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Case-Overload at the European Court of Human Rights



Vienna, July 6th 2012

Statement on CASE-OVERLOAD AT THE EUROPEAN COURT OF HUMAN RIGHTS

“The [European Convention on Human Rights] is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ...” (Airey v. Ireland, 9 October 1979, Series A no. 32, §24)

This requirement can be said to apply no less to the right of individual petition to the European Court of Human Rights, set forth in Article 34 of the Convention.

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The European Law Institute

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such its work covers all branches of the law: substantive and procedural; private and public.

ELI is committed to the principles of comprehensiveness and collaborative working, thus striving to bridge the oft-perceived gap between the different legal cultures, between public and private law, as well as between scholarship and practice. To further that commitment it seeks to involve a diverse range of personalities, reflecting the richness of the legal traditions, legal disciplines and vocational frameworks found throughout Europe. ELI is also open to the use of different methodological approaches and to canvassing insights and perspectives from as wide an audience as possible of those who share its vision.

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European Law Institute
Schottenring 14
1010 Vienna
Austria
Tel.: + 43 1 4277 22101
Mail: secretariat@europeanlawinstitute.eu
Website: www.europeanlawinstitute.eu

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The Working Party

Mark Entin

Since 2006, Director of the European Studies Institute and Professor of European Law at MGIMO-University, Moscow (key spheres: European system of human rights protection, Russia and the Council of Europe, common foreign and security policy, European Union-Russia cooperation). Director of the Institute of European Law, Moscow (2002-06). Deputy Permanent Representative of the Russian Federation to the Council of Europe (1996-2002). Holder of Jean Monnet Chair in European Union Law since 2006. Vice-President of the Russian Societies of International Law and European Studies.

Jean-Paul Jacqu 

Professor at the College of Europe since 1988. Honorary General Director, Legal Service of the Council of the European Union. Professor emeritus at the Law and Political Science Faculty, Strasbourg ; Director of the Institut des Hautes  tudes Europ ennes, Strasbourg (1974-77); Dean of the Law and Political Science Faculty, Strasbourg (1977-81); President of the University Robert Schuman, Strasbourg (1983-1990); Secretary-General of the International Institute of Human Rights – Ren  Cassin Foundation (1990-92).

Paul Mahoney (Chair)

Born 1946, law studies (M.A., Oxford University, 1967; LLM, University College London, 1969); doctor honoris causa, Aristotle University, Thessaloniki (2011); lecturer in law, University College London (1967-73); barrister (London, 1972-74); Registry lawyer/senior Registry lawyer, European Court of Human Rights (1974-90); visiting professor, University of Saskatchewan (1988); Head of Personnel, Council of Europe (1990-93); Head of Division (1993-95), Deputy Registrar (1995-2001) and Registrar (2001-05), European Court of Human Rights; President, European Union Civil Service Tribunal (2005-11); Chairman, Appeals Board, European Space Agency (2011-12); elected judge on the European Court of Human Rights in respect of the United Kingdom (2012).

Luzius Wildhaber

Professor Wildhaber was born in Basel, Switzerland, in 1937 and studied at the Universities of Basel, Paris, Heidelberg, London and Yale. He retired as President of the European Court of Human Rights in 2007. Before appointment to this post in 1998, seven years after having first become Judge of the Court, Professor Wildhaber had a distinguished academic career, including as Rector of Basel University, but mostly as Professor in the fields of Public

International, Constitutional, Comparative, and Administrative Law at the Universities of Basel and Fribourg.

The Advisory Committee

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FOREWORD BY THE PRESIDENT OF THE EUROPEAN LAW INSTITUTE

The European Law Institute (the “ELI” or “the Institute”) seeks to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Its mission is, building on the wealth of diverse legal traditions, the quest for better law-making in Europe and the enhancement of European legal integration. It has been founded in order to provide a forum for discussion and cooperation for both academics and practitioners. In contrast to purely academic research, the conclusions of its projects are intended to have immediate practical application.

It follows from the underlying principles of the ELI that a project concerned with backlog and delays at the European Court of Human Rights (“the Court”) should fit into a broader discussion going beyond the evident problem of case-overload confronting the Court. On a more general level, outcomes of ELI projects should have an immediate and visible impact, in particular one which might be directly usable by legislative bodies, judiciaries or other players. The projects should be at the service of the European citizen and respond to a manifest practical need.

The following paper seeks to achieve those goals. A manifest practical need is undeniable, in that European citizens are entitled to expect that their applications to the Court are handled within a reasonable time frame: “*justice delayed is justice denied*”, to cite the well-known dictum. The “deficit between applications introduced and applications disposed of”¹ – leading to a festering backlog of cases in the Court’s huge and ever-growing caseload - is one of the major reasons for fearing a paralysis of its functioning. If the number of the applications not processed within a reasonable time continues to increase, the effectiveness and viability of the protection system under the European Convention on Human Rights (“the Convention”) will be compromised.

This ELI project started at the end of December 2011 with the constitution of a small four-member Working Party and an Advisory Committee, composed of insiders and outsiders of the Convention system,

¹ Declaration of the High Level Conference on the Future of the European Court of Human Rights held in Brighton on 19 and 20 April 2012 (“the Brighton Declaration”), available at <http://www.coe.int/en/20120419-brighton-declaration/>, § 5.

practitioners and academics. The terms of reference given were to prepare a first contribution, under the auspices of the ELI, to the on-going debate on the future of the Court, by formulating a few practical key ideas regarding case-overload that could usefully be rendered public in a short time-span. The Working Party did not have as its objective to assess all the various solutions proposed for ensuring the effective functioning of the Court; rather the aim was to recommend measures capable, among others, of enhancing the working capacity of the Court, while at the same time guaranteeing a high level of protection for European citizens.

The recommendations presented in the Statement thus represent a selection made from a wider range of varied proposals, originating in various quarters. For information purposes, observations on proposals falling outside the compass of the recommendations in the Statement are set out in an appendix. The Advisory Committee, the Senate and the Council of the ELI have been particularly helpful in identifying points needing further elaboration or clarification and also in highlighting that the intractable subject-matter of too many applications flooding into the Court – of fundamental importance for European legal development – is one on which consensus is difficult to achieve. In this latter regard, the discourse inside the ELI reflects the range of perspectives outside the ELI. Its wide representation has enabled the ELI to produce a paper which, without being comprehensive, definitive or reflective of all approaches, can provide a practical point of departure for taking the discussion further. The selection of the few key recommendations was conditioned by the project group's conclusion that, over and above the improvement of national implementation of the Convention and better execution of the Court's judgments by respondent States, some adaptations of the procedures before the Court are necessary in order to bring the judicial workload down to manageable proportions.

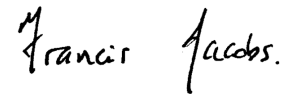
Two particular points that emerged during the fruitful and wide-ranging exchange of views on the project group's recommendations within the ELI bodies merit being mentioned here as important accompaniments to the recommendations.

First, as the Convention case-law itself establishes, the right of access to court means that litigants are entitled to an adjudication of their dispute before independent and impartial judges, not officials lacking judicial status. While noting that the single-judge procedure (introduced by Protocol No. 14 to the Convention) for treatment of clearly inadmissible applications associates the Registry in the decision-making process in the person of the Registry rapporteur who assists the single judge, the Statement is careful not to make any recommendation for removing the single judge and for transferring power to the Registry rapporteur. The general question whether a separate filtering mechanism might be called for in the future and, if so, what should be its form and composition is likewise left open.

Second, there are many examples of national supreme or constitutional courts controlling the level of their caseload through techniques such as the grant of "*certiorari*" or leave to appeal, that is to say, exercising a discretionary power to decide which cases to take and which ones not. Such a fundamental change in procedure should, however, never be introduced under cover of technical case-management rules. The ELI considers that any conditions for accepting for examination one case rather than another should not only

be objective and applied at an early stage, but, most importantly, be openly laid down in the law. As the Statement explains, this could be achieved either by enacting a new provision to this effect in the Convention or by innovative application of the already existing striking-out clause in the Convention, accompanied by a regulatory provision in the Rules of Court and perhaps a Resolution of the Committee of Ministers of the Council of Europe. What is clear is that the principle of legal certainty would rule out a “creeping” evolution of the exercise of such a power.

Finally, the present paper does not preclude further work on the subject of case-overload in the future, as the wider debate on possible reform of the Convention system continues. It is in the interest of European citizens that, as it stands, the caseload of the European Court of Human Rights be acknowledged as an obstacle to the effective protection of human rights in Europe. The paper presented by the ELI does not claim to provide an all-encompassing solution but is aimed at making, from one perspective, a positive contribution to a discourse which is both necessary and challenging. It is to be hoped that the paper will serve as a basis for stimulating the on-going debate both inside and outside the ELI.



Sir Francis Jacobs

President, European Law Institute

July 2012

I. INTRODUCTION: A MANAGEABLE CASELOAD

- (1) The following Statement has been drafted for the European Law Institute as a preparatory step towards a contribution by the Institute to the on-going debate in academic and other circles on the future of the European Court of Human Rights in the face of an expanding caseload, the latest manifestation of that debate being the high-level conference organised in Brighton, England, on 18 to 20 April 2012 by the United Kingdom Government in its capacity as chair of the Committee of Ministers of the Council of Europe.
- (2) The Statement does not purport to be an alternative to the more detailed and technical documents furnished for the purposes of the high-level conference by some other entities such as the Steering Committee for Human Rights of the Council of Europe (“the CDDH”, to use the acronym derived from the Committee’s title in French). The Statement does not therefore attempt to assess the comparative virtues of each one of the many proposed solutions for assuring the future of the Court now on the table for discussion. Rather, on the basis of a broad analysis of the root causes of the Court’s ever-growing caseload, the realistic prospects for the future and a vision of what should be the essential – international - mission of the Court, the Statement has adopted a deliberately selective and non-exhaustive approach: it focuses on what its authors consider to be the four main areas of action to be envisaged specifically in relation to the procedures before the Court in order to keep the Court’s caseload to manageable proportions. The emphasis has been placed on practical, sometimes innovative measures that could be taken within the existing treaty framework, while keeping in mind the possible need to plan for further, more far-going reform in the long term.
- (3) The Statement has been prepared by a Working Party,² appointed by the Institute at the end of December 2011. The Working Party began its work in January 2012 and received the benefit of comments from an Advisory Committee. The views expressed and the recommendations made are, however, those of the four members of the project group. The Statement comprises three sections, namely the present introduction, a summary of recommendations made and an explanatory report. It marks a preparatory step in a longer process by which the Institute, after fuller discussion of the topic among its members, expects to make a more comprehensive contribution to the on-going debate on the future of the Court. The Statement thus does not express the views of the Institute as such, but is intended to launch the discussion. There is also appended a working document setting out, for those who might be interested, observations on proposals for change not addressed in the Statement. The numerous preceding official or semi-official reports, resolutions and declarations, as well as academic studies, devoted from 2001 onwards to the problem of case-overload at the Court have naturally been drawn on for the preparation of the Statement and the debt owed to them is readily acknowledged. For ease of reading, however, the text does not attempt to summarise the

² See above p. 5 and 6 for the composition of the Working Party and the Advisory Committee

analysis, views and recommendations contained in those documents. For the same reason, footnote references have been kept to a minimum. Without citing the full list of documentation consulted, the following recent documents may be mentioned as those especially taken into account as being indicative of the latest state of play:

- the Declarations of the Committee of Ministers of the Council of Europe at the Interlaken (2010) and Izmir (2011) conferences on the future of the Court;³
 - a Resolution, together with accompanying report, of January 2012 by the Parliamentary Assembly of the Council of Europe on guaranteeing the effectiveness and authority of the Convention;⁴
 - the “conference report” of the Council of Europe meeting held at Wilton Park in November 2011 on the “2020 Vision for the European Court of Human Rights”;⁵
 - three reports from February 2012 by the CDDH;⁶
 - comments, dated January 2012, by a group of non-governmental organisations on the follow-up to the Interlaken and Izmir Declarations;⁷
 - the Preliminary Opinion of February 2012 by the Court in preparation for the Brighton Conference.⁸
- (4) Since the single, permanent Court was set up under Protocol No. 11 to the Convention, the story has been a constant one of the growing numbers of applications lodged each year outstripping the Court’s case-processing capacity. The Court inherited a significant backlog on its inception in late 1998. Since then, despite introducing many procedural innovations on its own initiative and achieving truly remarkable productivity gains in the 13 or so years of its existence (for which it is to be applauded), there has not been a year in which the Court has been able to reverse the imbalance between incoming and outgoing business. To take the last two full years of activity, the figures are as follows: 61,300 applications were allocated to a judicial formation in 2010 and 64,500 in 2011, as against 41,182 applications decided in 2010 and 52,187 in 2011. The total of pending applications

³ The text of the Statement was prepared parallel to the Brighton high-level conference mentioned at §1 above. Some footnote references to relevant paragraphs of the Declaration adopted at the close of the conference (see note 1 above) have however been added.

⁴ Resolution 1856 (2012) and Report of the Committee on Legal Affairs and Human Rights, rapporteur: Mrs Marie-Louise Bemelmens-Videc, doc. 12811.

⁵ Available on <http://www.wiltonpark.org.uk/resources/en/pdf/22290903/2011/wp1139-report>.

⁶ CDDH Final Report on measures requiring amendment of the Convention, doc. CDDH(2012)R74 Addendum I; CDDH Final Report on measures not requiring amendment of the Convention, doc. CDDH(2012)R74 Addendum II; CDDH Contribution to the ministerial conference organised by the UK Chairmanship of the Council of Europe, doc. CDDH(2012)R74 Addendum III.

⁷ Document referenced AI Index : IOR61/001/2012 – the seven organisations being Amnesty International, The AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE.

⁸ Available on the Court’s website.

currently (at 31 January 2012) stands at the near record of 152,000 applications. The consequences of the imbalance that has hitherto existed between input and output are easily imaginable. An especial concern is that for many years the more serious cases – where the international remedy could really make a difference – have not been dealt with anywhere nearly as expeditiously as they should have been.

- (5) Protocol No. 14 to the Convention, which came into force in June 2010 with an array of procedural changes, has already had a dramatically positive impact on the summary disposal of the huge volume of clearly inadmissible (“unmeritorious”) applications. There are nonetheless still some worrying signals to be discerned in the Court’s statistics, notably a significant backlog of meritorious applications requiring examination (“meritorious” being taken to mean applications that are not clearly inadmissible but contain some arguable elements). In this regard at least - and it is a serious regard - the problem of case-overload persists.⁹ Today as before, because of unacceptable delays that are no fault of the Court, thousands of meritorious applicants, especially those with potentially well-founded claims, are being denied the justice that the procedures in place appear to promise to them.
- (6) The general conclusion underlying the recommendations made in this Statement is that, quite apart from other necessary action, notably in the form of improved national implementation of the Convention rights, some aspects of the procedures before the Court could usefully be adapted in order to put the Court in a position where it can effectively manage all the categories of applications making up its caseload.

⁹ Cf the similar concern expressed in the *Brighton Declaration*, note 1 above, §§6, 16, 19.

II. SUMMARY OF RECOMMENDATIONS

- (7) The recommendations for the main forms of action to be taken in relation to the operation of the Convention machinery of protection with a view to enabling the Court to cope with its caseload may be summarised as follows:

A. For unmeritorious applications (that is, applications to be struck out or declared inadmissible at the outset)

(1) Consolidate and exploit to the fullest extent the single-judge procedure introduced by Protocol No. 14, as it is operated now by the Court and its Registry, so as to cope with both the existing backlog and the foreseeable future caseload;

Action: No treaty amendment, but doubtless a modest increase in the resources allocated to the Court so as to reinforce the Registry workforce assigned to the Filtering Section.

(2) While awaiting the longer-term results of the single-judge procedure in the light of incoming business, monitor the possible need for further reform, such as the creation of a separate filtering mechanism operating under the authority of the Court;

Action: Mandate to be given to the CDDH.

B. For repetitive applications (that is, applications in which the origin of the complaint made is a structural or systemic deficiency in the national legal order that is or has already been the subject of a pilot-judgment procedure before the Court)

(1) Institute a procedure whereby, in the wake of a pilot judgment finding a violation, the Court would, without the usual examination of cases taken to judgment, transmit repetitive applications to the Committee of Ministers by means of a formal “default” judgment to be dealt with by the Committee and the respondent State in the framework of the general measures of execution of the pilot judgment to be adopted at national level, in such a way as to ensure appropriate relief for all applicants in those applications;

Action: An invitation to the Court to act accordingly, to be formulated in a Resolution of the Committee of Ministers, to which effect would be given in the Rules of Court; to be codified, if necessary, in subsequent amendment of the Convention.

(2) Recourse by the Committee of Ministers to Article 46§3 of the Convention whenever a genuine difficulty or query arises in connection with the treatment of repetitive applications as part of the process of execution of the pilot judgment, so as to refer the matter back to the Court for a ruling;

Action: Preparedness by the Committee of Ministers to act in this way.

C. For otherwise meritorious applications

(1) Invite the Court to pursue and consolidate its priority policy;

(2) Put in place a visible, known procedure giving effect to the power of the Court to control its caseload of applications accepted for full judicial examination, which procedure would in particular involve removing from the Court's docket at the earliest opportunity cases that cannot be examined because of their low priority as established on the basis of objective criteria laid down in established case-law; this result to be achieved

- either by applying the existing striking-out provision of the Convention (Article 37§1(c));

Action: Invitation to be formulated in a Resolution of the Committee of Ministers, if necessary to be given effect in the Rules of Court.

- or, alternatively, if formal treaty amendment is felt to be preferable, by enacting in the Convention a new condition (not an admissibility condition as such) whereby the Court, sitting in a judgment-formation of at least three judges, may decide not to continue the examination of any application lodged under Article 34 which it considers, on the basis of established Convention case-law, not to allege a violation of the Convention and its Protocols of such a nature as to warrant adjudication on the merits;

Action: Treaty amendment.

(3) As a longer-term reform to come into effect once the Court's caseload has been stabilised to manageable proportions as a result of the adoption of other measures, empower the highest national court(s) to seek advisory opinions from the Court;

Action: Treaty amendment.

D. Generally

Invite the Court to continue in its search within the existing treaty framework for innovative new means for managing effectively its caseload and delivering justice in a timely fashion to as many deserving applicants as possible;

Action: Resolution by the Committee of Ministers.

- (8) The selective focus on these few solutions to the Court's dilemma of case-overload does not exclude the adoption of accompanying solutions or constitute a denial of the virtues of other solutions on the agenda at the high-level conference on the future of the Court: it is merely that the present Statement is limited to what are considered to be the key solutions, in terms of the procedures before the Court, for the different categories of caseload.

III. EXPLANATORY REPORT

A. SURVEY OF CHANGES ALREADY IMPLEMENTED

(9) Before adventuring down the road of envisaging reform of the existing procedural framework, it is necessary to see what relief has been brought by action already taken or changes already implemented. Such action and changes may be grouped under the broad heads of

- ever more efficient management of cases by the Court, covering internal organisation, the pilot-judgment procedure, case-priority and diffusion of explanatory material to potential applicants;
- budgetary increases;
- the new procedural tools provided for under Protocol No. 14, notably the single-judge procedure for unmeritorious cases, the new admissibility condition, joint examination of admissibility and merits, and smaller judgment-formations for meritorious cases.

1. Case-management

(a) *Internal organisation*

(10) By means of initiatives taken by the Court in the realm of its own internal judicial practice, including a sophisticated case-management system, and in the organisation of the Registry, considerable productivity gains have been achieved progressively over the years. However, such productivity gains, remarkable as they are, will never be enough on their own to keep up with the continuing and much greater expansion in the Court's caseload.

(b) *Pilot-judgment procedure*

(11) One generally acclaimed innovation in the last few years has been the jurisprudential development by the Court of the pilot-judgment procedure - starting with the *Broniowski* case,¹⁰ which, thanks to the friendly settlement negotiated by the Registry, resulted in retroactive remedial measures of

¹⁰ *Broniowski v. Poland*, (merits) ECHR 2004-V and (just satisfaction) ECHR 2005-IX.

general application being adopted by the respondent State and in hundreds of follow-up applications lodged in Strasbourg being returned to the national legal system for treatment. Again, this new procedural tool can be a helpful palliative in easing the caseload strain, but is by no means to be seen as a miracle solution: the pilot-judgment procedure represents a successful initiative on the part of the Court to reduce the work involved in one aspect of case-overload (a certain category of repetitive, well-founded cases), but it is not sufficient to cure the problem of even this one category (as to which, see §§40-47 below).

(c) *Case-priority*

- (12) As signalled on the Court's website, in 2009 the Court changed its policy in relation to the order in which it processes cases, with the relevant Rule of Court (Rule 41) being amended, so as no longer to deal with (*prima facie* meritorious) cases chronologically as they become ready for examination, but consistently to give priority to certain specified categories of cases raising important or urgent issues, adjourning or suspending examination of the majority of meritorious cases classified as "non-priority". Although this policy has been welcomed in many quarters, since it concentrates scarce resources on the relatively small number of deserving cases, it represents an open admission by the Court of its inability to handle all the business that the text of the Convention assigns to it. In addition, it marks a step in practice towards a system of accepting for examination on the international level only those cases that, for one reason or another, are judged to warrant adjudication on the merits under the Convention. Presumably as a consequence of devoting attention to the more serious and thus more work-intensive of the meritorious cases to the detriment of the non-priority cases, the number of judgments delivered fell from 2,607 in 2010 to 1,512 in 2011. The number of applications declared inadmissible or struck out by three-judge committees, chambers or the Grand Chamber likewise dropped a little, from 4,237 in 2010 to 3,623 in 2011. These output figures for meritorious applications disposed of, totalling 6,839 in 2010 but falling to 5,135 in 2011, are to be seen against the far higher figures both for pending meritorious applications (approximately 60,000 at the time of writing, made up of 34,000 repetitive applications and 26,000 non-repetitive meritorious applications) and for incoming meritorious applications (18,850 applications were earmarked for committees or chambers in 2010 and 17,200 in 2011). Meritorious cases coming before committees, chambers and the Grand Chamber in 2011 thus accounted for approximately 27% of applications allocated but only 10% of applications decided. The factual reality behind the priority policy, as reflected in these statistics, needs to be borne in mind when assessing solutions for coping with the caseload of meritorious applications (see, for example, §§40,45,48 below).

(d) Diffusion of information to potential applicants

- (13) There nowadays figures, in a prominent place on the Court’s website, an “admissibility checklist”. According to the explanatory notice, this checklist “is designed to help potential applicants work out for themselves whether there may be obstacles to their complaint being examined by the Court”. A detailed admissibility guide is available in 14 languages. The evident intention is to discourage as many potential applicants as possible from pursuing futile applications and thereby to stem the flow of obviously inadmissible cases. The impact of this initiative on the huge category of inadmissible cases, especially in the future, is not to be underestimated, but the effect of any information campaign in, for example, discouraging repetitive or non-priority meritorious cases is less sure. The Court has also clarified and rationalised the procedure for seeking interim measures, thereby reducing both for the Court itself and for the respondent governments the significant burden of work generated by this category of action.

2. Budgetary increases

- (14) Considerable budgetary increases have been granted to the Court since 1998, despite there having been zero real growth in the budget of the Council of Europe as a whole. The relatively favourable budgetary treatment of the Court carries with it the risk that other, valuable operational activities of the Council of Europe will be curtailed. Not only may the wisdom of such a policy by the governments be doubted, but the increases granted are still not sufficient to enable the Court to cope with its caseload (present and foreseeable, plus accumulated backlog) under the procedures as they exist now. As the present system functions, the Court is, evidently, seriously underfunded, in particular in comparison with other international or supranational courts funded by the same Contracting States.

3. Protocol No. 14

(a) Single-judge procedure

- (15) The new single-judge procedure (setting up of a separate filtering section, appointment of 60 Registry rapporteurs, designation of 20 single judges) has proved to be a real success in disposing of large numbers of unmeritorious applications in an economical and rapid manner in the first full year after the entry into force of Protocol No. 14. The figures for such applications decided in this manner in recent months attest to this, with a total of almost 47,000 applications declared inadmissible or

struck out by a single judge in 2011, representing a striking increase of over 30% in comparison with 2010. The forecasts of the Court are that, with some increases in staff resources, the existing arrears of unmeritorious cases could be eliminated within a few years (end 2015) thanks to this new procedure. This dramatic turnaround is relevant when assessing the need for any structural change in relation to the numerically important category of unmeritorious cases.

(b) New admissibility criterion

- (16) Three cumulative conditions (no significant disadvantage, no examination of the merits required by respect for human rights, and previous due consideration of the case by a domestic tribunal) are laid down in the new admissibility clause (Article 35 §3 (b) of the Convention). Even in theory it is no easy matter for these three conditions to be satisfied. At February 2012, only 30 applications had been rejected by chambers under this clause. This must represent something like 0.03% of all applications in respect of which an admissibility decision has been taken since Protocol No. 14 came into force in June 2010. Under the transitional provisions in the Protocol, the criterion cannot be applied by single judges until June 2012. The number of applications disposed of under this clause is therefore likely to increase in the future, though the paltry results so far may mean that one has to be prudent about expecting any enormous relief of the caseload.

(c) Joint examination of admissibility and merits

- (17) The establishment of a joint procedure whereby admissibility and merits are dealt with together in a single decision (Article 29 § 1 of the Convention) and not, as previously, in separate decisions had in fact been implemented by the Court in advance of the entry into force of Protocol No. 14 by way of creative interpretation of the Convention. In other words, all the benefit of this innovation had already been fully absorbed well before June 2010 and no further contribution to rendering the Court's caseload more manageable can be expected of it.

(d) Smaller judgment-formations for meritorious cases

- (18) *Three-judge committees* (which are now also competent to deal with routine and repetitive cases – Article 28 § 1(b) of the Convention): So far the number of Committee judgments remains quite low (in the hundreds – 380 in 2011). The modalities of this change are apparently taking time to implement. The Court's new priority policy in its treatment of cases, under which repetitive cases

are only accorded very low priority (§12 above), is also having as a consequence that few of the Court's limited, and insufficient, resources are allocated to the committee-procedure, so that the number of committee judgments is in fact liable to continue to remain relatively low, whatever its potential for shifting greater numbers of routine and repetitive cases.

- (19) *Five-judge chambers:* As yet, the Court has not requested the Committee of Ministers to reduce the composition of ordinary chambers from seven to five judges (as it is empowered to do under Article 26 § 2 of the Convention). The reasons for such hesitation can be guessed: constituting chambers with a geographically and gender balanced composition (Rule 25 § 2 of the Rules of Court) would be much more difficult; and there would also be a real risk of three-to-two decisions, with a potential inflation of the Grand Chamber's docket. It would seem that no great hopes can be placed in this potential procedural innovation for relieving in a significant way the mounting caseload pressure on the Court.

4. Conclusion

- (20) The conclusion arrived at is that, despite much progress already made on various fronts, a debilitating crisis of case-overload persists, the core problem being one of inherent incapacity to manage certain categories of the caseload, in particular among the meritorious cases. The key to dealing efficiently and in good time with the large numbers of unmeritorious applications seems to have been found (see §15 above). On the other hand, the result of the priority policy is that the Court now has the annual capacity to process somewhere between 5,000 and 7,000 meritorious applications of all kinds, with about 1,500 potentially well founded cases being taken to judgment on the merits; whereas the respective numbers of pending and incoming meritorious applications are far higher, being in the region of 60,000 for pending applications and 17-20,000 as regards the annual allocation to judgment-formations (see §12 above). It is clear that, with an ever-growing caseload, even the most efficient procedure for disposing of the numerically superior category of unmeritorious applications will still leave an unmanageable load of meritorious applications to be treated (see §§40,45,48 below).

B. CONSIDERATIONS GUIDING ANY FURTHER CHANGES TO BE MADE

- (21) The primary considerations that should guide any changes to the Convention system of human rights protection have been taken to be the following:

- no sacrifice of the right of individual petition;
- proper performance by the Contracting States of their fundamental obligations under the Convention, notably the obligations to implement the Convention rights within their internal legal orders and to execute the Court's judgments;
- the principle of subsidiarity;
- the role that the Court should play under the Convention system of human rights protection;
- the need for a package of changes and for changes to be practical, feasible and cost-effective.

1. No sacrifice of the right of individual petition

- (22) It is common ground among all interested parties that, as a principal, essential consideration influencing the adoption of any changes to the existing situation, the right of individual petition must be kept as the cornerstone of the Convention system.¹¹ Indeed, the right of individual petition can be said to have become part of the very identity of the Convention. However, as long as the principle of free access to the Strasbourg Court is maintained, the volume of incoming judicial business will be irreducible. Some counter-measures will be necessary to adapt the volume to the Court's capacity for adjudication. In particular, it should not be excluded as a matter of principle that the incoming flow is sifted and channelled in a procedurally and financially economical manner in order to identify those applications which merit being examined on the international level. On this view, maintaining the right of individual petition at the heart of the Convention system of human rights protection does not mean that every applicant is entitled to have the individual justice of his/her circumstances examined fully by the Court or even that every victim of an unresolved violation of a Convention right is entitled to receive individualised relief on the international level from the Court.

2. Contracting States' existing Convention obligations

- (23) For many, the starting point for resolving the crisis of case-overload is not so much the unadapted character of the international remedy available to individuals as the need to take action to secure better implementation by the Contracting States of their obligations under the Convention.¹² They note that six States account for two-thirds of the incoming applications and that to date 50% of all judgments delivered by the Court relate to repetitive issues. This being so, it is reasoned, the danger of the Court's being asphyxiated by an ever-expanding caseload should in the first place be

¹¹ The same essential consideration is emphasised in the *Brighton Declaration*, note 1 above, §§13, 31.

¹² *PA Report*, note 4 above, §6; *NGO Comments*, note 7 above, §§4-11.

addressed by strengthening implementation of the Convention rights on the national plane (which would reduce the need for individuals to apply to the Court for redress) and by “full, effective and rapid execution of the final judgments of the Court”, to use the words of the Izmir Declaration, so as to reduce the high number of repetitive applications coming before the Court.

- (24) It must surely be beyond contest that measures to secure improved national implementation and judgment execution should figure in the forefront of any package of action decided on by the Council of Europe governments, but the harsh reality is that such measures, while they will certainly contribute to alleviating the Court’s unmanageable burden, cannot on their own be counted on to provide a viable solution, even in the medium or long term. Some accompanying adaptation of the procedures before the Court for examination of individual applications is also needed as part of the package of the action to be undertaken. To require success on these two – essential – fronts as a necessary precursor to taking any concrete steps towards agreement for any change is to run a risk of waiting until it is too late. It is also likely that, with repetitive applications being accorded very low priority under the Court’s priority policy (see §12 above), repetitive issues will no longer continue to represent such a high percentage of the judgments delivered (cf the small number of 380 committee judgments delivered in 2011 - §18 above).

3. Principle of subsidiarity

- (25) Article 1 of the Convention spells out that the general purpose of the Convention is to bring about that each Convention country puts in place within its own internal legal order effective means for securing the guaranteed rights and freedoms to each and every individual coming within its jurisdiction. It follows from this general purpose, amongst other things, that, as has been proclaimed from the very early days of the Court’s case-law, the international machinery of enforcement established under the Convention is “subsidiary to the national systems safeguarding human rights”.¹³ Indeed, the principle of subsidiarity can be said to underlie the whole Convention system, from both a procedural perspective (the structure of the Strasbourg machinery and the form of the international remedy afforded to the individual) and a substantive perspective (the scope of the judicial control exercised on the merits by the Court in relation to the implementation of the guaranteed rights and freedoms by the national authorities). Consequently, the principle of subsidiarity in its procedural aspect – in the sense of situating the remedy for alleged human rights violations as far as possible within the national legal order and reserving the Convention machinery

¹³ For example, *Belgian Linguistic Case (merits)*, 23 July 1968, Series A No. 6, §10; *Handyside v. UK*, 7 December 1976, Series A No. 24, §48 ; and, more recently, *Scordino v. Italy (No. 1)*, ECHR 2006-V, §140.

of protection for those cases warranting external, international examination – is not only a legitimate but also a necessary consideration guiding adoption of any changes to the functioning of the international remedy intended to make the latter more effective. That is not to say, however, that, under cover of the principle of subsidiarity in its substantive aspect, the preoccupations of some governments as to a perceived over-interventionism by the Court into the merits of national decisions should distract from the separate debate about the Court’s problem of having too many cases.¹⁴

4. Role of the Court

- (26) The starting point for undertaking any far-reaching procedural changes to the protection system under the Convention is that the Contracting States should be agreed on what they want a European-level human rights court to do – or, rather, what they are willing to finance it to do.¹⁵
- (27) The different functions performed in practice by the Court in the context of processing cases may be broken down as follows:
- the filtering function, which involves sifting out, in an extremely summary procedure, huge numbers of unmeritorious applications;
 - routine adjudication on the merits - that is, rendering rulings of little or no legal interest applying well established case-law, whether or not a violation is found;
 - borderline fine-tuning - that is, going into the finer points of the Convention safeguards so as to update the level of protection afforded as values in democratic society evolve (achieved through evolutive interpretation);
 - addressing grave breaches of human rights;
 - confronting structural or systemic problems in national legal orders, problems which generate large numbers of victims of the human rights violation concerned and thus, actually or potentially, large numbers of well-founded applications in Strasbourg – examples being legislative property schemes (rent acts, post-communist property-restitution legislation, etc.), excessive length of court proceedings and failure to execute court judgments.

¹⁴ The “fundamental” principle of subsidiarity – primarily in its substantive aspect, together with the margin of appreciation – is adverted to in the *Brighton Declaration*, note 1 above, §§3,11,12.

¹⁵ When talking of the longer-term future of the Court, the *Brighton Declaration*, note 1 above, §31, recognises “the need to evaluate the fundamental role and nature of the Court”.

- (28) Today, the Court cannot perform all those functions in a satisfactory manner – delivering judicial decisions of the required quality in good time – because, as the Court has put it, “there remains a mismatch between the Court’s workload and its capacity”.¹⁶ If, as this Statement argues it should be, the conclusion arrived at the Brighton conference is that the serious difficulty experienced by the Court in coping with its caseload is not susceptible of being overcome by improved national implementation on its own, by a significant budgetary increase for the Court, by mere adjustments tinkering with the present procedural framework or even by a combination of such cures, then choices have to be made, priorities have to be established and some of the Court’s functions have to be privileged over others considered less vital for performance by an international court. In other words, a more harmonious balance will have to be struck between the Court’s various functions, depending on their respective importance for what is seen to be the essential mission or role to be served by the Court under the Convention in present-day conditions.
- (29) What the Court’s role should, or could feasibly, be in the future is perhaps a controversial matter on which opinions are divided. The conception of that role espoused in the present Statement is very much conditioned by the principle of subsidiarity (see §25 above).
- (30) No one disputes that, with successive reforms, the mission of the Court has become indissoluble from the right of individual petition. However, the demands placed on the Convention system by the vision of what may be called full “individual justice” – that is, the entitlement of every complainant to full judicial examination of his or her complaint and, if it is upheld, to individualised relief - have become increasingly difficult to meet as the caseload grows to enormous proportions. It is inconceivable that the Court, although undoubtedly having the substantive jurisdiction, should have the material capacity to look fully into the merits of all unresolved human rights violations within a Convention community of 47 States. The evolution of the Court’s caseload, as the Convention has become better and better known to European citizens, has led to a situation where an insistence on an essentially individualistic focus carries with it the seed of undermining the effective functioning of a system of free access to international justice in human rights matters open to 800 million people on the European continent.
- (31) In conclusion, adapting the international remedy to present-day conditions should be part of a larger picture of moving towards a greater dimension of subsidiarity in the allocation of responsibilities between the national and the international. A more harmonious balance between the various

¹⁶ *Court Preliminary Opinion*, note 8 above, §5.

adjudicative functions currently assigned to the Court under the Convention, and a balance that better achieves the basic purpose of the Convention, requires the Court to concentrate its scarce resources on applications warranting, for one reason or another, judicial examination on the international plane.

5. Other considerations

- (32) No one single change is likely to be capable on its own of resolving the problem of case-overload, a problem that is complex, (i) covering both an accumulated backlog and a foreseeable, continuing increase in incoming applications; (ii) involving both a huge numerical volume of unmeritorious applications and a smaller but still consequential and much more work-intensive stock of meritorious applications; (iii) made up of national caseloads that differ considerably in size and character, and thus pose different problems in terms of processing. A combination or cocktail of changes addressing different aspects of the problem of case-overload may well therefore be called for.
- (33) Finally, the drafting of this Statement has also been guided by the consideration that only those changes that are practical, feasible and cost-effective should be recommended. In the latter connection, it is doubtless politically unrealistic, in the current financial climate, to imagine that the governments would agree to the injection of significantly more cash even as part of the cure for the Court's ills, let alone the huge amounts that would be necessary to endow the Court, operating under the existing procedures, with the level of resources corresponding to the volume of its incoming caseload and accumulated backlog.¹⁷ Also, it may be doubted whether simply raising mathematically the budget of the Court every year as the number of incoming cases goes up is an appropriate solution, since the result would be an unwieldy court delivering many thousands of judgments but with its judges being unable to devote more than a little attention to the substantial and serious cases. The conclusion is therefore probably that, ideally, some further modest increase is to be called for, combined with measures to remove the inherent imbalance under the present system between the Court's workload and its case-processing capacity.

¹⁷ See the *Brighton Declaration*, note 1 above, §38, which speaks of "the need for budgetary caution" in relation to the choice of measures for giving effect to the Declaration.

C. MAIN AREAS OF RECOMMENDED FURTHER ACTION

(34) The Court's caseload may be broken down into three main categories, each category being the bearer of its own difficulties – such that there is not simply one indivisible problem of case-overload. These three main categories are:

- (a) a vast mass of unmeritorious applications (for the most part inadmissible - 73% of the allocated caseload and 90% of the cases disposed of in 2011), to be rejected at the outset in a summary procedure that not only delivers a decision to unsuccessful applicants within a reasonable time but is as economical, procedurally and financially, as possible, so as to leave the Court the time and resources for dealing with meritorious applications;¹⁸
- (b) so-called “repetitive” applications, in which the origin of the complaint made is a structural or systemic deficiency in the national legal order that is or has been the subject of a pilot-judgment procedure before the Court;
- (c) the remainder of meritorious applications, which category can itself be broken down into four sub-categories:
 - applications requiring routine adjudication on the merits,
 - applications raising issues of “fine-tuning” of Convention safeguards,
 - applications alleging grave breaches of human rights,
 - applications selected as pilot cases.

1. Vast mass of unmeritorious applications

(35) Even before the introduction of the single-judge procedure in June 2010 (see §15 above), it has long been so that in practice only the most summary of reasoning is given for the thousands and thousands of inadmissibility decisions (47,000 in 2011) taken in the initial screening-out procedure. In the abstract, given the volume of applications now involved, there would be obvious benefits in separating the relatively low-level judicial work of filtering from the much more important and judicially demanding task of ruling in meritorious cases, in particular those alleging serious human rights violations or raising issues capable of affecting the level of human rights protection in the legal orders of the Contracting States.

¹⁸ A similar objective is assigned to the screening out of clearly inadmissible applications by the *Brighton Declaration*, §17.

- (36) One solution advocated in this sense is to have a separate filtering mechanism in which the decision-making power would be vested in subordinate judges, appointed preferably by the Court itself. Under the single-judge procedure as it is operated now, the Court has already shifted much responsibility for the decision-making on to the Registry rapporteurs who, by virtue of Article 24 § 2 of the Convention, “assist” the Court when sitting in a single-judge formation. Registry officials, and in particular Registry rapporteurs, are fully impartial and independent of the parties and participate in the semi-judicial role conferred on the Registry. The procedures for their recruitment and promotion, which are open, objective and immune from political influence, are attended by safeguards ensuring both independence and a high level of competence. It may be that at some point in the future the distribution of actual responsibility between the rapporteur and the single judge can be seen to have resulted in a legal fiction of inadmissibility decisions being “taken” in a judicial sense by the single judge. In that event, in accordance with the principle of transparency, there might be something to be said for openly according a greater role in the decision-making process to the independent rapporteur, recruited primarily but not exclusively from within the Registry and given full judicial status by virtue of an official appointment as a subordinate judge, with supervisory control of the procedure resting with the Court judges. As now, national judges and lawyers seconded to the Registry, and integrated within its workforce, would provide valuable input from the outside world.
- (37) However, the background documents to the Brighton conference reveal that there is considerable reluctance on the part both of the non-governmental organisations and of many governmental representatives to giving any degree of decision-making power over admissibility to judicial officers appointed from within the Registry. Such reticence is, in the project group’s opinion, misconceived, but is a reality that is not likely to change. That being so, **it would be sensible to follow the CDDH’s pragmatic line of looking, at least in the short and medium term, to exploit the full potential of the single-judge procedure, before undertaking actual amendment of the Convention.**¹⁹ The current procedure would appear to be achieving more or less the same results as those achievable by formally separating filtering from processing meritorious cases.
- (38) The only, tentative, recommendation the Working Party would make concerning operation of the single-judge procedure is that if, as is likely, the volume of incoming applications continues its upward annual progression, **the Court should, subject to safeguards, investigate transferring in practice the centre of gravity of the decision-making process further towards the Registry rapporteur.** Apart from thereby enabling the judges to concentrate more time on the more serious

¹⁹ This could be said to be the approach taken by the *Brighton Declaration*, note 1 above – see §§17, 20(a)(ii).

cases that do matter, this will in any event necessarily occur as the numbers of unmeritorious applications under the supervision of each single judge go up each year.

- (39) What new heights the volume of incoming applications will reach in the future, especially after accession of the European Union to the Convention, remains an unknown factor. Despite the hopes of the Court that the results over the last year “ma[k]e it possible to envisage a situation ... in which there is both a balance between new cases and decided cases and a progressive elimination of the current backlog [of unmeritorious applications]”,²⁰ there must nonetheless be some risk of the relief offered by the single-judge procedure proving to be only temporary. For this reason, the recommendation is made as a measure of precautionary forward-planning that, while awaiting the longer-term results of the single-judge procedure in the light of incoming business, **the Council of Europe keep under examination the possible need for further reform of the manner in which unmeritorious applications are processed.**

2. Repetitive applications

- (40) There are 34,000 repetitive applications pending, which would normally represent many years’ work for the Court in the light of the present total output of committees, chambers and the Grand Chamber for all categories of meritorious applications (just over 5,000 applications disposed of in 2011 and just under 7,000 in 2010 – see §12 above). It is difficult to see how the Court will catch up on such arrears, not to mention deal in a timely manner with all the new repetitive applications that will presumably continue to flow in. Any proposal made must satisfactorily address this factual reality (see §44 below – and, in like vein, §48).
- (41) The pilot-judgment procedure (see §11 above) has brought some welcome respite, but is clearly not susceptible of providing a fully adequate solution: time and resources are nonetheless required to process the follow-up applications; and calls for better execution of pilot-judgments by respondent States, though necessary and to be supported, are doubtless expressions of wishful thinking as far as the reality, in the foreseeable future, of shifting this burden from the Court’s caseload is concerned.

²⁰ *Court Preliminary Opinion*, note 8 above, §8.

- (42) In theory, as explained above (§18), the three-judge committee's new judgment-delivery powers under Protocol No. 14 (Article 28 § 1(b)), combined with the simpler, shorter procedure introduced, could enable increased productivity to cope with at least part of the burden of repetitive applications. However, since Protocol No. 14 came into force in June 2010, the number of committee judgments has been small (380 in 2011). This is apparently because the Court does not have the resources or capacity to do the judicial work necessary. Under the priority policy (see §12 above), the limited resources available are directed towards cases raising important or urgent issues and repetitive cases are accorded very low priority. Unless a large injection of additional resources is made (which is unlikely), the potential of three-judge committees to process repetitive applications will remain theoretical; and even then it is debatable whether the judges would have sufficient time to devote to the volume that repetitive cases represent without prejudicing the quality of treatment given to substantial and serious cases (see the comment under §33 in relation to budgetary increases).
- (43) There are thus deeper-seated queries, going beyond lack of resources, as to whether the Court's judges can and should be obliged to adjudicate in the normal way on each and every repetitive case. Once the Court has delivered a pilot judgment identifying a structural or systemic problem in a national legal order, it can be said that the Court has exhausted its primary mission under the Convention and that, even if the respondent government executes the pilot judgment by adopting general remedial measures at national level in respect of the other multiple victims affected, little is contributed to raising the level of human rights protection in the country concerned by the Court's thereafter devoting any of its scarce resources to processing the hundreds, perhaps thousands, of follow-up or clone cases concerning the precisely same problem. The Working Party therefore retained as the simplest, most practical and most appropriate means of processing this category of applications to treat them, without more, as already being decided on the merits by virtue of the pilot judgment and to remit as expeditiously as possible to the respondent State, the author of the structural or systemic deficiency at the root of the prejudice suffered, the responsibility for resolving the concrete issue of individual redress in the follow-up cases. It will be recalled that Article 41 of the Convention only requires "just satisfaction" to be afforded on the international level "if necessary". This proposal would involve treating all repetitive applications as part of the process of execution of the pilot judgment, by having **a procedure whereby the Court, in the wake of a pilot judgment, could transmit to the Committee of Ministers all other pending or newly lodged follow-up applications, to be dealt with by the Committee and the respondent State in the framework of the general measures of execution of the pilot judgment at national level, in such a way as to ensure appropriate relief for all applicants in those applications.**

- (44) This could be done even now under the existing terms of the Convention, the Working Party believes, by the Court's foregoing in repetitive applications the usual examination carried out in cases taken to judgment and instead adopting what might be called a **formal "default" judgment** whose execution is linked to that of the pilot judgment - so that there would be no question of the Court's transferring a judicial function as such to the Committee of Ministers. This proposal is a variant on a new practice that the Court itself is envisaging "whereby in relation to clearly repetitive cases the Registry would simply refer a list of cases directly to the Government to be settled in an appropriate way. In the absence of any justified objections from the Government, failure to provide redress within a fixed period would lead to a 'default judgment' awarding compensation to the applicant".²¹ The project group's proposal differs in that the repetitive cases would be referred to the respondent government, not directly by the Registry for friendly settlement or a unilateral declaration by the government, but via the Committee of Ministers by means of a "default" judgment finding a violation on the basis of the pilot judgment, with a view to the repetitive applications being included in the general remedial measures, retroactive if need be, that the respondent government is in any event required to take at national level in execution of the pilot judgment in respect of all victims of the systemic or structural violation found in the pilot judgment (as occurred in the *Broniowski* case²²). The idea being that the proposal fits in with the philosophy underlying the pilot-judgment procedure and is a coherent development of that procedure, building on the judgment-execution obligations incumbent on the respondent government.²³
- (45) The Secretariat of the Committee of Ministers would doubtless need to be strengthened in order to cope with such collective influxes of cases for execution, but it is suggested that the work on assessing the solution for each individual repetitive case be done by the authorities of the respondent State concerned in the framework of the general measures taken within the national legal order in execution of the pilot judgment. There can never be excluded the risk that the national scheme adopted for this purpose does not afford reparation as generous or as rapid as applicants would have wanted. This, on its own, is not however a reason for maintaining the status quo. The Court cannot do everything, and its credibility is threatened by the growing volume of pending repetitive applications (34,000), which now amounts to over twenty times the total of the current annual output of cases disposed of by judgment (1,512) and which cannot be handled even in the simplified procedure before three-judge committees.

²¹ *Court Preliminary Opinion*, note 8 above, §21.

²² Note 9 above.

²³ See the analysis of the problem of repetitive applications found in the *Brighton Declaration*, note 1 above, §§18,20(a)(ii),(c) and (d) – in particular, §20(d) where the Committee of Ministers of the Council of Europe is invited "to consider the advisability and modalities of a procedure by which the Court could register and determine a small number of representative applications from a group of applications that allege the same violations against the same respondent State Party, such determination being applicable to the whole group".

- (46) That said, where repetitive applications are to be included in a collective process before the Committee of Ministers, **some special safeguard against inadequate execution of the pilot judgment, including the aspect of treatment of the follow-up cases, would appear called for.** A creative interpretation by the Committee of Ministers of Article 46 § 3 of the Convention²⁴ could provide such a safeguard: the Committee of Ministers would be within its rights to consider any real difficulty or doubt regarding, for example, the proposed national scheme of reparation as a “problem of interpretation” of the pilot judgment “hindering” the Committee’s supervision of the execution of the judgment and, consequently, to refer the matter back to the Court for a ruling. The Court would thereby retain a residual measure of control over the fate of repetitive applications. Under the Convention as it stands, in so far as an applicant is complaining that the Committee of Ministers has itself failed to exercise proper supervision over the execution of a pilot judgment by accepting an inadequate form or level of redress, the remedy, as in any case whether repetitive or not, is to lodge a fresh application alleging that the new national measure taken in the applicant’s regard does not comply with the Convention. An inflow of such applications could prompt another pilot judgment.
- (47) In sum, including repetitive applications as part of the process of execution of the pilot judgment is an overdue simplification. In order to achieve as rapid a stabilisation of the Court’s caseload as possible, such simplification would best be accomplished within the existing treaty framework. It could be done by means of an invitation to the Court, formulated in a Resolution of the Committee of Ministers, to proceed in this manner, to which effect would be given in the Rules of Court (as occurred in relation to the procedure for delivering pilot judgments). The procedural change thus effected could later be confirmed and codified on the occasion of a subsequent amendment of the Convention (as occurred in relation to the institution of the Grand Chamber). On this occasion the mechanism for dealing with problems of execution of pilot judgments or “default” judgments in all the repetitive applications could be refined, in particular by providing that the Court itself be empowered to restore repetitive applications to its list of cases in the event of failure to execute adequately a pilot judgment (on analogy with Article 37 § 2 of the Convention). Finally, the power to transmit without further ado repetitive applications to the Committee of Ministers should apply to applications pending at the time of the entry into force of the change as well as to applications lodged thereafter, so as to enable the backlog to be covered as well.

²⁴ “If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. ...” (A new and, as yet, unused provision introduced by Protocol No. 14.)

3. Other meritorious applications

(a) *Court's power to control cases examined on the merits*

(48) Even if satisfactory solutions can be found for the two categories of unmeritorious applications and repetitive applications (existing backlog as well as estimated incoming business in the future), there would still remain an unmanageable number of otherwise meritorious applications. The Court's statistics show that something like 26,000 non-repetitive meritorious applications are currently pending (that is, using the Court's "priority" categories: some 6,000 priority cases in categories I, II and III, and some 20,000 cases in the lower category IV); and that 9,250 incoming meritorious applications (repetitive and others) were earmarked in 2011 for the chamber/Grand Chamber procedure and 7,950 for the lighter three-judge committee procedure. In order to appreciate the Court's lack of case-processing capacity in this regard, the above figures have to be measured against the total of 5,135 meritorious applications of all kinds disposed of by committees, chambers of the Grand Chamber in 2011 (1,512 judgments and 3,623 inadmissibility decisions or striking out). It would seem evident on these figures that the Court is not in a position to deal effectively with either the accumulated backlog or the existing annual intake of non-repetitive meritorious applications. The judicial and registry resources needed to give a judicial examination to each one of these applications are enormous and, apparently, beyond the reach of the Council of Europe. Moreover, not only is a judgment-delivery capacity of 1,500 or so judgments a year about right for the highest human rights court in Europe in order to ensure quality and consistency, but it cannot be substantially expanded without prejudicing the priority treatment given to the more serious cases. The phenomenon is likely to continue into the foreseeable future, since as the volume of incoming applications grows so do the numbers of non-repetitive meritorious applications. Again, any proposal made must satisfactorily address the factual reality confronting the Court and the limits on its capacity to process these cases under the existing procedures, including the rapid and simplified procedure before three-judge committees.

(49) Various accessory solutions on offer, such as the appointment of ad litem judges, could help to attenuate the situation, but will not suffice on their own. Neither will efficiency and productivity gains achieved by the Court on the procedural and organisational planes, remarkable though they have been over the years. **The core problem of inherent incapacity to manage the caseload made up of not only repetitive applications but also other meritorious applications will remain.** Some practical, sure means must therefore be found for reducing the work generated by this category of applications – which includes the most important cases, namely those which do merit being fully examined by an international court – to manageable proportions in a permanent manner that takes account of the likely continuing increase in its numerical volume every year.

- (50) In the project group's view, the only solution that is guaranteed, both now and in the future, to give the assurance of the Court's being able to process effectively an incompressible but permanently growing number of non-repetitive meritorious applications is for **the Court itself to control the number of applications accepted for full judicial examination**. This is not to ignore that better implementation of the Convention rights by national authorities is not only the overall objective of the Convention but also the ultimate solution for balancing in a healthy way the respective national and international responsibilities for protection of human rights under the Convention system. However, better implementation by national authorities will not happen tomorrow, or even in five years' time, to the degree necessary to bring the volume of meritorious cases to manageable proportions.
- (51) **In the immediate the Court should be encouraged to pursue and consolidate its priority policy,**²⁵ which in effect does entail the Court's controlling its own caseload. What does, however, appear unsatisfactory at the moment is the uncertain fate of the thousands of non-priority applications put on (indefinite?) hold. Large numbers of endlessly waiting litigants not only give rise to a denial of justice, but will have a corrosive effect on the Court's reputation as an efficient and even viable tribunal. Unfortunately, no perfect solution is available. The lesser of two evils is that there should be **a visible, known procedure for removing from the Court's docket at the earliest opportunity cases that cannot be examined because of their low priority as established on the basis of objective factors**. This result could be achieved by one or other of two means, one involving innovative change of practice under the existing procedural framework, the other requiring formal treaty amendment.
- (52) *Innovative change of practice under the existing procedural framework.* The language of one provision in the Convention, namely Article 37§1(c),²⁶ would appear sufficiently wide to allow the Court to strike out applications which it considers on objective grounds do not warrant examination on the international level. On this evolutive reading of the Convention "in present-day conditions", treaty amendment would not be necessary to empower the Court to control the number or kind of cases to which it accords a full judicial examination on the merits. A Resolution of the Committee of Ministers could invite the Court to consider this manner of proceeding, thereby providing sufficient

²⁵ See the *Brighton Declaration*, note 1 above, §20(a)(i).

²⁶ "The Court may at any stage of the proceedings decide to strike an application out of its list where the circumstances lead to the conclusion that ... for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

validating legitimacy; and, if judged necessary by the Court, the Rules of Court could be adapted. In particular, potential applicants in this kind of case should be forewarned in some official text of the possible procedural outcome of their case.

- (53) The Working Party recognises that the decision not to continue the examination of a *prima facie* meritorious case should not be taken in the very summary, hardly judicial procedure at the filtering stage (currently by the single judge assisted by the Registry rapporteur). For this reason, it recommends that it should be the three-judge committees (and the chambers) that in practice take such striking-out decisions. In particular, if three judges in a committee²⁷ are unanimously satisfied that, given its low priority classification, an application contains no allegation of a human rights violation warranting full examination on the merits on the international plane, it is difficult to level a charge of arbitrary rejection. It is not suggested that all applications not falling within the top-priority categories should be automatically struck out. The system would be such that the objective criteria as to what constituted alleged violations of a kind not warranting being examined on the merits would have to be laid down in established case-law of the Court (that is to say, in rulings of chambers or the Grand Chamber), in the way that the loosely-worded “manifestly ill-founded” admissibility condition is currently applied. It would be for the Court to build up incrementally through case-law a practice based on a number of objective criteria which would make it possible for the three judges in a committee to determine not only in a rapid fashion at an early stage but, more importantly, objectively, and not subjectively according to their personal feelings, why it would not be justified to continue the examination of the particular application. It may be surmised, for example, that the case-law would hold absence of judicial proceedings before a national court or arguable complaints directed against the adequacy of domestic remedies as constituting considerations in favour of continuing the international examination of an application. In cases where a three-judge committee was not unanimously satisfied that the circumstances were covered by clear case-law, the committee would not issue a striking-out decision,²⁸ but the application could then be allocated to a chamber for a ruling on whether or not striking out was justified,²⁹ thereby developing the case-law.

²⁷ Acting under Article 28§1(a) of the Convention: “In respect of an application submitted under Article 34, a committee may, by unanimous vote, ... declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination”

²⁸ Under Articles 28§1(a) and 37§(c) of the Convention, that is.

²⁹ By virtue of Article 29§1 of the Convention: “If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. ...”

- (54) *Formal treaty amendment.* If formal treaty amendment is felt to be preferable for introducing such an important change to the way applications are treated, alternatively to such a change of procedural practice by the Court under Article 37 § 1(c) of the Convention, a specific provision could be introduced into the Convention explicitly recognising the power of the Court to control the caseload of applications to be examined on the merits. Such a treaty provision could take the form of

a new condition (not an admissibility condition as such) whereby the Court, sitting in a judgment-formation of at least three judges, may decide not to continue the examination of any application lodged under Article 34 which it considers, on the basis of established Convention case-law, not to allege a violation of the Convention and its Protocols of such a nature as to warrant adjudication on the merits.

What is said above in relation to the crucial role occupied in any such system by objective criteria laid down in established case-law binding on three-judge formations, would likewise apply to any new Convention provision along the lines suggested above.

- (55) The Working Party considered whether, in order to afford a supplementary safeguard, the decision foreseen above (not to continue examination of the application) should not be accompanied by a referral of the case back to a designated independent national authority, such as a national human rights commission, having competence to review the matter *ex aequo et bono*. Although much attracted by this idea, it concluded, however, that any benefit in such a mechanism was outweighed by the objections raised against it – notably the risk of disturbing legal certainty and the operation of the principle of *res iudicata* in the event that, as usually occurred, the impugned national measure had been embodied in a final judicial ruling.

(b) *Advisory opinions*

- (56) As a way of facilitating improved national implementation of Convention rights and thereby eventually reducing the number of applications lodged in Strasbourg, the Working Party group saw utility in **a system of advisory opinions to be sought from the Court by the highest national courts**, so as to “plug” the national judiciary directly, and in a preventive way, into the Convention machinery of protection, thereby leading over time to a better enforcement of the Convention rights by national judges acting in collaboration with the Strasbourg judges. The Working Party shares the

conviction of those who believe that the aspect of better implementation of the Convention rights on the national plane (covering enactment in the law, protection in practice and enforcement through remedies) cannot be ignored in any exercise of Convention reform if an enduring solution for the problem of case-overload is to be found. Many of the - necessary - changes mooted in connection with better national implementation, such as adapting the work programme of the Council of Europe, improving the process of execution of the Court's judgments and training legal professionals, do not call for amendment of the Convention. Harnessing the national judiciary as part of the Convention machinery of protection does, however, require such amendment.

- (57) Advisory opinions (or whatever other terminology is used to describe replies given by the Court to requests from national courts for interpretation of the Convention) are unlikely to have an immediate impact as such on the volume of incoming individual applications. The number of cases subject to an advisory-opinion procedure would, in statistical terms, perhaps not be that significant, but would nonetheless constitute a source of further, time-consuming judicial work for the Court. The recommendation to institute a mechanism of advisory opinions may therefore appear somewhat anomalous in the context of measures to ease the caseload strain of the Court. The Working Party is aware of the danger that in the wrong conditions such a mechanism would serve mainly to create yet another layer in an already cumbersome system. It has therefore taken this danger into account when formulating the following recommendation for a reform that can usefully be envisaged as one of the steps in the progressive movement towards a greater dimension of subsidiarity between the Convention machinery and the national legal orders (see §31 above), with the proviso that it is a reform conditional on the Court's having been put in a position to manage effectively the volume of incoming individual applications.
- (58) There is no suggestion that any mechanism of advisory opinions should take the place, even in part, of the right of individual petition. Rather the intention is to strengthen the Convention system. In terms of case-overload and making the right of individual petition effective, the aim pursued is of course a long-term one: injection of a dose of advisory opinions would furnish an additional means of shifting – permanently – the primary responsibility for human rights protection on to the national plane by putting in place a channel of dialogue between the Court in Strasbourg and the national courts. In so doing, it would contribute, once such a mechanism had “taken off”, to establishing a better balance than now between national and international protection. The investment is one that can bear fruit only in a somewhat distant future, but that should not be a reason to refrain from planning for it now.

- (59) Evidently, the intention cannot, as is the case with preliminary rulings in the legal order of the European Union, be to assure a uniform application of the Convention in all the Convention countries. The advisory opinion given by the Court in Strasbourg would bear on interpretative matters – the elucidation of the principles and values relevant for the application of the Convention standard(s) at issue in the given context of the litigation before the national court –, but the application of the Convention to the particular facts (as regards, for example, the test of necessity, the striking of the fair balance, the principle of proportionality, and so on) would always be for the national court. The decision, whatever way it goes, is therefore a national one and any execution of the judgment is for the national authorities. In this way, the principle of subsidiarity finds a privileged expression. This would be especially so if the procedure were to allow a preliminary exchange between the Strasbourg judges and the national judges before the delivery of the advisory opinion, in order to ensure that the “right” question is being put. At the close of the national proceedings, the right of individual petition to the Court should always remain available to any disappointed litigant claiming that the advice had not been followed or correctly applied to the facts.
- (60) The present Statement has not been drafted with a view to going into the technicalities of **the conditions on which advisory opinions could be sought, received and acted on**. This is a matter for negotiation and consultation between the interested parties. Some generalities do, however, merit comment.
- (61) To begin with, not only would the intended judicial dialogue be more powerful, but the fear of the Court being burdened with an excessive additional workload could be overcome if, as has been proposed, the power to seek an advisory opinion is restricted to the highest national courts and its exercise be optional for them. Secondly, there is sense in reserving advisory opinions for significant issues that can make a perceptible difference to the level of human rights protection, such as novel issues of interpretation and issues capable of affecting many people. Whether a detailed admissibility condition along such lines should be carved in marble on the face of the Convention or whether the text should be such as to allow both the national judges and the Court some discretion over the inflow and scope of requests for advisory opinions is debatable, however. Generally speaking, it may be better for the organic development of any institution of advisory opinions for the conditions regulating the admissibility of requests to be formulated in broad, flexible terms and not be excessively strict, given that the sense of responsibility of the actors concerned – the highest judges in Europe – to act in the general interest can presumably be relied on. Finally, what force, binding or otherwise, should be attached to the reply given by the Court to the national court seems to be largely a theoretical question, which could likewise be left to be worked out in practice rather than being legislated on in detail. At the very least, the requesting national court would have to treat the reply received as being an authoritative source of interpretation of the Convention, but this is so

evident that there is no need to state it in the Convention. Furthermore, the residual possibility of an individual application being lodged under Article 34 of the Convention at the close of the national proceedings not only provides a safeguard for the unsuccessful national litigant(s) but would doubtless also make the national court think twice before declining to follow the Court's interpretation of the Convention standard at issue. In any event, even if the abstract interpretation furnished by the Court were to be labelled as "binding", the national court would still be vested with a margin of appreciation in its adjudication on the particular case, if only to go further than the minimal requirements of the Convention as stated in the reply. It is above all a political issue for the States to resolve, depending on what they consider to be the formula most likely to be regarded by judges on their highest courts as enabling them, the requesting judges, to engage in a profitable dialogue with the Strasbourg Court on questions of interpretation of the Convention.

- (62) In sum, in the right conditions a mechanism of advisory opinions could represent a long-term investment for securing a better balance between national and international protection of human rights.³⁰ Those right conditions are: that the power to seek advisory opinions be restricted to the highest courts; that there be no obligation for those courts to seek an opinion; that the object of the mechanism should not be to secure the uniform application of the Convention; and, most importantly, that other measures assuring the stabilisation of the Court's caseload at manageable proportions, such as the exercise by the Court of control over what cases are examined on the merits, be in place and functioning effectively. Without being taken in combination with such other stabilising measures, advisory opinions would most likely impose a further unwanted judicial burden on the Court and aggravate rather than relieve the problem of case-overload.

D. CONCLUDING REMARKS

- (63) Treaty negotiation is no easy business; it takes time. And then there is no guarantee how soon the amendments bringing relief to the Court's dilemma of case-overload will come into force. In the meantime, the applications will continue to flood in, unless the public loses confidence in the Court to deliver justice in a reasonable time. This is why this Statement has put emphasis on what can be achieved within the existing treaty framework in relation to the Court's procedures for examining individual applications, even be it sometimes by means of a bold reading of the text of the

³⁰ The *Brighton Declaration*, note 1 above, §12, welcomes and encourages open dialogue between the Court and the highest national courts; notes that the interaction between the Court and the national authorities could be strengthened by the introduction of an advisory-opinion mechanism; and invites the Committee of Ministers of the Council of Europe to draft a protocol to this effect by the end of 2013.

Convention. The Court itself has shown the way through remarkable productivity gains, ingenious reorganisation of procedures and internal working methods, and an innovative application of the Convention's procedural clauses. The final recommendation of this Statement is therefore that the Contracting States, knowing the difficulties of formal treaty amendment (which may nonetheless prove necessary in the long run), should expressly **invite the Court, in a Resolution of the Committee of Ministers, to continue in its search within the existing treaty framework for innovative new means for managing effectively its caseload and delivering justice in a timely fashion to as many deserving applicants as possible.**

- (64) Some of the foregoing recommendations may be perceived as marking a reduction in the individual's access to a full judicial procedure before the Court. The concern, even dismay, that such recommendations may give rise to is understandable, but they represent minimal realistic solutions for enabling the very system of individual petition to remain viable in the foreseeable future, while preserving the essential of the mission assigned to the Court under the Convention. As said earlier, the Court is not in a position to perform in a satisfactory manner all the functions currently undertaken, delivering judicial decisions of quality in a reasonable time. As it operates now, the Convention system involves a structural denial of justice for too many applicants, especially deserving applicants. The Court cannot be expected to do everything and perfect solutions are not available. As a consequence, choices have to be made and, as the Court itself has done, priorities have to be established. If and when, as we all hope, the day comes when national implementation of the Convention rights, especially in the high case-count countries, has improved to the extent that the inflow of applications is reduced to manageable proportions, the two recommended solutions entailing that the Court not undertake the usual examination of the merits in some categories of *prima facie* meritorious cases would become largely redundant. In the meantime, which may well be a long time, some safety valve along the lines of these two recommended solutions is necessary to prevent the individuals who really need international protection of their human rights from being denied access to a "practical and effective" remedy before the Court.

Vienna, July 6th 2012

IV. APPENDIX: PROPOSALS FOR CHANGE NOT DISCUSSED IN THE STATEMENT (Working document of the Working Party)

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- (1) In seeking to identify the main forms of action to be undertaken in order to put the Court in a position where it can manage effectively its current and foreseeable caseload, the Working Party naturally had regard to all the various proposals for change on the table for discussion at the forthcoming Brighton conference. The present document brings together for the record, on the basis of the project's preparatory papers, various comments of the Working Party or its members on proposals for change not discussed in the body of the Statement.

A. PROPOSALS FOR REDUCING THE INFLOW OF APPLICATIONS OR NARROWING ACCESS TO THE COURT³¹

1. Formalising the conditions for exercising the right of individual petition

- (2) *Compulsory legal representation when lodging the application and court fees.*³² Such restrictions on the right of individual petition would undoubtedly reduce the Court's caseload by discouraging applicants of the kind who flood the Court with unmeritorious applications (such as convicted prisoners, disappointed litigants before national courts, mental patients and so on). The Working Party is not, however, persuaded that the advantages of these proposals outweigh their disadvantages. The symbolic value of the right of individual petition (in allowing any individual an initial access to the Court that is free and unrestricted) would be undermined by imposing a financial or representational barrier. The Working Party would prefer to maintain the initial unrestricted access but to make it clear to potential applicants in the text of the Convention that only those applications found, on the basis of established case-law, to satisfy the objective criterion of warranting examination on the merits will be judicially considered in a full manner. Also, as pointed out by the CDDH, the non-governmental organisations and the Court itself, there are other drawbacks with both proposals – for example, compulsory legal representation would have to be accompanied by an adequate legal aid scheme (presumably funded by the public authorities within each State – which already raises doubts in terms of feasibility in current economic conditions) and a system of court fees would pose administrative difficulties for the Court.

³¹ The classification adopted here does not coincide with that adopted by the CDDH in its documents ("measures to regulate access to the Court", "measures to address the number of applications pending before the Court" and "measures to enhance relations between the Court and national courts") – see, for example, *CDDH Final Report*, note 6 of the Statement.

³² Proposal not taken up in the *Brighton Declaration*, note 1 of the Statement.

- (3) *Fine for futile applications.*³³ The imposition of (financial) sanctions on applicants who lodge futile applications would not only certainly be justified in that such individuals needlessly oblige the Court to expend its limited resources for no public good; it would also serve to discourage individuals minded to lodge what they must realise are futile applications. Given that a similar clause at the European Court of Justice has proved to be useful in this regard,³⁴ the Working Party would not be opposed to seeing the Court being empowered to impose such sanctions as an accessory accompaniment to any more far-reaching reform. Such a clause, although it would not make a significant dent in the mass of unmeritorious applications, would nonetheless be justifiable and helpful in relation to one, albeit perhaps small, category of particularly inappropriate applications lodged in Strasbourg. The Working Party is not convinced by arguments to the effect that the imposition of sanctions might discourage future meritorious applications not only from other applicants but also from the sanctioned applicants themselves.

2. New admissibility condition whereby cases already properly considered by national courts under the Convention would be inadmissible

- (4) Under this proposal, which is strongly contested by non-governmental organisations, the Court, subject to two provisos, would have to declare inadmissible applications that are substantially the same as a matter that has already been examined by a domestic tribunal applying Convention rights.³⁵ Such an admissibility condition could possibly be described giving effect to the new reality of the shared responsibility between the national courts and the (international) Court in Strasbourg, now that the Convention has permeated national law in most Contracting States and is being applied by their national courts as an integral part of domestic law in the light of the Court's case-law. To that extent, it could be said to better reflect the principle of subsidiarity "in present-day conditions": evolutive legislation as opposed to evolutive interpretation. On the other hand, it does openly predicate a less intrusive scrutiny by the Court whenever the national courts have applied the Convention. Hence the instinctive distrust of it on the part of the non-governmental organisations. Proper application of the doctrine of the margin of appreciation would produce much the same result, namely the exercise of judicial restraint by the Court in the face of a considered decision taken by the "better placed" national judges on the basis of Convention standards. Furthermore, the Court's judicial time is likely to be taken in many cases in examining applicants' claims that the

³³ Proposal not taken up in the *Brighton Declaration*, note 1 of the Statement.

³⁴ See Article 94(a) of the Rules of Procedure of the European Union Civil Service Tribunal (a party may be ordered to refund avoidable court costs up to 2000 euros "where the action is manifestly an abuse of process").

³⁵ Proposal not taken up in the *Brighton Declaration*, note 1 of the Statement, but at §15(d) the Court is encouraged to take a strict approach, notably having regard to the margin of appreciation, by declaring such applications inadmissible as being "manifestly ill-founded" under Article 35§3(a) of the Convention.

Convention error committed by the national court was a “manifest” one (this being one of the saving provisos). Consequently, even seen from the long-term angle of consolidating the dialogue between the Strasbourg Court and the national courts, its practical utility as a tool for relieving the Court of part of its caseload may be doubted. It may well be that this proposal is aimed more at perceived activism on the part of the Court than at the problem of case-overload.

3. Amending the “no-significant-disadvantage” admissibility condition

- (5) By virtue of the new admissibility condition inserted in the Convention by Protocol No. 14 (Article 35 § 3(b)), the Court is required to declare inadmissible any application where “the applicant has not suffered a significant disadvantage”. A proposal has been made to remove from this clause the proviso that “no case may be rejected on this ground which has not been duly considered by a domestic tribunal”.³⁶ Whether it is at all worthwhile maintaining the clause is debatable in view of the paltry number of cases so far declared inadmissible under it (see §16 of the Statement). The results of its application by single judges from June 2012 onwards will have to be awaited before a definitive conclusion can be arrived at. However, even with the proposed surgery, the prospects of a *de minimis* clause being capable of having any significant impact on the Court’s caseload appear minimal.

4. Six-month rule

- (6) The Court itself has suggested that in present-day conditions a period as long as six months is not necessary to enable alleged victims of human rights violations to bring a claim in Strasbourg after they have already exhausted domestic remedies.³⁷ The thinking is presumably that if a shorter time-limit of, say, two or three months were fixed, the right of individual petition would not be unduly weakened, whereas only the fewer number of applications where the applicant felt there to be some urgency would be lodged as a consequence. This proposal³⁸ doubtless constitutes part of a package of accessory changes capable of bringing some relief, but the Working Party is uncertain as to whether, on its own, it would have a great impact in bringing the Court’s caseload down to manageable proportions.

³⁶ Proposal taken up in the *Brighton Declaration*, note 1 of the Statement, §15(c) – the necessary amending instrument to be adopted by the end of 2013.

³⁷ *Court Preliminary Opinion*, note 8 of the Statement, §37.

³⁸ Proposal taken up in the *Brighton Declaration*, note 1 of the Statement, §15(a) – the time-limit to be reduced to four months and the necessary amending instrument to be adopted by the end of 2013.

B. PROPOSALS FOR INCREASING OUTPUT OR LIGHTENING THE BURDEN OF PROCESSING CASES

1. Increasing the number of judges on the Court

- (7) Within the CDDH a proposal, with several variants, has been made to create *ad litem* judges who could be drafted on to the Court, perhaps for relatively short periods, to sit on committees and chambers, so as to increase case-processing capacity and to help with case-overloads as they arise.³⁹
- (8) It will be remembered that during the discussions on Protocol No. 14, the idea of increasing (permanently) the number of judges from high case-count countries did not receive much support, in particular from Russia, the country with the highest case-count. A similar though not identical idea has, however, recently surfaced in relation to the Court of Justice of the European Union: the Court of Justice has proposed that the case-overload crisis in the General Court (the second level of jurisdiction within the Court of Justice) should be addressed by creating 12 additional posts of judge on the General Court, which at present is composed of 27 judges, one in respect of each Member State. Within the European Parliament it was also suggested that, pending a legislative decision on the Court's proposal, the resources linked to the creation of the 12 additional judgeships be allocated provisionally to the Court of Justice so as to enable the General Court to constitute a task-force for eliminating the backlog. Although the financial climate is not propitious to extra spending by the governments, the Council of Europe could usefully at least also examine whether the logic behind these two initiatives could not be transposed in some appropriate way to the Strasbourg Court, seeing that increasing judicial numbers, even permanently, is not considered to be wholly unrealistic in the context of a case-overload crisis at the other large European-level court funded, as it is, by many of the same governments.

³⁹ The *Brighton Declaration*, note 1 of the Statement, §20(e), reacts favourably to this proposal by inviting the Committee of Ministers of the Council of Europe, "acting on information received from the Court", to decide by the end of 2013 whether or not to proceed to amend the Convention to enable the appointment of additional judges.

2. A smaller “supreme” Court

- (9) The proposal floated within the CDDH to have a smaller Court with fewer judges than Contracting States, perhaps with advocates general assisting it,⁴⁰ can be taken to be a variant of the idea of a separate filtering mechanism (see §§36-37 of the Statement) – in that such a smaller “supreme” Court, dealing only with the more important cases and advisory opinions (if ever such a system were introduced – as to which, see §§56-62 of the Statement), would presumably need to have sitting beneath it a lower-level judicial body entrusted with filtering (and, perhaps also, processing the more routine and the repetitive meritorious applications). It takes little imagination to envision this subordinate court inheriting the composition of the present Court, with one judge for every Contracting State - but judges who, given the lower level of the judicial work to be accomplished, would be less highly qualified and less well remunerated, thereby off-setting the additional expenses occasioned by the creation of a smaller “supreme” Court. However, political difficulties convincing all the Contracting States to reduce the membership of the ultimate judicial body under the Convention are to be expected.

3. A “sunset clause”

- (10) The proposal for the introduction of a “sunset clause” for striking out applications not communicated to the respondent government within a specified reasonable time⁴¹ amounts to a complement to the Court’s priority policy (see §12 of the Statement), in that it would expressly empower the Court to dispose, at a stroke, of less serious although prima facie meritorious applications not benefiting from priority examination. In essence, it puts into legislative form what is liable to be the reality in practice of the Court’s priority policy: sooner or later the Court may well have to inform applicants in many, if not most, less serious cases that it is simply not in a position to deal with their application. For that reason, a “sunset clause” would be in accord with the principle of transparency: the treaty text entitling individuals to petition the Court would at the same time honestly inform them of the possible procedural outcomes of their application. The operation of a “sunset clause” would, however, doubtless need to be linked to some other objective factor, such as an identifiable decision by the Court as to the less serious nature of the application (on the basis of a more refined priority policy?), so as to overcome the charge of arbitrary treatment dictated solely by the effluxion of time. Furthermore, there is a risk of perverse results going against the aim pursued, namely a tendency on the part of the Court, wishing to keep to a minimum the number of disappointed applicants, to communicate more applications than necessary to respondent governments. Whatever may be said

⁴⁰ Proposal not taken up in the *Brighton Declaration*, note 1 of the Statement.

⁴¹ Proposal not taken up in the *Brighton Declaration*, note 1 of the Statement.

in favour of this proposal, its potential to acquire support would seem limited by the fact that not only the non-governmental organisations but also the Court itself are opposed to it.

4. Relieving the Court of the just-satisfaction exercise

- (11) Some commentators have opined that the “mercantile” approach of the Court in relation to the award of just satisfaction – that is to say, applying the principle of *restitutio in integrum* and making a detailed, individualised financial assessment of actual prejudice in each case – only serves to inflate the volume of applications whose main, if not sole, aim is to recover money for one individual concerned (cf Italian length-of-proceedings applications). Having regard also to the time-consuming exercise that assessment of individual prejudice in this manner involves for the Court, especially in property cases (for example, post-*Loizidou*⁴² cases), it has therefore been suggested that award of just satisfaction in principle be removed from the remit of the Court and transferred elsewhere, preferably to the national legal order. A move in that direction has been made on the initiative of the Court in relation to one category of cases, namely repetitive applications, in the form of the pilot-judgment procedure (see § 11 of the Statement). The relief thereby offered is, however, clearly not enough in the face of the workload that, overall, assessment of just satisfaction represents. Thus, it is advocated that a change of principle be made in relation to the award of just satisfaction, either
- (a) by writing into the Convention an obligation for the Contracting States to make available at national level some easily accessible mechanism for making full and rapid reparation for any violation of the Convention that has been found in a judgment by the Court or that can be presumed to have occurred on the basis of such a judgment (follow-up cases to a pilot judgment); or
 - (b) failing that, by the Court’s changing its practice so as to privilege a “public-policy” approach (symbolic awards) rather than the “mercantile” approach hitherto followed.
- (12) The Working Party saw much potential benefit for lightening the caseload in the proposal to remove, in principle, the exercise of assessment of just satisfaction from the remit of the Court, both as a means of discouraging the large numbers of applicants who are evidently mainly motivated by the prospect of obtaining full financial compensation and in order to divest the Court of a heavy and time-consuming task that serves no good purpose in the general interest (no contribution to

⁴² *Loizidou v. Turkey (merits)*, Reports 1996-VI ; (*just satisfaction*), Reports 1998-IV.

improving the standards of human rights protection in the Convention community of States, in particular no noticeable significant deterrent effect on defaulter States). In brief, this proposal is in line with what the Working Party takes to be a more harmonious balancing of the Court's functions and with preserving an effective international role for the Court in the future (as to which, see §§26-31 of the Statement). However, the Working Party felt that the broader solution of a clause empowering the Court not to continue the examination on the merits of less deserving cases (see §§48-55 of the Statement), which would accomplish much more in terms of stabilising the caseload of examinable meritorious cases at a manageable level, would enable the same result to be arrived at: most applications primarily aimed at recovering compensation would presumably not be accepted on the ground that they did not warrant examination on the merits. Consequently, in accordance with its policy of focusing solely on the few key solutions, the Working Party agreed that the proposal regarding just satisfaction, whatever its merits, should not be taken up in the Statement.⁴³

5. Execution of the Court's judgments

- (13) It is common ground that better execution of the Court's judgments, notably those judgments identifying defective national implementation of the Convention that generates multiple and repetitive applications to Strasbourg, is one of the means for reducing the caseload to more manageable proportions, particularly in respect of the six States which are the major suppliers of applications. Hence various suggestions aired in the CDDH reports to strengthen the process of execution of judgments, for example by entrusting the supervisory responsibility to an independent authority or by linking execution more solidly to the work programme of the Council of Europe. In the Working Party's view, action along such lines, though not capable of securing in a substantial manner the requisite equilibrium between the workload generated by the incoming applications and the Court's case-processing capacity, should certainly figure in the package of measures to be adopted by the governments.⁴⁴

⁴³ In the section headed "Longer-term future of the Convention system and the Court", the *Brighton Declaration*, note 1 of the Statement, §35(f)(ii), "invites the States Parties, including through the Committee of Ministers, to initiate comprehensive examination of ... the affording of just satisfaction to applicants under Article 41 of the Convention".

⁴⁴ A whole section (§§26-29) of the *Brighton Declaration*, note 1 of the Statement, is devoted to improving execution of the Court's judgments and, in the section on the longer-term future of the Convention system and the Court (§35(f)(i)), the Contracting States and the Committee of Ministers are invited to undertake "comprehensive examination ... of the procedures for the supervision of the execution of judgments ... and the role of the Committee of Ministers in this process".

6. The principle of subsidiarity and the margin of appreciation

- (14) The mentions in the Interlaken and Izmir declarations of the need for the Court to respect better the principle of subsidiarity – presumably including in particular its substantive manifestation in the context of the adjudication on the merits, namely the doctrine of the margin of appreciation - would appear to be an expression of irritation on the part of some governments in response to what they consider to be over-interventionism by the Court into matters normally reserved for democratic choice at national level within each country. Generally speaking, not only is the principle of subsidiarity in its procedural aspect relevant as a consideration for the Working Party's examination (see §25 of the Statement), but the substantive quality of the Court's case-law is essential if the national courts are to retain confidence in the Court and to engage in constructive collaboration in the operation of the Convention system of human rights protection. The international remedy must therefore be structured and organised in such a way that the judges on the Court have adequate time to devote to cases warranting examination on the merits and thus to ensure the quality of the case-law. On the other hand, what constitutes proper respect by the Court of the fundamental principle of subsidiarity through appropriate application of the doctrine of the margin of appreciation is essentially an issue of judicial policy going to judicial duty and so a more controversial terrain on which to offer recommendations to the Court.⁴⁵ Whatever the impact of the adoption of a wide or narrow margin of appreciation on the caseload, the Working Party therefore considered it more prudent to remain within the selective terms of reference that it had set itself, namely possible changes to procedures before the Court.
- (15) Beyond those general observations, in terms of specific action to be included in the package of measures to be adopted in the wake of the Brighton conference, the Working Party would see little harm, and even some benefit, in following the example of the European Union treaties⁴⁶ by enacting in the Convention – but in the preamble rather than in the body of the Convention – a mention of subsidiarity as one of the fundamental principles underlying the whole of the Convention system of human rights protection. In contrast, it has serious objections – going to the independence of the Court - to any attempt by the governments, under the guise of rendering the Court more effective, to “rein in” the Court by inserting in the Convention an article on principles of interpretation, and in particular on the doctrine of the margin of appreciation.⁴⁷ Insofar as any action is to be taken in this connection, it is jurisprudential and not legislative. There is certainly, for example, scope for the

⁴⁵ This did not stop the *Brighton Declaration*, note 1 of the Statement, §12(a), from “encouraging the Court to give great prominence to and apply consistently these principles [subsidiarity and the margin of appreciation in its judgments]”. See also §§3, 11, 12, 15(d), 25(c), 29(b) for references to subsidiarity and the margin of appreciation.

⁴⁶ See Article 5§1 of the consolidated version of the Treaty on European Union, as it results from the Treaty of Lisbon.

⁴⁷ In the *Brighton Declaration*, note 1 of the Statement, §12(b), it was decided that a reference to both the principle of subsidiarity and the margin of appreciation “as developed by the Court's case-law” should be inserted in the preamble to the Convention – the amending instrument to be adopted by the end of 2013.

Court to refine its case-law on the kind of judicial control that it will exercise when recognising a margin of appreciation to the national authorities, so as to make the dividing line between binding international standards and national freedom of action more transparent and easily comprehensible for legal practitioners at national level. Such enhanced clarity would, in particular, facilitate improved national implementation of the Convention rights by enabling national supreme and constitutional courts to apply the Strasbourg case-law more effectively and with greater consistency.

C. MISCELLANEOUS PROPOSAL

1. Simplified amendment procedure

- (16) There would appear to be broad agreement in various quarters that, subject to certain safeguards, notably preserving the autonomy of the Court to regulate its own procedure in its Rules of Court, a simplified amendment procedure internal to the Council of Europe should be available for effecting changes to a number of non-fundamental procedural provisions currently contained in the Convention.⁴⁸ This would allow the Convention machinery to evolve more rapidly and more easily in the light of experience and changing circumstances. One consequence would be that in regard to such non-fundamental procedural provisions the Court would not be hostage to the cumbersome, time-consuming process of formal treaty amendment, and not obliged to accumulate an unmanageable caseload in the long interval before amendment arrived. The Working Party can appreciate the benefits of splitting up in such a manner the procedural provisions currently contained in the Convention. Again, however, any such exercise should not be a pretext for transferring from the Court (an independent judicial body) to the governments (interested respondent parties in the cases brought before the Court) the power to regulate matters presently governed by the Rules of Court.

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⁴⁸ The *Brighton Declaration*, note 1 of the Statement, §37, calls for a swift and successful conclusion to the work, mandated in the Interlaken and Izmir Declarations (see §3 of the Statement), on whether such a simplified amendment procedure should be introduced.

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