁹⁷ See R. Lawson "Guaranteeing the authority and effectiveness of the ECHR, doc. AS/Jur (2008)05, 7 (February 2008) available at <http://www.respoint.se/itp/event/euoparadet/content/File/14PACE.report.Lawson.Eng.doc>, p.7. See also suggestions made by S. Sedley, footnote 95, above.

⁹⁸ R. Lawson also notes that EU funding could be obtained for translations, if necessary.

⁹⁹ See footnote 94 above, especially as concerns information about follow-up to Committee of Ministers Recommendation (2004) 4 to member states on the ECHR in university education and professional training.

¹⁰⁰ *Directorate of Co-operation Activity Report 2010*, page 12. The website www.coehelp.org provides materials and tools used in the training of judges and other legal professions.

¹⁰¹ The HELP Programme, launched in 2006, was aimed at increasing knowledge and skills in European human rights standards within professional groups and civil society through training and awareness raising activities, and developing and strengthening procedures, mechanisms and remedies for the effective protection of human rights at the European and national levels.

¹⁰² Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Moldova, Montenegro, Russian Federation, Serbia, "the former Yugoslav Republic of Macedonia" and Ukraine.

41. The Human Rights Trust Fund (HRTF), managed by the Council of Europe Development Bank (CEB), was established in 2008¹⁰³ and supports the implementation of the ECHR through two projects.¹⁰⁴ The first is aimed at removing obstacles to the enforcement of domestic court judgments, as their non-enforcement is one of the most frequent sources of violations found by the Court in several states (discussed above¹⁰⁵), and is being implemented by six states. The second is aimed at contributing to the execution of judgments of the Strasbourg Court by the Russian Federation.¹⁰⁶ This initiative merits additional support, including from the CEB itself¹⁰⁷. With more widespread membership, the HRTF has the potential of becoming an important forum for the funding, development and implementation of ECHR training programmes within State Parties.¹⁰⁸ This HRTF could also, perhaps, help fund the secondment of judges/lawyers at the Court's registry in Strasbourg from certain countries.

42. Finally, there are also important programmes run jointly by the Council of Europe and the EU. While the majority of joint programmes are country-specific, there are also a number of regional and multilateral thematic joint programmes regarding, for instance, national minorities, awareness-raising on the abolition of the death penalty, national minorities, as well as a programme to strengthen democracy and constitutional development in Central and Eastern Europe in liaison with the Council of Europe's Venice Commission.¹⁰⁹

3.4. *Advisory Opinions: a platform for judicial dialogue*

43. In the Izmir Declaration of April 2011, there is a specific section on "Advisory Opinions" which specifies, in part, that "Bearing in mind the need for adequate national measures to contribute actively to diminishing the number of applications,[the Conference] invites the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court's case-law, thus providing further guidance in order to assist States Parties in avoiding future violations."¹¹⁰ Although this has been understood by some as an invitation to reopen the discussion on the institution of "preliminary rulings" with respect to the Court of Justice of the EU, I see this as a request to revisit the proposal already mooted by the Group of Wise Persons back in 2006,¹¹¹ i.e., to provide an additional mode of dialogue between the highest national courts and the Strasbourg Court.¹¹²

44. Such a procedure, drafted as an Optional Protocol to the ECHR, would enable national courts to consult the Strasbourg Court with regard to legal questions on the interpretation of the ECHR. These opinions would not be binding, but would carry considerable authority, without in any way "interfering" with the right of individual application (Article 34, ECHR). As, on the intergovernmental side, the arguments in

¹⁰³ See Committee of Ministers Decision: Agreement Establishing a Human Rights Trust Fund (1/16/2008), available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1225169&Site=CM>

¹⁰⁴ Germany, the Netherlands and Finland joined Norway's efforts to finance this project. See Human Rights Trust Fund Project, available at http://www.coe.int/t/DGHL/Monitoring/Execution/Themes/HRTF/Intro_HRTF_en.asp

¹⁰⁵ See, in particular, references to such structural problems highlighted in docs. 12455 (report of Mr C. Pourgourides, footnote 2, and AS/Jur/Inf (2011) 05, footnote 15, above).

¹⁰⁶ *Id.*

¹⁰⁷ The CEB makes annual profits of well over € 100 million, not least thanks to the capital (as of 2010, € 3 bn subscribed but uncalled, another € 2 bn paid-up capital and reserves) placed at its disposal by its shareholders (member States) without taxation or remuneration in the form of dividends. Information about the work of the CEB can be accessed on the Bank's website, at <http://www.coebank.org/> Not all Council of Europe member States are members of the CEB; missing are, in particular, Austria, the Russian Federation, Ukraine and the United Kingdom.

¹⁰⁸ See W. Schwimmer, "Institutional and functional arrangements for the protection of human rights at national and European levels: introductory report," in *Reforming the ECHR: a Work in Progress* (2009), p.29.

¹⁰⁹ Consult [Joint Programmes Internet Site](#). See also [The Council Of Europe and the European Union](#) website for further information concerning the relations between the two institutions. See, for a recent example, 3-year action plan launched with respect to Ukraine, in September 2011, details available at

http://www.coe.int/lportal/c/document_library/get_file?uuid=24875c00-6299-4c4f-9bd5-ad47a56d5f1e&groupId=10227.

See also, in this connection, J. McBride "The training needs of Ukrainian judges and lawyers with regard to the ECHR," Joint Programme between the EU and the Council of Europe on Transparency & Efficiency of the Judicial System of Ukraine (TEJSU project), doc. DG-HL (2011), 2 November 2011, especially §§13, 103, 109, 115, 116, 130, 135, 136 & 144, available at

http://www.coe.int/t/dghl/cooperation/capacitybuilding/source/echr/CoE_Ukraine_ECHR_Training_Report_Final.pdf.

¹¹⁰ Section D, see *supra* footnote 40.

¹¹¹ See Wise Persons Report p.80, *supra* note 4.

¹¹² Discussed in some detail by M.O'Boyle, the Court's Deputy Registrar, in "The legitimacy of Strasbourg review: time for a reality check?" in *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa* (2011), pp.489-498.

favour and against this suggestion have already¹¹³ - and will now again - be analysed in some depth, I limit my comments to indicate my support for this idea. This is certainly not a priority issue, and it is a procedure which may generate at first some extra work for the already overburdened Court. But it could be limited to a narrow category of cases while applying to and potentially enabling state-level resolution of a large number of issues, thus preventing future repetitive applications to the Strasbourg Court. In effect, the resolution of questions of interpretation of the Convention would shift from *ex-post* to *ex-ante*, saving valuable Court resources. Moreover, this one-time “delay” in national proceedings would have the advantage of permanently resolving a question of interpretation, leading to speedier resolution of parallel cases at the domestic level. Such a procedure would also strengthen the link between Strasbourg and the states’ highest courts by creating a platform for judicial dialogue, thereby facilitating the application of Strasbourg case-law by national courts.

3.5. Filtering of applications and repetitive cases before the Court: the available options

45. In order to ensure that judges have sufficient time to devote to cases which raise substantial or new and complex issues of human rights law or involve allegations of serious human rights violations warranting a full process of considered adjudication, there is consensus that the filtering mechanism of single and three-judge formations (which deal with “manifestly well-founded” cases), instituted by Protocol No.14, must be supplemented. The Evaluation Group, back in 2001, referred to the need to have recourse to additional “standby” judges,¹¹⁴ while the Group of Wise Persons, in 2006, advocated the establishment of a completely new judicial filtering body (a “Judicial Committee” of lower-ranking judges).¹¹⁵ The Interlaken and Izmir Declarations both called for the development of further measures for effective filtering and the appropriate treatment of repetitive applications.¹¹⁶

46. It is not for me, in this report, to go over well-trodden ground.¹¹⁷ Instead, I prefer to take a firm stand on this subject and suggest that, for reasons which I outline below, much of this work ought to be carried out by temporary judges and/or senior registry lawyers. A number of proposals have been mooted in this connection.¹¹⁸ One suggestion, which seems sensible to me, is that certain senior registry lawyers, possibly under the supervision of a judge, be given the competence to reject all or some clearly inadmissible cases, cases which, it could be argued, do not require (or even deserve) the considered attention of an international judge.

47. A second suggestion is that filtering be entrusted to a new category of judge, a variant of what was proposed by the Group of Wise Persons. They would be devoted primarily, but not exclusively, to this task. This approach would retain the judicial character of decision making, whilst liberating the time of existing, regular judges for work on *prima facie* admissible cases.¹¹⁹

48. A third suggestion, inspired by the *ad litem* judge system that exists at the International Criminal Tribunal for the former Yugoslavia (ICTY),¹²⁰ is making it possible for the Court to be reinforced with temporary judges.¹²¹ Both the latter two proposals involve a separate category of judge appointed for a limited period and for a specific purpose, with the aim of enhancing the Court’s judicial capacity. However, ICTY *ad litem* judges are primarily intended to discharge the same function as permanent judges (although they may also act as reserve judges) and are required to have the same qualifications. In both cases, such judges would not be immediately operational. A filtering mechanism could combine two or more of these suggestions.

¹¹³ See doc. DH-GDR (2011) 15 .

¹¹⁴ See Report, §87, p.603, *supra* note 4.

¹¹⁵ See Report, §§ 51 to 65, pp.617-618, *supra* note 4 (and footnote 30).

¹¹⁶ See the texts of both the Interlaken and Izmir Declarations, *supra* notes 37 & 40, *passim*.

¹¹⁷ See, e.g., Appendix IV in CDDH Interim Activity Report, CDDH (2011) R72 Addendum I, pp.15- 25, in which issues of filtering of applications and treatment of repetitive applications is discussed in detail..

¹¹⁸ Information extracted from CDDH Interim Activity Report, doc. CDDH (2011) R72 Addendum I, §§11 to 21.

¹¹⁹ This proposal has had the support of the German authorities: see H. Keller, A. Fischer and D. Kühne, “Debating the future of the European Court of Human Rights after the Interlaken Conference: two innovative proposals” vol. 21 Eur. J. Int’l L. (2010) pp.1025 -1049, at p. 136.

¹²⁰ The term *ad litem* judge, is explained in my Information Report: “*Ad hoc* judges at the European Court of Human Rights: an overview”, in doc.AS/Jur (2011) 36, §§30-31 & 35.

¹²¹ A proposal mooted by the Finnish and Norwegian experts (position paper: Norwegian comments, 14 July 2010, on file with the Secretariat, recently refined in doc. DH-GDR (2011)019), also supported by the Netherlands, see doc. DH-GDR(2011)014.

49. The Interlaken Declaration also called upon the Committee of Ministers to consider whether repetitive cases could be handled by judges responsible for filtering. This could, of course, be envisaged for the last two categories, but not by registry officials.

50. It is noteworthy, in this connection, that the Court has indicated on several occasions that its case-processing capacity could be substantially (but not sufficiently) increased even before the adoption of a new mechanism, by increasing the staff of the registry. In any case, no new system of filtering could significantly augment the Court's decision-making capacity without including additional registry staff to prepare decisions, unless at the cost of work on other, higher priority cases – which would surely be counter-productive.

51. If senior registry lawyers were not appointed to undertake this work, how exactly, and by whom, would the judges be nominated and chosen? What role, if any, would or should the Assembly play in such a situation? Also, budgetary considerations will need to be borne in mind. In this connection, I have made a rough calculation on how much a "new filtering judges" body might cost: with five filtering judges (paid at the level of a Section Registrar at the Court), plus 20 assistant lawyers to prepare decisions, with the help of two assistants, the additional annual cost would be around €1,5m in salaries, which would permit the processing of an extra 8,000 decisions or so (the registry assumes that one assistant lawyer can prepare 400 draft decisions a year). Given that the backlog grows by over 20,000 applications a year, this is a considerable expenditure. If the five filtering judges were replaced with registry staff (by, for instance, a few more senior staff to supervise and a substantial number of assistant lawyers), the output could triple for the same amount of money expended. Hence, if states continue to insist that such decision-making power remain in the hands of judges, senior registry staff could be appointed as auxiliary judges for the purpose of making decisions on (in)admissibility, as had been suggested by the Evaluation Group back in 2001.¹²² Yet another argument in favour of this solution is that any system involving the appointment of persons from outside the registry would automatically entail additional expenditure for the training and relocation of such persons, with rotation being necessarily at a greater frequency than the terms of nine years served by Court judges at present.¹²³

3.6. *Utility of simplifying the procedure to amend the Convention*

52. Paragraph 12 of the Interlaken Action Plan calls for the use of a simplified amendment procedure for amending provisions of the Convention relating to organisational matters¹²⁴, an idea already mooted previously by the Evaluation Group back in 2001¹²⁵ and by the Group of Wise Persons in 2006.¹²⁶

53. There is a logic in providing the possibility of amending provisions relating to organisational matters by means of, for example, a unanimously adopted resolution of the Committee of Ministers without an amendment to the Convention being necessary each time, especially in the light of difficulties experienced with the entry into force of Protocol No.14.¹²⁷ Work on this subject was entrusted to a specially appointed sub-committee of the CDDH in 2010 and will probably continue in 2012.¹²⁸ I consider this proposal of instituting a more flexible system interesting. But the putting into operation of such a procedure is likely to necessitate the adoption of an amending protocol. The difficulty here is that this form of "delegation of powers" might not be considered, in certain states, as compatible with established ratification procedures

¹²² Report, § 85, p.603, *supra* note 4.

¹²³ See E. Lambert Abdelgawad, "A critical approach to the proposals for reforming the European Court of Human Rights from the Strasbourg Viewpoint" (in French): address to the AS/Jur in Oslo, on 7 June 2011. Text on file with the Secretariat. See also a policy paper of the Dutch Minister of Security and Justice, also on behalf of the Minister of Foreign Affairs, issued on 3 October 2011, entitled 'The Government's position on the reform of the European Court of Human Rights and on the accession of the EU to the ECHR', available at <http://www.mr-online.nl/images/stories/files/20111003-5708634-kabinetspunt-inzake-de-hervormingen-van-het-eur-hof-voor-de-rechten-vd-mens.pdf>; The Netherlands Parliament reference: Tweede Kamer 2011-2012, 32735-32.

¹²⁴ The text reads: "12. The Conference calls upon the Committee of Ministers to examine the possibility of introducing by means of an amending Protocol a simplified procedure for any future amendment of certain provisions of the Convention relating to organisational issues. This simplified procedure may be introduced through, for example:

a) a Statute for the Court;

b) a new provision in the Convention similar to that found in Article 41(d) of the Statute of the Council of Europe". [Article 41d of the Council of Europe's Statute permits amendment, by the Committee of Ministers (and the Assembly), of specific provisions of the 1949 Statute: text available at <http://www.conventions.coe.int/Treaty/en/Treaties/Html/001.htm>]

¹²⁵ See § 88 of Report, footnote 4, p.603.

¹²⁶ See §§ 44 to 50 of the Wise Persons Report, footnote 4, p.616, and footnote 30.

¹²⁷ On this subject, see PACE Opinion 271 (2009) on draft Protocol 14 *bis* to the ECHR, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC11879.pdf> (based on AS/Jur doc.11879, Rapporteur K de Vries, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC11879.pdf>).

¹²⁸ Committee of experts on a simplified procedure for amendment of certain provisions of the ECHR (DH-PS), which held its first three meetings in October 2010, in March and in October 2011. The remit of the DH-PS is wider than what was envisaged initially: see E. Fribergh & J.Darcy, footnote 138, p.78.

with respect to which national parliaments have an important role.¹²⁹ Hence, implementation of any such arrangement, once in place (e.g., the designation of *ad litem* or “lower-ranking” judges, discussed above), would, I submit, need to be contingent on the Assembly’s (and probably also the Court’s) prior approval.

54. I do not find the idea of (complex) negotiations on the subject of a possible Statute of the Court to be a priority consideration.¹³⁰ To enter into protracted discussions concerning the utility of “downgrading” certain provisions of the Convention and “upgrading” a number of the Court’s rules into a possible Statute is a potentially complicated, and perhaps even dangerous, procedure which does not need to be given priority in the near future.

3.7. *The responsibility of parliaments to ensure compliances with Convention standards*

55. The double mandate of parliamentarians - as members of PACE and of our respective national parliaments - can be of fundamental importance to ensure that standards guaranteed by the Strasbourg Court are effectively protected and implemented domestically without, in the vast majority of cases, the need for individuals to seek justice in Strasbourg. Hence the utility of stressing - despite the apparent lack of recognition of the value of this “parliamentary dimension” in the Interlaken and in Izmir documents (see paragraph 18 above)¹³¹ - “the key role parliaments can play in stemming the flood of applications submerging the Court by, for instance, carefully examining whether (draft) legislation is compatible with the Convention’s requirements and in helping states to ensure prompt and full compliance with the Court’s judgments” (§5, PACE Resolution 1726 (2010)).

56. It is incumbent upon states’ national authorities to guarantee the rights and freedoms enshrined in the Convention and its protocols: “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” (Article 1 of the Convention). It is the responsibility of all the state organs - the executive, the courts and the legislature - to prevent or remedy human rights violations at the national level. Governments and parliaments are principally responsible for prevention, whereas remedying violations is mainly the responsibility of the judiciary, unless the only remedy available is a change to the law. The legislature must examine whether draft legislation is compatible with the Convention and its protocols, as interpreted by the Court. Only when the domestic system fails should the Strasbourg Court step in. Subsequently, if and when there is an adverse finding by the Court, the emphasis shifts back to the domestic arena and the state is required to execute the judgment under the supervision of the Committee of Ministers (Article 46 ECHR). At this stage too, parliamentary involvement may be necessary. The (rapid) adoption of legislative measures is often required to ensure full compliance with Court judgments. Hence the need for parliaments, which can influence the direction and priority of legislative initiatives, to exercise effective oversight of action or inaction of the executive.¹³²

57. Even more importantly - as has been regularly repeated in several Assembly Resolutions since 2000¹³³ - although the execution of the Court’s judgments is the principal responsibility of the Committee of Ministers under Article 46 of the Convention, it is clear that the Assembly and national parliaments must now play a more proactive role in this respect; the viability of the Convention system is at issue.¹³⁴ Here again,

¹²⁹ See doc. DH-PS (2011)R 2, esp. §§ 6 and 20: certain experts felt that consultation of the Assembly could be important, from the point of view of checks and balances, in order to ‘reassure’ national parliaments. But I fear that ‘consultation’ of the Assembly would not suffice.

¹³⁰ For arguments in favour of a statute, consult H.Keller, D. Kühne & A. Fischer, “Proposal for a Draft Statute of the European Court of Human Rights” to be published in HRLJ; German version in vol.38 EuGRZ (2011), pp.341-359, and K. Drzewicki “Remodelling of the Treaty-Based System for European Human Rights Protection,” in Reforming the ECHR: a work in progress (2009), pp. 193-99.

¹³¹ Discussed in paragraph 18, above, and in the report I presented on the “Interlaken process”, submitted by the AS/Jur to the Assembly plenary, doc. 12221, §§18 to 23, in April 2010, *supra* note 36.

¹³² See A. Drzemczewski, *supra* footnote 42, at p.178. Experience also suggests that national parliaments must possess an efficient legal service with specific ECHR competence. Without such expertise at their disposal, it may be difficult for parliamentarians to carry out this important work properly.

¹³³ E.g., Resolution 1787 (2011) and texts listed in Doc.12455 (footnote 4 on page 7), *supra* footnote 2. The Assembly should, in particular, be vigilant that the new twin-track supervision system, operated by the Committee of Ministers since January 2011, with “enhanced” supervision of the execution of judgments of the Court in complex and difficult cases, works efficiently: if, for example, an action plan is decided upon in the context of ‘general measures’, it is also our responsibility to help ensure that such measures are swiftly and fully implemented. The new twin-track procedure is explained in doc. CM/Inf/DH (2010) 37, accessible at <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694239&SecMode=1&DocId=1616248&Usage=2>

¹³⁴ PACE Resolution 1787 (2011), § 2, *supra* note 2. The Committee of Ministers has acknowledged that the implementation of Court judgments “has greatly benefited in the past and continues to benefit from the Parliamentary

the dual role of parliamentarians as members of their respective national legislative bodies and of the Assembly, merits emphasis. As concerns the work of parliaments, the problem is the unsatisfactory manner in which many legislative bodies function in this respect. In its recent Resolution 1823 (2011) of June 2011, “National parliaments: guarantors of Human Rights in Europe”, the Assembly pointed to positive examples in several member states, notably the United Kingdom, the Netherlands, Germany, Finland and Romania, in which (rigorous) parliamentary procedures and/or structures exist to monitor the implementation of the Court’s judgments. But most parliaments do not have such supervisory mechanisms.¹³⁵ In these circumstances, I can only endorse the views of Mr C. Pourgourides, the AS/Jur Rapporteur on the implementation of judgments of the Court, who - in all his country visits - has systematically stressed the need to reinforce parliamentary involvement in this respect. He has even gone so far as to suggest that “the Assembly may - in the future - seriously need to consider suspending the voting rights of a national delegation where its national parliament does not seriously exercise parliamentary control over the executive in cases of non-implementation of Strasbourg Court judgments.”¹³⁶ On 5 April 2011 the President of the Assembly wrote to a number of chairpersons of PACE delegations asking them to indicate what follow-up had been given - by their respective parliaments - to Resolution 1787 (2011) which, in its paragraph 10.4 “call[ed] upon the chairpersons of national parliamentary delegations - together, if need be, with the relevant ministers - of [the eight] states in which in situ visits were undertaken to present the results achieved in solving substantial problems highlighted in [the] resolution.” In his letter, President Çavusoglu specified the need to ensure full and expeditious compliance with the Court’s judgments which, in many instances, requires regular and rigorous parliamentary oversight. We, the Parliamentary Assembly, and the AS/Jur in particular, are duty-bound to follow-up this important initiative.

4. Conclusions

58. Primary responsibility for applying Convention standards lies with domestic courts and authorities; the Strasbourg Court should play a secondary role. This is embodied in the principle of subsidiarity. It is understood that states, in most instances, provide a higher level of protection than the “common European standard” guaranteed by the Court in Strasbourg, and their national authorities are accorded a certain latitude in the implementation of Convention rights, on the understanding that it is the Strasbourg Court which has the final say in cases brought before it: Articles 19, 32 and 46 of the Convention (see paragraphs 24 and 25, above).¹³⁷

59. The statistics, in Strasbourg, look somewhat alarming. The stock of pending applications before the Court stands at 160,000, and the volume continues to rise by over 10% *per* year. The Committee of Ministers had 9,922 cases pending before it at the end of 2010. But of the pending cases, only some 13% of these were “leading” cases, i.e., those identified as revealing new systemic/structural problems requiring the adoption of new general measures.¹³⁸ The rest, amounting to 87%, are in principle clone or repetitive cases. That said, it is it is evident, as indicated by the Court’s Registrar, that the “root problem... is simple and well-known: there are too many applications coming to the Court compared to its current capacity.”¹³⁹ Numerous attempts to reform the system in Strasbourg have not been able to ebb the overwhelming tide of new applications, diminish the Court’s backlog or, so it is claimed, to create a sustainable system that will continue to be effective in the future.¹⁴⁰ In this respect, it has been argued that even Protocol No. 14 has a

Assembly’s and national parliaments’ greater involvement” (Reply to Assembly [Recommendation 1764](#) (2006) on the implementation of the judgments of the European Court of Human Rights, [Doc. 11230](#), of 2 April 2007, § 1).

¹³⁵ The text of Resolution 1823 (2011) is available at

<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1823.htm>. It is based on a report (doc.12636) prepared by Mr Pourgourides, the AS/Jur’s outgoing Chairman, who provides an overview of parliamentary good practices, §§61 to 89, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12636.pdf>. See, in particular, the message that dedicated human rights committees or appropriate analogous structures be set up by parliaments.

¹³⁶ “Implementation of judgments of the European Court of Human Rights. Progress report”, doc. AS/Jur (2009) 36 (declassified by the AS/Jur on 11 September 2009), § 23, available at

http://assembly.coe.int/CommitteeDocs/2009/ejdoc36_2009.pdf

¹³⁷ See also A. Mowbray, “The Interlaken Declaration—The Beginning of a new era for the European Court of Human Rights”, vol.10 H.R.L. Rev.(2010), pp. 521- 533, at p.528.

¹³⁸ See § 12 of doc. AS/Jur/Inf (2011)05 rev.2, *supra* note 15.

¹³⁹ *Per* E. Fribergh, “The future of the Court after Interlaken” in *Mélanges C. Rozakis* (2011), pp. 199- 206, at p.201 . See also E. Fribergh and J. Darcy “The European Court of Human Rights – changes and challenges” in No.7 Human Rights, Journal of the Council of Judges of Russia & the International Union of Jurists (2011), pp. 74-79.

¹⁴⁰ See P. Leach, “On Reform of the European Court of Human Rights”, 6 E.H.R.L.R (2009) pp. 725- 733, at p. 726 .

limited, specific lifespan, being merely a tool for the temporary survival of the system while other, more appropriate solutions, are sought.¹⁴¹

60. Two separate, and yet intertwined, issues merit priority treatment. The first concerns the need, for the Court to be given the means to regulate the filtering of applications appropriately and deal with repetitive cases (as discussed in Section 3.5 above, at paragraphs 45-51). Governmental experts should not be tinkering with peripheral issues such as compulsory legal representation and the possible introduction of court fees before the Court.¹⁴² The Court has taken the bold step of adopting a “priority policy” which, if implemented rigorously, will “ensure that the most serious cases and the cases which disclose the existence of widespread problems capable of generating large numbers of additional cases are dealt with more rapidly.”¹⁴³ By taking this decision, the Court has, in effect, provided “breathing space” to those engaged in the reform process, and will permit all concerned to re-focus discussion away from the obsessive concern with the rising backlog of applications before the Court and instead grapple with problems of “*persistent defaulters*” in which serious human rights problems exist.¹⁴⁴ The future of the Convention system is in our hands, collectively, and not only in those of the Court. It is therefore principally for member states, their executive, judicial and parliamentary authorities to guarantee the authority and long-term effectiveness of the European Convention of Human Rights.

¹⁴¹ See, e.g., M. O’Boyle “On reforming the operation of the European Court of Human Rights” E.H.R.L.R (2008), pp.1-11 (“the tools contained in the 14th Protocol . . . were meant to enable the Court to ‘survive’ - to tread water so to speak - ending the outcome of the longer term reform processes.”).

¹⁴² There is strong opposition to these ideas. See, e.g., observations provided to the AS/Jur by Mrs Lambert Abdelgawad at our hearing on 7 June 2011 in Oslo, *supra* note 122. As concerns the latter, even the Court is against the idea: see Opinion of the Court for the Izmir Conference, doc. 3484768 of 4 April 2011, §10; leading human rights NGOs are of the same view: see statement made at the Izmir conference, available at <http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Amnesty%20International%20-%20Joint%20NGO%20Statement.pdf>

¹⁴³ See footnote 14, above; available at http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf.

¹⁴⁴ *Per* H. Däubler-Gmelin, in her forthright text on “The future of the Strasbourg Court...”, *supra* note 16 p. 2, §9.