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**Guaranteeing the authority and effectiveness of the European Convention on Human Rights**

Report<sup>1</sup>

Committee on Legal Affairs and Human Rights

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*Summary*

The European Court of Human Rights is facing difficulties on several fronts: the backlog of cases continues to grow, threatening to swamp the Court altogether, while certain of its judgments have been subjected to criticism in some states parties.

The Court is an extraordinary instrument and has had a profoundly positive impact on Europe's law and practice, but it cannot become a substitute for national protection of human rights. It was always meant to play a subsidiary or "back-up" role. If the right of individual application is to be preserved in essence, and if the Court is to deliver authoritative and high-quality judgments within a reasonable time, the pressing priority must be to improve the situation in those countries where the standards of the European Convention on Human Rights are not being properly implemented.

National parliaments can play a vital role in this by, for instance, ensuring that draft laws are compatible with Convention requirements in the first place, by pressing governments to promptly and fully comply with the Court's judgments and by scrutinising current reform efforts. They can also demand more money to enable the Court to keep up its essential work.

For its part, the Parliamentary Assembly should be more involved in the process of reforming the Convention system, with the power to scrutinise national reports on how the reforms agreed at Interlaken and Izmir are being implemented.

**A. Draft resolution<sup>2</sup>**

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 recognises the subsidiary nature of the supervisory mechanism established by the European Convention on Human Rights (ETS No. 5, "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 Convention 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 scrutinise 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.

6. Finally, the authority and effectiveness of the Convention system are contingent on the political will and commitment of member states to provide the Organisation with the 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<sup>3</sup>**

1. The Parliamentary Assembly, referring to its Resolution ... (2012) on guaranteeing the authority and effectiveness of the European Convention on Human Rights (ETS No. 5), 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 enable the Organisation to implement its human rights mandate effectively;

1.2. the 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 Ms Bemelmans-Videc, rapporteur**

### **Contents**

#### *Page*

1.	Introduction	4
2.	Overview of the present situation	5
	2.1.	<i>Role of the European Convention on Human Rights</i> 6
	2.2.	<i>Overload of the Court</i> 7
	2.3	<i>Report of the Group of Wise Persons; the Interlaken and Izmir Conferences</i> 7
	2.4.	<i>Major stumbling block: the Council of Europe's budgetary predicament</i> 9
3.	Selected issues which merit consideration	11
	3.1.	<i>A reminder as to what "subsidiarity" means</i> 11

3.2.	<i>Absence of effective domestic remedies still a major problem</i>	12
3.3.	<i>Need to enhance the authority of the Convention and the Court's case law on the domestic plane</i>	14
3.4.	<i>Advisory Opinions: a platform for judicial dialogue</i>	17
3.5.	<i>Filtering of applications and repetitive cases before the Court: the available options</i>	17
3.6.	<i>Utility of simplifying the procedure to amend the Convention</i>	19
3.7.	<i>The responsibility of parliaments to ensure compliance with Convention standards</i>	19
4.	Conclusions	20

## **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",<sup>4</sup> the Bureau of the Assembly requested the Committee on Legal Affairs and Human Rights 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 European Convention on Human Rights (ETS No. 5, "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 judgments of the European Court of Human Rights ("the Court").<sup>5</sup>

2. This report should be seen as a contribution to the longstanding debate on the future of the Convention system. It provides an overview of measures taken in recent years to try to respond to the call for reform of the system (Part 2),<sup>6</sup> 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 Court can be consolidated and reinforced.<sup>7</sup> 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.

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 Interlaken<sup>8</sup> and Izmir<sup>9</sup> Conferences in February 2010 and April 2011 respectively (as well as the entry into force of Protocol No. 14 to the Convention (CETS No. 194) in June 2010). These developments reflect the substantial efforts that have been, and are still being, undertaken to attain the goals referred to above.<sup>10</sup>

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 Convention<sup>11</sup> and the Council of Europe's untenable budgetary predicament,<sup>12</sup> to which can be added the need to strongly react to recent – often gratuitous and inappropriate – criticism of the Court's case law.<sup>13</sup>

## 2. Overview of the present situation

6. Since its entry into force in 1953, the European Convention on Human Rights system has rightly been heralded as one of, if not the most effective legal mechanism for the protection of international human rights.<sup>14</sup> However, it has also been recognised that the system's ability to meet the "challenges resulting from its own success" is vital to its continued viability, namely finding the means to efficiently manage the influx of cases that create a significant backlog in the Court's docket without losing sight of the Convention's fundamental purpose as the collective guarantor of human rights in Europe.<sup>15</sup> 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),<sup>16</sup> accept the political reality that the Court must concentrate on the quality of its work and deal with the most important, urgent cases relating to allegations of very serious human rights violations (see "the Court's priority policy"<sup>17</sup>), and to remind ourselves that the Court 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,<sup>18</sup> 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 committee's former chairperson, Ms Herta 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".<sup>19</sup> 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 European Convention on Human Rights*

7. The Convention system currently ensures states 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".<sup>20</sup> 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 (ETS No. 155) 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 Convention as a "type of European Bill of Rights".<sup>21</sup>

8. The Convention 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.<sup>22</sup> In performing such a mission, the Convention's scope extends beyond traditional treaty law.<sup>23</sup> The basic tenets of this view are that the rights guaranteed by the Convention are practical and tangible, and the Court's application of the "living instrument theory" in the interpretation of the Convention and its protocols,<sup>24</sup> allows it to keep pace with social change and the evolution of standards.<sup>25</sup> Moreover, although states 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 Court's case law must be duly adjusted: see Articles 1, 13, 19, 32 and 46 of the Convention.<sup>26</sup>

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.<sup>27</sup> However, non-governmental organisations (NGOs), academics and lawyers with extensive litigation experience, including a number of 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,<sup>28</sup> the crucial link between the individual and the Convention system.

10. If the reality faced by the Convention system is considered, it becomes obvious that this dual function is necessary, especially for states that were admitted to the Council of Europe without having first developed functional democracies and implemented the rule of law,<sup>29</sup> 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 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.<sup>30</sup>

## *2.2. Overload of the Court*

11. It must be admitted that the Court's dual role within the Convention system, as explained above, has led to a proliferation of applications, 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.<sup>31</sup> More than 90% of these applications 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 applications, 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 states parties: Italy, Poland, Romania, the Russian Federation, Turkey, and Ukraine.<sup>32</sup> These states have significant structural or systemic problems linked to the dysfunctioning of their 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;<sup>33</sup> 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 Convention 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 Court of the overload of complaints if implemented in concert.<sup>34</sup>

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.<sup>35</sup>

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",<sup>36</sup> the Stockholm Colloquy in June 2008, entitled "Towards stronger implementation of the European Convention on Human Rights at national level"<sup>37</sup> and the Skopje Conference in October 2010, on "Strengthening subsidiarity: integrating the Strasbourg Court's case law into national law and judicial practice",<sup>38</sup> 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) on the effective implementation of the European Convention on Human Rights: the Interlaken process.<sup>39</sup> The Interlaken Action Plan sets out obligations for the Committee of Ministers, states parties, the Court and the 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.<sup>40</sup> In June 2010, Protocol No. 14 to the Convention 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, in January 2011, a "twin-track supervision system" that provides for continued supervision of state execution of Court judgments, while promoting subsidiarity.<sup>41</sup> The Court has also implemented certain reforms. These include the single-judge system to filter inadmissible applications (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 the 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.<sup>42</sup>

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.<sup>43</sup> A selected number of issues which, 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,<sup>44</sup> 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 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.<sup>45</sup> This point was reiterated by the Assembly itself, in its [Resolution 1823](#) (2011) "National parliaments: guarantors of human rights in Europe", adopted in 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".<sup>46</sup> 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 respective countries' political leaders. The present situation is simply untenable, not to say suicidal.<sup>47</sup> 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,<sup>48</sup> which is more than the annual contribution made by 15 member states.<sup>49</sup> 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, established to provide assistance and expertise to the European Union and its member states when they are implementing EU/Community law on fundamental rights matters. It employs around 70 members of staff<sup>50</sup> and its tasks are to collect data on fundamental rights, conduct research and analysis, provide independent advice to policymakers, 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 European Union Treaty,<sup>51</sup> 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,<sup>52</sup> for 2010 it was €20 million,<sup>53</sup> and for 2011 it was, again, €20 million.<sup>54</sup>

- The Publications Office of the European Union 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.<sup>55</sup>

- 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.<sup>56</sup> The total number of staff at the three courts was 1 927 in 2010 and 1 954 in 2011.<sup>57</sup> Its budget in 2010 was €330 million and in 2011 it was €341 million.<sup>58</sup>

- The International Criminal Tribunal for the former Yugoslavia (ICTY) has concluded proceedings for 126 accused persons and has ongoing proceedings for 35 persons.<sup>59</sup> As of August 2011, it employed 919 staff members and its budget for 2010-2011 was €209 million.<sup>60</sup>

- The International Criminal Court (ICC) had a budget of €103 million for 2010.<sup>61</sup> This was based on the assumption that the Prosecutor would conduct five active investigations and up to three trials during 2010.<sup>62</sup> A figure of 763 staff members was approved and it filled 686 of these.<sup>63</sup>

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 European Union in 2010, less than a quarter of the budget of the Court of Justice of the European Union 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 to the Court from the Council of Europe's Programmes of Activity budget, seriously curtailing and undermining the impact of the Council of Europe'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.<sup>64</sup> 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 member states, 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 matter.

### **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 the 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 to the Assembly by the Committee on Legal Affairs and Human Rights.<sup>65</sup> 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, European Union accession to the European Convention on Human Rights, judicial corruption in certain states parties to the need to eradicate impunity, are of particular relevance in this respect.<sup>66</sup>

#### *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 Court. Once human rights are efficiently and effectively protected at the national level, in States Parties to the Convention, the 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" those states in which major and numerous human right violations occur,<sup>67</sup> as well as in those in which major structural problems exist,<sup>68</sup> 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 Convention places primary responsibility on states 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, paragraph 1). This is referred to as the principle of subsidiarity. Subsidiarity and, to a certain extent, the related doctrine of a "margin of appreciation"<sup>69</sup> 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.<sup>70</sup> In other words, the principle of subsidiarity has two aspects: one procedural, requiring 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.<sup>71</sup>

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

26. At present, a number of states 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.<sup>72</sup> 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.<sup>73</sup> However, even when a judgment of the Court identifies a violation, the practice often persists and remedies are either not available at all or not ap-

plied to subsequent violations due to structural deficiencies in national legal systems or due to political controversy.<sup>74</sup> This undermines the efficacy of the Convention system and opens the door to repetitive/"clone" applications.

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, paragraph 1, of the Convention, has been recorded in, *inter alia*, Bulgaria, Greece, Italy, Moldova, Poland, Romania, the Russian Federation, Turkey and Ukraine.<sup>75</sup> 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.<sup>76</sup>

28. Moreover, the proliferation of Article 6 cases may actually affect the quality of judgments issued by the 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.<sup>77</sup> 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.<sup>78</sup>

29. States have found a variety of methods to comply with these obligations. For example, in the *Procaccini* case, the Court indicated that all states 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.<sup>79</sup> Likewise, recent Polish legislation formulated to improve compliance with the Convention<sup>80</sup> has been deemed effective by the Court<sup>81</sup> as it allows 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.<sup>82</sup>

30. The Court judgments in the *Procaccini* and *Scordino*<sup>83</sup> cases demonstrate that states 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 acknowledged that states may choose to provide solely compensatory remedies, but that such remedies must be administered effectively and expeditiously.<sup>84</sup> 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.<sup>85</sup> 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, paragraph 1, violations.<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup>

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 Dymtro Kottliar, 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 dis-

pute 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.<sup>89</sup>

33. As my committee colleague, Mr Serhii Kivalov (Ukraine, ALDE), will present a separate report on “Ensuring the viability of the Strasbourg Court: structural deficiencies in states parties”,<sup>90</sup> 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.<sup>91</sup> Failure to implement judgments of the Court in such instances gravely undermines the value of the protection system established by the Convention”.<sup>92</sup> That said, on the basis of the list of problems enumerated by Mr Kotliar, it is obvious that a one-size-fits-all approach for improving domestic remedies (for example, 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.<sup>93</sup>

### 3.3. *Need to enhance the authority of the Convention and the 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 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 Committee on Legal Affairs and Human Rights on a number of occasions,<sup>94</sup> as well as by the Court’s outgoing President, Jean-Paul 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”.<sup>95</sup> 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, paragraph 1, of the Convention.<sup>96</sup>

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, namely governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level”. Also, the Interlaken Action Plan calls on 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, paragraph 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 Court’s 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 be-

fore 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, paragraph 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 and the case law of the [European] Court [of Human Rights] as a source of law”.<sup>97</sup> Hence, the Court's 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 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 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 database<sup>98</sup> 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.<sup>99</sup> 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 Court case law in their respective languages.<sup>100</sup>

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 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.<sup>101</sup> 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.<sup>102</sup> 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, paragraph 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 Court's case law for, 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.<sup>103</sup> For instance, the HELP II Programme was launched in 2010 to assist national training institutions of judges and prosecutors to incorporate the Convention into their curricula for initial and continuous training.<sup>104</sup> It focuses in particular on capacity-building of national training institutions. However, unlike the initial programme of which it is a follow-up,<sup>105</sup> it is limited to a relatively small number of states.<sup>106</sup>

41. The Human Rights Trust Fund (HRTF), managed by the Council of Europe Development Bank (CEB), was established in 2008<sup>107</sup> and supports the implementation of the European Convention on Human Rights through two projects.<sup>108</sup> 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 above<sup>109</sup>), and is being implemented by six states. The second is aimed at contributing to the execution of judgments of the Court by the Russian Federation.<sup>110</sup> This initiative merits additional support, including from the CEB itself<sup>111</sup>. 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 states parties.<sup>112</sup> 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 European Union. 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 European Commission for Democracy through Law (Venice Commission).<sup>113</sup>

#### 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".<sup>114</sup> 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 European Union, I see this as a request to revisit the proposal already mooted by the Group of Wise Persons back in 2006,<sup>115</sup> namely to provide an additional mode of dialogue between the highest national courts and the Strasbourg Court.<sup>116</sup>

44. Such a procedure, drafted as an Optional Protocol to the Convention, would enable national courts to consult the Strasbourg Court with regard to legal questions on the interpretation of the Convention. These opinions would not be binding, but would carry considerable authority, without in any way "interfering" with the right of individual application (Article 34 of the Convention). As, on the intergovernmental side, the arguments in favour and against this suggestion have already<sup>117</sup> – and will now again – be analysed in some depth, I limit my comments to indicating 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 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 the Court and the states' highest courts by creating a platform for judicial dialogue, thereby facilitating the application of the Court's 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,<sup>118</sup> 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).<sup>119</sup> The Interlaken and Izmir Declarations both called for the development of further measures for effective filtering and the appropriate treatment of repetitive applications.<sup>120</sup>

46. It is not for me, in this report, to go over well-trodden ground.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup>

48. A third suggestion, inspired by the *ad litem* judge system that exists at the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>124</sup> is making it possible for the Court to be reinforced with temporary judges.<sup>125</sup> 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.

49. The Interlaken Declaration also called on 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 for 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 of 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 1.5 million euros 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.<sup>126</sup> 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.<sup>127</sup>

### 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 matters,<sup>128</sup> an idea already mooted previously by the Evaluation Group back in 2001<sup>129</sup> and by the Group of Wise Persons in 2006.<sup>130</sup>

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.<sup>131</sup> Work on this subject was entrusted to a specially appointed sub-committee of the CDDH in 2010 and will probably continue in 2012.<sup>132</sup> 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 with respect to which national parliaments have an important role.<sup>133</sup> Hence, implementation of any such arrangement, once in place (for example, 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.<sup>134</sup> 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 compliance with Convention standards*

55. The double mandate of parliamentarians – as members of the Assembly 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 Izmir documents (see paragraph 18 above)<sup>135</sup> – “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” (Assembly [Resolution 1726](#) (2010), paragraph 5).

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 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). 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.<sup>136</sup>

57. Even more importantly – as has been regularly repeated in several Assembly Resolutions since 2000<sup>137</sup> – 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.<sup>138</sup> Here again, 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) “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.<sup>139</sup> In these circumstances, I can only endorse the views of Mr Christos Pourgourides, the committee’s 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”.<sup>140</sup> On 5 April 2011, the President of the Assembly wrote to a number of chairpersons of the Assembly 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 Committee on Legal Affairs and Human Rights 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 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, and their national authori-

ties are accorded a certain latitude in the implementation of Convention rights, on the understanding that it is the 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).<sup>141</sup>

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, namely those identified as revealing new systemic/structural problems requiring the adoption of new general measures.<sup>142</sup> The rest, amounting to 87%, are in principle clone or repetitive cases. That said, 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”.<sup>143</sup> Numerous attempts to reform the system 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.<sup>144</sup> In this respect, it has been argued that even Protocol No. 14 has a limited, specific lifespan, being merely a tool for the temporary survival of the system while other, more appropriate solutions are sought.<sup>145</sup>

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 or the possible introduction of court fees before the Court.<sup>146</sup> 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”.<sup>147</sup> 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.<sup>148</sup> 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 and their executive, judicial and parliamentary authorities to guarantee the authority and long-term effectiveness of the European Convention on Human Rights.

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<sup>1</sup> Reference to committee: Bureau decision, Reference 3380 of 5 October 2007.

<sup>2</sup> Draft resolution adopted unanimously on by the committee on 16 November 2011.

<sup>3</sup> Draft recommendation adopted unanimously by the committee on 16 November 2011.

<sup>4</sup> See document AS (2007) CR 31, report of the debate.

<sup>5</sup> See, in this connection, e.g., Assembly [Resolution 1787](#) (2011) and [Recommendation 1955](#) (2011) on the implementation of judgments of the European Court of Human Rights, and [Doc. 12455](#) (rapporteur: Mr Christos Pourgourides), especially paragraphs 195 to 208 in which reference to additional background information can be found.

<sup>6</sup> When reference is made, in this report, to the Convention, this usually also encompasses the substantive rights guaranteed in the Convention’s protocols.

<sup>7</sup> 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 Convention (2001), chaired by Ambassador J. Harman, and the Report of the Group of Wise Persons to the Committee of Ministers (document CM(2006)203). Both texts can be found in “Reforming the European Convention on Human Rights. Work in progress” (Council of Europe Publishing, 2009), pp. 563-628. [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM\(2006\)203](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM(2006)203).

<sup>8</sup> Interlaken Declaration, High Level Conference on the Future of the European Court of Human Rights (19 February 2010).

<sup>9</sup> Izmir Declaration, High Level Conference on the Future of the European Court of Human Rights (27 April 2011), <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1591969>.

<sup>10</sup> Committee of Ministers, Report on the Future of the European Court of Human Rights: Follow-up to the Interlaken and Izmir Conferences, document CM(2011)57 final (3 May 2011), <https://wcd.coe.int/ViewDoc.jsp?id=1781899>.

<sup>11</sup> 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 and M. Leuprecht, eds, 2011), pp.105-115 at p. 114. See footnote 21.

<sup>12</sup> See, e.g, paragraph 10 of [Doc. 12221](#) on "Effective implementation of the European Convention on Human Rights: the Interlaken process".

<sup>13</sup> See, e.g., "Criticism of the European Court of Human Rights",

[http://en.wikipedia.org/wiki/Criticism\\_of\\_the\\_European\\_Court\\_of\\_Human\\_Rights](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,2011/6/16/kst157272.html](http://www.rijksbegroting.nl/2011/kamerstukken,2011/6/16/kst157272.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.

<sup>14</sup> See, e.g., E. Bates, *The Evolution of the European Convention on Human Rights*, Oxford University Press, 2010, pp. 1-2.

<sup>15</sup> 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.

<sup>16</sup> See CDDH Interim Activity Report, document CDDH(2011)R72 Addendum I, of 1 April 2011, paragraph 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!).

<sup>17</sup> See the Court's website: Priority Policy:

[www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/Case+processing/](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 Court, 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."

<sup>18</sup> See "States with major structural/systemic problems before the European Court of Human Rights: statistics" document AS/Jur/Inf (2011) 05 rev 2, p. 7, [http://assembly.coe.int/CommitteeDocs/2011/ajinfdoc05%202011rev\\_EN.pdf](http://assembly.coe.int/CommitteeDocs/2011/ajinfdoc05%202011rev_EN.pdf). These statistics do not take into account many outstanding problems in the implementation of Court judgments in several other states (listed in footnote 4 of document 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.

<sup>19</sup> "The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process" document AS/Jur (2010) 06, p. 2, paragraph 9,

[http://assembly.coe.int/CommitteeDocs/2010/20100121\\_ajdoc06%202010.pdf](http://assembly.coe.int/CommitteeDocs/2010/20100121_ajdoc06%202010.pdf).

<sup>20</sup> E. Bates, op. cit., p. 147 (quoting D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (1st edition, 1995), p. 33).

<sup>21</sup> For a detailed survey, consult E. Bates, op. cit, p. 146. See also 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. Caflisch and others, eds, 2007) p. 263).

<sup>22</sup> 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*.

<sup>23</sup> 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, paragraph 75; see also A. Drzemczewski, *European Human Rights Convention in Domestic Law: a Comparative Study* (1983), pp. 22-34.

<sup>24</sup> See, e.g., *Airey v. Ireland* (1979), *Tyrer v. United Kingdom* (1978).

<sup>25</sup> 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), AS/Jur (2007) 25,

[http://assembly.coe.int/CommitteeDocs/2007/20070410\\_ajdoc25\\_2007.pdf](http://assembly.coe.int/CommitteeDocs/2007/20070410_ajdoc25_2007.pdf).

<sup>26</sup> See working document "The effectiveness of the ECHR at national level", AS/Jur (2007) 35 rev 2, paragraph 7,

[http://assembly.coe.int/CommitteeDocs/2008/20070726\\_effectivenessconvention.pdf](http://assembly.coe.int/CommitteeDocs/2008/20070726_effectivenessconvention.pdf). See also H. Keller and A. Stone Sweet, eds, *A Europe of Rights. The impact of the ECHR on national legal systems* (2008), *passim*.

<sup>27</sup> Summarised by E. Bates, *op. cit.*, pp. 500-502. 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 and M.R. Madsen, eds, 2011).

<sup>28</sup> *Ibid.*

<sup>29</sup> Democracy, as mentioned by the Preamble to the Convention, is meant to be "political effective democracy".

<sup>30</sup> See paragraphs 4 to 7 of my address at the San Marino Colloquy, *op. cit.*

<sup>31</sup> Statistics from: [www.coe.int/t/dghl/monitoring/execution/Reports/Stats/Statistiques\\_2009\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/execution/Reports/Stats/Statistiques_2009_EN.pdf). Statistical information is also available on the Court's website.

<sup>32</sup> Statistics available in "States with Major Structural/Systemic Problems before the European Court of Human Rights: Statistics", *op. cit.* See also, European Court of Human Rights, Pending Applications Allocated to a Judicial Formation (30 June 2011) on the Court's website.

<sup>33</sup> Report of the Group of Wise Persons to the Committee of Ministers, *op. cit.*

<sup>34</sup> 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).

<sup>35</sup> *Ibid.*

<sup>36</sup> Future Developments of the European Court of Human Rights in the Light of the Wise Persons' Report, San Marino Colloquy, [www.coe.int/t/dghl/standardsetting/cddh/Publications/SanMarino\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/Publications/SanMarino_en.pdf). See also *supra* note 25.

<sup>37</sup> Selected texts from the Stockholm Colloquy, including my speech on the “parliamentary dimension”, can be found in document AS/Jur (2008) 32 rev, [http://assembly.coe.int/CommitteeDocs/2008/20080623\\_ajdoc32\\_2008\\_rev.pdf](http://assembly.coe.int/CommitteeDocs/2008/20080623_ajdoc32_2008_rev.pdf).

<sup>38</sup> At which the committee's Chairperson, Mr Christos Pourgourides, presented a paper on the interpretative authority (*res interpretata*) of the Court's case law, see document AS/Jur/Inf (2010) 04,

[http://assembly.coe.int/CommitteeDocs/2010/20101125\\_skopje.pdf](http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf).

<sup>39</sup> See also [Doc. 12221](#) (rapporteur: Ms Marie-Louise Bemelmans-Videc).

<sup>40</sup> Interlaken Declaration, High Level Conference on the Future of the European Court of Human Rights (19 February 2010), <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1591969>.

<sup>41</sup> Committee of Ministers, Report on the Future of the European Court of Human Rights: Follow-up to the Interlaken and Izmir Conferences, *op. cit.*, p. 34, paragraph 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.

<sup>42</sup> *Ibid.* 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), p. 461-472 at p. 471.

<sup>43</sup> Izmir Declaration, *op. cit.*

<sup>44</sup> See proceedings of the Izmir Conference (bilingual, English/French version), pp. 19-21.

<sup>45</sup> In a letter dated 6 April 2011, addressed to the (Turkish) Chairperson 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.

<sup>46</sup> Paragraph 5.2 of [Resolution 1823](#) (2011).

<sup>47</sup> See paragraph 10 of [Doc. 12221](#), *op. cit.*, p. 4.

<sup>48</sup> 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).

<sup>49</sup> 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.

<sup>50</sup> [Organisation of the FRA](#).

<sup>51</sup> This article refers to the Council's power to apply penalties in case of a serious breach of fundamental rights in a member state.

<sup>52</sup> [FRA revenue and expenditure 2009](#).

<sup>53</sup> [FRA revenue and expenditure 2010](#).

<sup>54</sup> [FRA revenue and expenditure 2011](#).

<sup>55</sup> Publications Office – Key figures 2010.

<sup>56</sup> 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*.

<sup>57</sup> General Budget of the European Union for the financial year 2011, p. I/115,

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:068:FULL:EN:PDF>.

<sup>58</sup> Ibid. Section IV of the General Budget of the European Union – Court of Justice of the European Union, p. I/273. See also A. Lester “The European Court of Human Rights after 50 years” in *The European Court of Human Rights between Law and Politics*, op. cit., pp. 98-117, at pp.106-107.

<sup>59</sup> ICTY – Key Figures.

<sup>60</sup> ICTY – About the ICTY. Note that the figure in euros is derived from US\$301 895 900 at an exchange rate of 0.69.

<sup>61</sup> .

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> In its budget request for 2012-2013, the Court has requested 150 additional staff members.

<sup>65</sup> [http://assembly.coe.int/Main.asp?link=/Committee/JUR/role\\_E.htm](http://assembly.coe.int/Main.asp?link=/Committee/JUR/role_E.htm).

<sup>66</sup> Committee's reports: [http://assembly.coe.int/ASP/Doc/ATListingCommittee\\_E.aspn](http://assembly.coe.int/ASP/Doc/ATListingCommittee_E.aspn). Committee documents and public statements: <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, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1514441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1514441); Mr Buyse’s blog on the Convention, 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 and 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, [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Res\(2009\)5](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Res(2009)5); 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): document AS/Jur (2008) 07, especially pp. 6-8.

<sup>67</sup> Such major human rights violations are identified and documented in reports by, respectively, Ms Herta Däubler-Gmelin (Doc. 11934) and Mr Christos Pourgourides (Doc. 12455), 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 and of Resolution 1787 (2011) on the implementation of judgments of the European Court of Human Rights.

<sup>68</sup> See document AS/Jur/Inf (2011)05 rev 2, op. cit.

<sup>69</sup> The concept of a (national) margin of appreciation can be understood as a practice of allowing states parties discretion in the manner in which they fulfil their Convention obligations with respect to, e.g., Articles 8 to 12 of the Convention. 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.

<sup>70</sup> 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 the Jurisconsult of the European Court of Human Rights, document 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.

<sup>71</sup> 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.

<sup>72</sup> Article 13 of the Convention 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."

<sup>73</sup> See, e.g., Strasbourg Court judgment in *Surmeli v. Germany* (2006), paragraph 99, and two recommendations of the Committee of Ministers to member states: Recommendation Rec(2004)6 on the improvement of domestic remedies,

<https://wcd.coe.int/wcd/ViewDoc.jsp?id=743317> and Recommendation Rec(2010)3 on effective remedies for excessive length of proceedings, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1590115>. 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.

<sup>74</sup> See, in this connection, the paper presented by E. Fribergh, the Court's Registrar, "How to deal with repetitive applications in the future" at the Round Table held in Bled (Slovenia) on 22-23 September 2009,

[www.echr.coe.int/NR/rdonlyres/F4E1DAB4-9382-4CF1-8407-EE82A92A275A/0/ErikFriberghBledspeech.pdf](http://www.echr.coe.int/NR/rdonlyres/F4E1DAB4-9382-4CF1-8407-EE82A92A275A/0/ErikFriberghBledspeech.pdf), and the report on the state of human rights and democracy in Europe, Doc. 11202 (rapporteur: Mr Christos Pourgourides).

<sup>75</sup> See, for more details, [Resolution 1789](#) (2011), op. cit. 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, Slovak Republic, 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", [www.echr.coe.int/NR/rdonlyres/E6B7605E-6D3C-4E85-A84D-6DD59C69F212/0/Graphique\\_violation\\_en.pdf](http://www.echr.coe.int/NR/rdonlyres/E6B7605E-6D3C-4E85-A84D-6DD59C69F212/0/Graphique_violation_en.pdf)).

<sup>76</sup> *Kudła v. Poland*, judgment of 26 October 2000, Application No. 30210/96.

<sup>77</sup> 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).

<sup>78</sup> Ibid. 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).

<sup>79</sup> See *Giuseppina and Orestina Procaccini v. Italy*, judgment of 29 March 2006 (Grand Chamber), Application No. 65075/01, paragraphs 70-96.

<sup>80</sup> *Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki* 2004, [www.abc.com.pl/serwis/du/2004/1843.htm](http://www.abc.com.pl/serwis/du/2004/1843.htm) (in Polish).

<sup>81</sup> *Charzyński v. Poland*, decision of 1 March 2005, Application No. 15212/03, paragraphs 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).

<sup>82</sup> 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 European Convention on Human Rights", document AS/Jur (2008) 5),

[www.respoint.se/itp/event/europaradet/content/File/14PACE.report.Lawson.Eng.doc](http://www.respoint.se/itp/event/europaradet/content/File/14PACE.report.Lawson.Eng.doc).

<sup>83</sup> *Scordino v. Italy* (No.1), judgment of 29 March 2006 (Grand Chamber).

<sup>84</sup> *Procaccini* judgment, paragraphs 80-88.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*, paragraph 75.

<sup>87</sup> For more information on individual member states' approaches to excessively lengthy proceedings, see my report AS/Jur (2007)35 rev 2, op. cit., and D. Kotliar, "Solving Systemic Problems in States Parties: A Way to Ensure Viability of the Strasbourg Court", on file with the secretariat.

<sup>88</sup> See *Procaccini* judgment (which lists several substantial flaws in the Pinto Act).

<sup>89</sup> *Debelić v. Croatia*, judgment (2007). See also Venice Commission, Study No. 538/2009, paragraph 79.

<sup>90</sup> Motion for a resolution, [Doc.12370](#). See also Secretariat background information note, document AS/Jur/Inf (2011) 05 rev 2, op. cit. 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), *passim*,

[www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2010\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2010_en.pdf).

<sup>91</sup> Report on legal remedies for human rights violations in the North-Caucasus Region, [Doc. 12276](#).

<sup>92</sup> Paragraph 212 of [Doc. 12455](#), report on the implementation of judgments of the European Court of Human Rights. 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 (where he proposes the creation of a fact-finding chamber within the Court), and P. Leach, C. Paraskeva and G. Uzelac *International human rights and fact-finding* (2009), *passim*, [www.londonmet.ac.uk/library/e40396\\_3.pdf](http://www.londonmet.ac.uk/library/e40396_3.pdf).

<sup>93</sup> See, in this connection, for example, the Court's judgment in *Abuyeva v. Russian Federation* (2010), paragraphs 241-243, and P. Leach's indication that "infringement proceedings", by virtue of Article 46, paragraph 4 of the Convention, may be necessary in this case (EHRAC Bulletin, 2011, Issue 15), pp. 1-3, [www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/EHRAC/Publications/EHRAC%20Bulletin%20Issue%2015%20ENG%20ONLINE.pdf](http://www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/EHRAC/Publications/EHRAC%20Bulletin%20Issue%2015%20ENG%20ONLINE.pdf).

<sup>94</sup> See pages 14-15 of document AS/Jur/Inf (2010) 04, "Strengthening subsidiarity: integrating the Strasbourg Court's judgments case law into national law and judicial practice", op. cit.

<sup>95</sup> Memorandum presented at the Interlaken Conference, text available in document AS/Jur/Inf (2010) 04, p. 10.

<sup>96</sup> Article 46, paragraph 1, reads: "The high Contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties."

<sup>97</sup> A few other examples can be found in document AS/Jur/Inf (2010) 04, especially the compilation of background material, at pp. 5-44, *passim*.

<sup>98</sup> European Court of Human Rights HUDOC Database, [www.echr.coe.int/ECHR/EN/Header/Case law/Decisions+and+judgments/HUDOC+database/](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.

<sup>99</sup> See, on this and related subjects, a compilation of replies from member states in Committee of Ministers document 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 Rec(2002)13 on the publication and dissemination in the member states of the text of the Convention and of the case law of the European Court of Human Rights).

<sup>100</sup> 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),

[www.statewatch.org/news/2009/may/echr-germany-policy-paper.pdf](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 Court judgements, in German, by the editor N.P. Engel: *Europäischer Gerichtshof für Menschenrechte. Deutschsprachige Sammlung*.

<sup>101</sup> See R. Lawson "Guaranteeing the authority and effectiveness of the ECHR, document AS/Jur (2008) 05, p. 7, [www.respoint.se/itp/event/europaradet/content/File/14PACE.report.Lawson.Eng.doc](http://www.respoint.se/itp/event/europaradet/content/File/14PACE.report.Lawson.Eng.doc). See also suggestions made by S. Sedley, *op. cit.*

<sup>102</sup> R. Lawson also notes that EU funding could be obtained for translations, if necessary.

<sup>103</sup> See footnote 99 above, especially as concerns information about follow-up to Committee of Ministers Recommendation Rec(2004)4 on the Convention in university education and professional training.

<sup>104</sup> Directorate of Co-operation Activity Report 2010, p. 12. The website [www.coehelp.org](http://www.coehelp.org) provides materials and tools used in the training of judges and other legal professions.

<sup>105</sup> 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.

<sup>106</sup> Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Moldova, Montenegro, the Russian Federation, Serbia, "the former Yugoslav Republic of Macedonia" and Ukraine.

<sup>107</sup> See Committee of Ministers Decision: Agreement Establishing a Human Rights Trust Fund (16 January 2008), <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1225169&Site=CM>.

<sup>108</sup> Germany, the Netherlands and Finland joined Norway's efforts to finance this project. See Human Rights Trust Fund Project, [www.coe.int/t/DGHL/Monitoring/Execution/Themes/HRTF/Intro\\_HRTF\\_en.asp](http://www.coe.int/t/DGHL/Monitoring/Execution/Themes/HRTF/Intro_HRTF_en.asp).

<sup>109</sup> See, in particular, references to such structural problems highlighted in *Doc. 12455*, *op. cit.*, and document AS/Jur/Inf (2011) 05, *op. cit.*

<sup>110</sup> *Ibid.*

<sup>111</sup> The CEB makes annual profits of well over €100 million, not least thanks to the capital (as of 2010, €3 billion subscribed but uncalled, another €2 billion 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 [www.coebank.org/](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.

<sup>112</sup> See W. Schwimmer, "Institutional and functional arrangements for the protection of human rights at national and European levels: introductory report," in *Reforming the European Convention on Human Rights: a Work in Progress* (2009), p. 29.

<sup>113</sup> 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, three-year action plan launched with respect to Ukraine, in September 2011, [www.coe.int/lportal/c/document\\_library/get\\_file?uuid=24875c00-6299-4c4f-9bd5-ad47a56d5f1e&groupId=10227](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 European Convention on Human Rights", Joint Programme between the European Union and the Council of Europe on Transparency and Efficiency of the Judicial System of Ukraine (TEJSU project), document DG-HL(2011)13, 2 November 2011, especially paragraphs 13, 103, 109, 115, 116, 130, 135, 136 and 144, [www.coe.int/t/dghl/cooperation/capacitybuilding/source/echr/CoE\\_Ukraine\\_ECHR\\_Training\\_Report\\_Final.pdf](http://www.coe.int/t/dghl/cooperation/capacitybuilding/source/echr/CoE_Ukraine_ECHR_Training_Report_Final.pdf).

<sup>114</sup> Section D of the Izmir Declaration, *op. cit.*

<sup>115</sup> See *Wise Persons' Report*, *op. cit.*, p. 80.

<sup>116</sup> 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.

<sup>117</sup> See document DH-GDR(2011)15 .

<sup>118</sup> See *Evaluation Group's Report*, *op. cit.*, paragraph 87, p. 603.

<sup>119</sup> *Ibid.*, paragraphs 51-65, pp. 617-618.

<sup>120</sup> See the texts of the Interlaken and Izmir Declarations, *op. cit.*

<sup>121</sup> 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.

<sup>122</sup> Information extracted from CDDH Interim Activity Report, document CDDH(2011)R72 Addendum I, paragraphs 11- 21.

<sup>123</sup> 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.

<sup>124</sup> The term *ad litem* judge is explained in my information report: "Ad hoc judges at the European Court of Human Rights: an overview", document AS/Jur (2011) 36, paragraphs 30-31 and 35.

<sup>125</sup> A proposal mooted by the Finnish and Norwegian experts (position paper: Norwegian comments, 14 July 2010, on file with the Secretariat, recently refined in document DH-GDR(2011)019), also supported by the Netherlands, see document DH-GDR(2011)014.

<sup>126</sup> *Evaluation Group's Report*, *op. cit.*, paragraph 85, p. 603.

<sup>127</sup> 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 committee 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", [www.mr-online.nl/images/stories/files/20111003-5708634-kabinetspunt-inzake-de-hervormingen-van-het-eur-hof-voor-de-rechten-vd-mens.pdf](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.

<sup>128</sup> 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 41.d of the Council of Europe's Statute permits amendment, by the Committee of Ministers (and the Assembly), of specific provisions of the 1949 Statute: [www.conventions.coe.int/Treaty/en/Treaties/Html/001.htm](http://www.conventions.coe.int/Treaty/en/Treaties/Html/001.htm)]

<sup>129</sup> See paragraph 88 of the Evaluation Group's Report, *op. cit.*, p. 603.

<sup>130</sup> See paragraphs 44 to 50 of the Wise Persons' Report, *op. cit.*, p. 616.

<sup>131</sup> On this subject, see Assembly [Opinion 271](#) (2009) on draft Protocol No. 14 *bis* to the European Convention on Human Rights, and [Doc.11879](#) (rapporteur: Mr Klaas de Vries).

<sup>132</sup> Committee of experts on a simplified procedure for amendment of certain provisions of the European Convention on Human Rights (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 and J. Darcy, p. 78, footnote 143.

<sup>133</sup> See document DH-PS(2011)R2, especially paragraphs 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.

<sup>134</sup> For arguments in favour of a statute, consult H. Keller, D. Kühne and 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 European Convention on Human Rights: a work in progress* (2009), pp. 193-99.

<sup>135</sup> Discussed in paragraph 18 above, and in [Doc. 12221](#), paragraphs 18-23.

<sup>136</sup> See A. Drzemczewski, *op. cit.*, p. 178. Experience also suggests that national parliaments must possess an efficient legal service with specific Convention competence. Without such expertise at their disposal, it may be difficult for parliamentarians to carry out this important work properly.

<sup>137</sup> E.g., [Resolution 1787](#) (2011) and texts listed in [Doc. 12455](#), *op. cit.*, p. 7. 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 document CM/Inf/DH(2010)37, <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694239&SecMode=1&DocId=1616248&Usage=2>.

<sup>138</sup> Assembly [Resolution 1787](#) (2011), paragraph 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 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](#), paragraph 1).

<sup>139</sup> See also [Doc. 12636](#) (rapporteur: Mr Christos Pourgourides), which provides an overview of parliamentary good practices, paragraphs 61-89. See, in particular, the message that dedicated human rights committees or appropriate analogous structures be set up by parliaments.

<sup>140</sup> "Implementation of judgments of the European Court of Human Rights. Progress report", document AS/Jur (2009) 36, paragraph 23, [http://assembly.coe.int/CommitteeDocs/2009/ejdoc36\\_2009.pdf](http://assembly.coe.int/CommitteeDocs/2009/ejdoc36_2009.pdf).

<sup>141</sup> 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.

<sup>142</sup> See paragraph 12 of document AS/Jur/Inf (2011) 05 rev 2, op. cit.

<sup>143</sup> 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 and the International Union of Jurists* (2011), pp. 74-79.

<sup>144</sup> 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.

<sup>145</sup> 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").

<sup>146</sup> There is strong opposition to these ideas. See, e.g., observations provided to the committee by Ms Lambert Abdelgawad at our hearing on 7 June 2011 in Oslo, op. cit. As concerns the latter, even the Court is against the idea: see Opinion of the Court for the Izmir Conference, document 3484768 of 4 April 2011, paragraph 10; leading human rights NGOs are of the same view: see statement made at the Izmir conference,

[www.coe.int/t/dghl/standardsetting/conferenceizmir/Amnesty%20International%20-%20Joint%20NGO%20Statement.pdf](http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Amnesty%20International%20-%20Joint%20NGO%20Statement.pdf)

<sup>147</sup> "Priority policy", op. cit., [www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority\\_policyPublic\\_communication\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf).

<sup>148</sup> Herta Däubler-Gmelin, in her forthright text on "The future of the Strasbourg Court", op. cit., p. 2, paragraph 9.