

Faculteit Rechtsgeleerdheid  
Universiteit Gent

Academiejaar 2013-2014

**THE FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS:  
Facing the backlog challenge**

Masterproef van de opleiding  
'Master in de rechten'

Ingediend door  
Alexander H. G. Verstraete  
Studentennr. 00902176

Promotor : Prof. Dr. Y. Haeck  
Commissaris: Dr. C. Burbano Herrera



*“For those who, as Ministers, have to think of the cost of our proposal, I say that there will never be a lower insurance rate this side of paradise”<sup>1</sup>*

- Sir David Maxwell-Fyfe, August 1949

---

<sup>1</sup> SIR DAVID MAXWELL-FYFE in : Preparatory Commission of the Council of Europe, *Collected Edition of the “Travaux Préparatoires”*, Volume I, The Hague, Martinus Nijhoff, 1975, 120.



## Table of contents

1. Introduction.....	1
2. Europe – Council of Europe – European Convention on Human Rights – European Court of Human Rights .....	3
2.1. The Council of Europe as part of the progressive movement of European integration ..	3
2.2. The ECHR and ECtHR within the Council of Europe .....	3
2.3. The right of individual application.....	7
2.4. General principles concerning the application of the ECHR and the functioning of the ECtHR .....	9
2.5. Conclusion .....	11
3. The procedures before the ECtHR: 1950-present .....	13
3.1. Procedural reforms since Protocol No. 11 .....	13
3.2. Protocol No. 14.....	14
3.2.1. Preparations leading up to the Protocol .....	14
3.2.2. The Protocol .....	15
3.3. Current procedure pursuant to Article 34 (individual application).....	17
3.3.1. General proceedings.....	17
3.3.2. Admissibility criteria .....	19
3.3.3. Pilot judgment procedure .....	20
3.3.4. Friendly settlements and unilateral declarations.....	22
3.3.5. The Court’s priority policy .....	22
3.4. Conclusion .....	23
4. The ECtHR: defining the problem.....	25
4.1. In general: input, output and pending applications.....	25
4.1.1. Input .....	25
4.1.2. Output .....	26
4.1.3. Pending applications (backlog).....	27
4.2. In detail: the inner kitchen of the ECtHR.....	28
4.2.1. Personnel & organisation .....	28
4.2.2. Budget .....	32
4.2.3. Input and output in detail .....	34
4.2.4. Percentage of (in)admissible cases .....	36
4.2.5. Pending applications (backlog) in detail.....	37
4.2.6. Backlog figures per high case-count country .....	39

4.2.7.	Duration of proceedings .....	42
4.3.	Conclusion.....	43
5.	Reforming the Court towards a more efficient future: general criticism on the current functioning of the ECtHR and main ideas for its future.....	45
5.1.	Introduction .....	45
5.2.	Focus on constitutional justice .....	47
5.3.	Focus on individual justice/relief.....	49
5.4.	Analysis and conclusion .....	50
6.	Reform put in practice: Protocol No. 15 & 16 .....	55
6.1.	Preparation leading up to the Protocols.....	55
6.1.1.	The Woolf Report (2005) .....	55
6.1.2.	Report of the Group of Wise Persons (2006).....	56
6.1.3.	Ministerial Conferences of Interlaken, Izmir and Brighton.....	57
6.1.4.	Conclusion.....	62
6.2.	Protocol No. 15 .....	63
6.2.1.	Reference to the principle of subsidiarity and the doctrine of margin of appreciation in the Preamble of the ECHR .....	63
6.2.2.	Amendment of Article 21 and 23: Candidate-judges may not have reached the age of 65 upon their proposal to the Parliamentary Assembly.....	64
6.2.3.	Amendment of Article 35 (1): a time limit of four months.....	65
6.2.4.	Amendment of Article 35(3)(b): a case may be rejected even when it has not been duly considered by a domestic tribunal.....	66
6.2.5.	Amendment of Article 30: concerning the relinquishment of jurisdiction to the Grand Chamber.....	67
6.2.6.	Conclusion.....	67
6.3.	Protocol No. 16 .....	68
6.3.1.	Introduction .....	68
6.3.2.	Coming into force of Protocol No. 16 .....	68
6.3.3.	Protocol No. 16: an overview.....	70
6.3.4.	Preliminary rulings at the CJEU .....	75
6.3.5.	(Dis)advantages of the new procedure.....	76
6.3.6.	Conclusion.....	76
7.	Future reform of the Court: proposals & analysis .....	79
7.1.	Introduction .....	79

7.2.	Improvement of national implementation of the Convention: <i>A priori</i> Advisory opinions	79
7.2.1.	Introduction.....	79
7.2.2.	Advisory opinions at the IACtHR .....	80
7.2.3.	Opinions of the Venice Commission.....	81
7.2.4.	Proposal: advisory opinions on envisaged legislation at the ECtHR.....	83
7.2.5.	Conclusion .....	85
7.3.	Concerning the internal structure and working method of the Court: Expansion of the capacity of the ECtHR .....	86
7.3.1.	Introduction.....	86
7.3.2.	Summary exposition of the main proposals.....	87
7.3.3.	An analysis .....	88
7.3.4.	Conclusion .....	102
7.4.	Stimulation of the execution of the judgments of the ECtHR process: optimisation of the pilot judgment procedure .....	103
7.4.1.	Introduction.....	103
7.4.2.	Pilot judgments, default judgments and pecuniary sanctions .....	104
7.4.3.	Conclusion .....	109
7.5.	Conclusion .....	110
8.	Conclusion .....	112
9.	Bibliography.....	117
9.1.	Legislation.....	117
9.1.1.	Treaty law .....	117
9.1.2.	Other.....	117
9.2.	Case law and (advisory) opinions .....	118
9.3.	Council of Europe documents .....	120
9.3.1.	Reports and Declarations .....	120
9.3.2.	CDDH documents .....	121
9.3.3.	Speeches.....	122
9.3.4.	Other.....	122
9.4.	Non-Council of Europe related documents.....	125
9.5.	Doctrine .....	126
9.5.1.	Books .....	126
9.5.2.	Articles.....	127

9.5.3. Other .....	129
9.6. Other .....	130
10. Annex .....	133
11. Nederlandstalige samenvatting .....	153

## **Words of thank**

First of all, I would like to thank all my close friends at the law faculty, for their support during the last couple of months at the library, for the energizing collective thee and coffee breaks and lunches and the fantastic friendship during these five years at law school.

I would further like to thank the personnel of the library of the ECtHR who were very kind to me during my stay in Strasbourg and who were most willing to assist me in the preparation of this thesis.

Of course many thanks to my parents for the funding of my trip to Strasbourg and to my family in general for their never ending support and love.

Special thanks to Isabelle and Nicolas for their long friendship and their critical review of this thesis.

Thanks also to my *commissaris*, Dr. Clara Burbano Herrera, for reading and reviewing this thesis.

Many thanks as well to my promoter, professor Yves Haeck, for his instructive advice and support during these two years of hard work and for his confidence that allowed me to publish an article in *de Juristenkrant* on Protocol No. 16 to the ECHR.

But of course, most of all thanks to Sahin, for bringing joy to the life of a thesis-student.

To all of them I am indebted.

*Alexander Verstraete  
Ghent University  
Spring 2014*



# 1. Introduction

The European Convention on Human Rights (hereafter: ECHR) is 54 years old this year. In all those years it has proven to be a very successful mechanism to protect human rights throughout Europe. In fact, it is the most successful of its kind worldwide.<sup>2</sup> About 800 million people in 47 Member States are put under the umbrella of its protection. Examples of changes are ample: Austria was obliged to allow same-sex couples to adopt each other's children<sup>3</sup>; Belgium's family law was amended to allow for equal rights for children born out of wedlock and in wedlock after the *Marckx* judgment<sup>4</sup>; The United Kingdom was obliged to take action against corporal punishments<sup>5</sup> and was not allowed to save DNA-data of acquitted civilians<sup>6</sup>; Moldova recognised freedom of religion<sup>7</sup>; the *Salduz case*<sup>8</sup> had implications for the codes of criminal procedures all over the continent, the Court also observed the protection of the freedom of the press whenever needed<sup>9</sup> and so on. This success has of course only been made possible through the help of the institutions that were established to achieve these goals: the former European Commission of Human Rights (hereafter: the Commission) and the European Court of Human Rights (hereafter: the ECtHR or the Court).

*"Excellence, it is sometimes said, is the enemy of good"*.<sup>10</sup> The Court has a tremendous record in observing the protection of human rights all over Europe, but it is struggling for its survival. *"The European Human Rights Convention: Time for a Radical Overhaul?"* was the title of an article by ANDREW DRZEMCZEWSKI, currently Head of the Legal Affairs and Human Rights Department of the Parliamentary Assembly of the Council of Europe. Nowadays, many articles are being published on the Court's volume of work, backlog and delays in proceedings, and basically, that is what this thesis is about as well. DRZEMCZEWSKI's article, however, dates from 1987<sup>11</sup>, which is 27 years and 6 approved protocols concerning the Court's proceedings earlier. Still things have not become any better, very much to the contrary even. Since their inception the Commission and Court have decided on over half a million applications.<sup>12</sup> Half a million applications is a tremendous amount, but the Court in its present form simply cannot keep up with the amount of cases it receives (over 60,000 per year, see further). Back in 1987 DRZEMCZEWSKI spoke of a *"breaking-point"* that was being reached, *"both in terms of volume of work and related unacceptable*

---

<sup>2</sup> S. J. MEYER, "The Constitutional Potential of the European Court of Human Rights", *NUJS L. Rev.* 2012, (207) 211.

<sup>3</sup> ECtHR, *X and others v. Austria*, 2013.

<sup>4</sup> ECtHR, *Marckx v. Belgium*, 1979.

<sup>5</sup> ECtHR, *Tyrer v. UK*, 1978.

<sup>6</sup> ECtHR, *S. and Marper v. UK*, 2008.

<sup>7</sup> ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, 2001.

<sup>8</sup> ECtHR, *Salduz v. Turkey*, 2008.

<sup>9</sup> For example in the pivotal case ECtHR, *Sunday Times v. UK*, 1979.

<sup>10</sup> LORD WOOLF, Review of the Working Methods of the European Court of Human Rights, December 2005, [www.echr.coe.int/Documents/2005\\_Lord\\_Woolf\\_working\\_methods\\_ENG.pdf](http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf), 7.

<sup>11</sup> A. DRZEMCZEWSKI, "The European Human Rights Convention: Time for a Radical Overhaul?", *B.C. Int'l & Comp. L. Rev.* 1987, 9-15.

<sup>12</sup> ECtHR, Overview 1959-2013, February 2014, [www.echr.coe.int/Documents/Overview\\_19592013\\_ENG.pdf](http://www.echr.coe.int/Documents/Overview_19592013_ENG.pdf), 8.

*delays in proceedings*".<sup>13</sup> Of course, back then both the old Commission and the Court were still non-permanent and the secretary of the ECtHR consisted out of less than 50 people. Yet, the fact that we have been discussing the urgent reform of the ECtHR for almost as long as 30 years now and the fact that despite all efforts the Court is still unable to realise reasonable duration of proceedings is quite embarrassing. Already in 1985 the Swiss government considered the length of proceedings in Strasbourg as manifestly excessive. It asked how it could take the Strasbourg organs three years and ten months to find that domestic proceedings lasting three and a half years have exceeded a reasonable time as prescribed by Article 6 of the Convention (hereafter Convention articles will just be mentioned as 'Article x').<sup>14</sup> That is almost 30 years ago and since then the ECtHR's backlog has grown exponentially, in fact, the word 'exploded' might be a more appropriate way of describing it.

Two conclusions can be drawn from this backlog. First, it makes clear that the ECtHR is not working sufficiently efficient. Second, it is a fact that human rights violations still occur on an all too often basis in Europe. Any reform of the ECtHR should address both issues. For example, a judicial backlog is easily solved by closing the Court's doors, but human rights would not be protected any better by such a measure.

The problem of judicial backlog, or as the French call it: "*l'engorgement*"<sup>15</sup>, is what this thesis is about. The Court's situation will be evaluated and it is the aim of this thesis to thereafter provide sufficient ideas and suggestions for the Court to sustainably and structurally reduce its judicial backlog as to allow faster proceedings, with the final aim of strengthening the position of human rights in Europe. It is important for the reader, however, to note that this thesis is about the internal reform of the ECtHR. The purpose of this thesis is not to find practical solutions in the member states to improve the implementation of the ECHR or to evaluate the functioning of the Department for the Execution of the European Court of Human Rights Judgments, attached to the Committee of Ministers. Both are indeed indispensable parts of the entire European human rights protection system, and urgent measures need to be taken with respect to these aspects as well, but the limitations of a master thesis do not allow a thorough analysis of both the Court and these two other aspects of the ECHR system.

The issues discussed in this thesis are about more than just the procedural aspects of the functioning of the ECtHR and increasing its efficiency. In the end this thesis is about the ECtHR as the highest court in Europe for the observance of the protection of human rights. This thesis is about the legitimacy and the authority of the ECtHR. If the Court is unable to address applications within a reasonable amount of time, how can it then still claim to be the ultimate authority in the European architecture of human rights protection? In short, the question to be resolved in and by this thesis is the following: How can the judicial backlog of the ECtHR be reduced so as to increase the Court's legitimacy and authority and in the end enhance human rights protection in Europe?

---

<sup>13</sup> A. DRZEMCZEWSKI, "The European Human Rights Convention: Time for a Radical Overhaul?", *B.C. Int'l & Comp. L. Rev.* 1987, (9) 13.

<sup>14</sup> Council of Europe Doc. MDH(85)1, 1985.

<sup>15</sup> For example used by former President of the ECtHR, JEAN-PAUL COSTA (J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 244.).

## **2. Europe – Council of Europe – European Convention on Human Rights – European Court of Human Rights**

### **2.1. The Council of Europe as part of the progressive movement of European integration**

In response to the atrocities of the Second World War the leaders of several European states believed that peace, stability and the further development of the European continent could only be achieved by cooperation between the previously warring nations. Europe saw, therefore, in the following years the birth of several bodies, both intergovernmental and supranational, all of whom were concerned with enhanced co-operation between European countries. This has resulted in a maze of associations, organizations and unions. The previous century saw the birth of: the Western European Union (WEU), the Organisation for European Economic Co-operation (OEEC) (now known as the Organisation for Economic Co-operation and Development (OECD)), the European Coal and Steel Community / European Economic Community / European Community / European Union, the European Free Trade Association, the Organisation for Security and Cooperation in Europe and of course also the Council of Europe (hereafter: CoE).

This last organisation was founded on the 4<sup>th</sup> of May 1949 by ten European States with the Treaty of London ('The Statute of The Council of Europe'). It is appreciated by the wider public as the necessary 'soft power', complement to the 'hard power' of the WEU and NATO.<sup>16</sup> Its aim is to enhance the cultural, social and political life of Europe and to promote human rights, democracy and the rule of law.<sup>17</sup> These aims are pursued through its organs<sup>18</sup>, e.g. human rights *i.a.* through the ECtHR, the Committee of Ministers and originally also the Commission). The CoE started with ten Founding Members and has since then become a pan-European intergovernmental organisation presently consisting of 47 member states.

As one of the major European organisations, the CoE has a lot in common with the European Union. They share the same values of human rights, democracy and rule of law, but whereas the CoE focuses on agreeing on minimum legal standards in a wide range of areas, the European Union has known a far deeper political and – most of all economic – integration process. The overlap in competences between both organisations demands good co-operation. The by far most important example of this co-operation will be the accession of the EU to the ECHR in the near future.

### **2.2. The ECHR and ECtHR within the Council of Europe**

As the protection of human rights in Europe is one of the main aims of the CoE, the member states adopted a human rights convention rather quickly after the inception of the CoE. This was done on the 4<sup>th</sup> of November 1950 with the Treaty of Rome, commonly known as the ECHR. This Treaty laid down the foundation for the observance of human rights protection in Europe and followed as a hard law alternative to the Universal Declaration of Human Rights (1948), which

---

<sup>16</sup> M. BOND, *The Council of Europe: structure, history and issues in European politics*, London, Routledge, 2012, 1.

<sup>17</sup> P. LEACH, *Taking a Case to the European Court of Human Rights*, New York, Oxford University Press, 2011, 1.

<sup>18</sup> Article 1(b) Statute of the Council of Europe.

consisted of legal soft law principles. All member states of the CoE are also High Contracting States to the ECHR.

Although the ECtHR has accepted that the ECHR also protects economic, social and cultural rights indirectly on several occasions<sup>19</sup>, the Convention is mostly concerned with civil and political rights. The ECHR intends to protect the following human rights and freedoms<sup>20</sup>:

- Right to life (article 2 ECHR)
- Prohibition of torture (article 3 ECHR)
- Prohibition of slavery and forced labour (article 4 ECHR)
- Right to liberty and security (article 5 ECHR)
- Right to a fair trial (article 6 ECHR)
- No punishment without law (article 7 ECHR)
- Right to respect for private and family life (article 8 ECHR)
- Freedom of thought, conscience and religion (article 9 ECHR)
- Freedom of expression (article 10 ECHR)
- Freedom of assembly and association (article 11 ECHR)
- Right to marry (article 12 ECHR)
- Right to an effective remedy (article 13 ECHR)
- Prohibition of discrimination (article 14 ECHR)
- Protection of property (article 1, Protocol 1)
- Right to education (article 2, Protocol 1)
- Right to free elections (article 3, Protocol 1)
- Freedom of movement (article 2, Protocol 4)
- Prohibition of expulsion of nationals (article 3, Protocol 4)
- Prohibition of collective expulsion of aliens (article 4, Protocol 4)
- Abolition of the death penalty in time of peace (article 1 and 2, Protocol 6)
- Procedural safeguards relating to expulsion of aliens (article 1, Protocol 7)
- Right of appeal in criminal matters (article 2, Protocol 7)
- Compensation for wrongful conviction (article 3, Protocol 7)
- Right not to be tried or punished twice (article 4, Protocol 7)
- Equality between spouses (article 5, Protocol 7)
- General prohibition of discrimination (article 1, Protocol 12)
- Abolition of the death penalty in time of war (article 1, Protocol 13)

Contrary to earlier “Declarations of human rights”, such as the Universal Declaration of Human Rights and the French *Declaration des droits de l’homme et du citoyen* of 1789, the ECHR does not only *declare* human rights. A Court is set up by the ECHR (Article 19) to observe the protection of the human rights inscribed in Section I of the Convention and the Protocols thereto. This Court, the ECtHR, is based in Strasbourg. It is not to be confused with the Court of Justice of the European Union, an EU court, based in Luxembourg, nor with the International Criminal Court or International Court of Justice, which are both UN courts based in The Hague.

---

<sup>19</sup> See for example: ECtHR, *Airey v. Ireland*, 1979, para. 26; ECtHR, *Sidabras and džiautas v. Lithuania*, 2004, para. 47.

<sup>20</sup> Y. HAECK, *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2011, 35-37.

The ECtHR can be described as a *sui generis*<sup>21</sup> supranational<sup>22</sup> and quasi-constitutional<sup>23</sup> court that ensures the observance of the engagements undertaken by the High Contracting Parties in the European Convention on Human Rights and the Protocols thereto.<sup>24</sup> The Court is composed of one judge per High Contracting Party (Article 20) whom is elected only if he or she is of the highest moral character and if he or she proves to possess the qualifications required for appointment to high judicial office or be a person of recognised competence in national or international law (Article 21(1)). The Court started functioning in 1959.

The ECtHR has jurisdiction to decide on the interpretation and application of the above described rights and freedoms in:

- inter-state cases (Article 33);
- in cases brought before it by individuals who claim to be the victim of a violation of one of the ECHR-rights by a High Contracting Party (Article 34).

The first procedure is rarely used.<sup>25</sup> The second is the Court's 'crown jewel' and most used procedure. It is even argued to be *over-used*.<sup>26</sup>

During the proceedings the High Contracting Parties "*undertake not to hinder in any way the effective exercise of this right [of individual petition]*" (Article 34). They also "*shall furnish all necessary facilities*" if the Court needs to undertake an investigation in a given case (Article 38). If a State has been found guilty of breaching its obligations under a certain article of the ECHR or one of its Protocols, the concerning state is bound by the judgement of the Court as an obligation of results to make an end at the violation of that particular human right (Article 46(1)).

The Court's judgements have power of enforcement on their own. However, the Court does not squash national decisions by itself. It is for the High Contracting Parties to give relieve to the victim of the human rights violation (although the Court *may* itself also afford pecuniary just satisfaction to the injured party (Article 41)). The execution of the judgements is supervised by the Committee of Ministers (hereafter: CoM) (Article 46(2)), as can be seen in Annex 1. As its name says, the CoM is – in principle – composed of the Ministers of Foreign Affairs of the High Contracting Parties. In reality it is composed of their permanent representatives at the CoE, called 'Ambassadors'. The CoM is the CoE's decision making body and *i.a.* supervises the execution of judgments of the European Court of Human Rights. It cannot really put a lot of pressure on the State Parties to properly execute the Court's judgments. It works on the basis of persuasion rather than on constraint<sup>27</sup> and at most, if a state really refuses to cooperate, it can refer the case back to the Court to have the relevant state convicted for failing to fulfil its

---

<sup>21</sup> W. VERRIJDT, "De gevolgen van het Elfde Protocol bij het E.V.R.M.", *Jura falc.* 2002-2003, 581.

<sup>22</sup> W. VERRIJDT, "De gevolgen van het Elfde Protocol bij het E.V.R.M.", *Jura falc.* 2002-2003, 583.

<sup>23</sup> Y. HAECK, *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2011, 149.

<sup>24</sup> Art. 19 ECHR.

<sup>25</sup> Only 13 cases have been adjudicated up till now, with three more pending currently (all *Georgia v. Russia*). See: [www.echr.coe.int/Documents/InterStates\\_applications\\_ENG.pdf](http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf).

<sup>26</sup> L. WILDHABER, *The place of the European Court of Human Rights in the European Constitutional landscape*, May 2002, [www.confcoconsteu.org](http://www.confcoconsteu.org), 2.

<sup>27</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 252.

obligation to abide by the final judgement of the Court (Article 46 (1) and (4)). Initiating this procedure requires a decision of the CoM adopted by a majority vote of two thirds of the representatives entitled to sit on the committee however. In general it can be said that the relying upon the good faith of the High Contracting Parties is far from efficient.<sup>28</sup>

Apart from these procedures, the Court also has two types of advisory jurisdiction. One for requests by the CoM on legal questions concerning the interpretation of the Convention (except for the interpretation of Section I provisions) and the Protocols thereto (Article 47). Due to the very restricted scope of this procedure it has only been used twice.<sup>29</sup> In the near future a second advisory opinion jurisdiction will confer the right on the highest national courts and tribunals of the High Contracting Parties to request advisory opinions to the ECtHR on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto<sup>30</sup> (for more information on this procedure: see Chapter 6.3.).

In this thesis the focus will be on the individual application procedure of Article 34. This right of individual petition to an international body against a state was unseen in the world before the ECHR came into force, *i.a.* given the importance of principles such as state sovereignty<sup>31</sup>. It is however an essential feature to ensure an effective enforcement of the rights protected by the ECHR. Moreover, it is characteristic for modern, democratic states, that obey principles such as the rule of law to accept the authority of an international court and to permit that court to point out the wrongdoing by the states and to oblige them to undo the wrong.

The fact that there is a Court observing the implementation of the ECHR is one of the main reasons for which the ECHR has such a big impact on (the legislation of) the participating countries. Yet, the Court can do everything it wants, the main challenge lays on the national level with the governments implementing, 'domesticating'<sup>32</sup>, the Convention and its Protocols in their domestic jurisdictions. KELLER and STONE SWEET have demonstrated that there is a strong correlation between relatively higher domestic human rights standards and relatively lower numbers of application to Strasbourg.<sup>33</sup> It is therefore important that the Convention's provisions are directly applicable in the national jurisdictions (although this is not a requirement under the Convention<sup>34</sup>), are judicially enforced, are binding on all national public authorities,

---

<sup>28</sup> E. LAMBERT-ABDELGAWAD, "The Court as a part of the Council of Europe: the Parliamentary Assembly and the CoM", in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, (263) 277.

<sup>29</sup> ECtHR, *Advisory Opinion of 12 February 2008* and ECtHR, *Advisory Opinion of 22 January 2010*; Y. HAECK, *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2011, 160.

<sup>30</sup> Article 1 (1) Protocol No. 16 to the ECHR.

<sup>31</sup> P. LEACH, *Taking a Case to the European Court of Human Rights*, New York, Oxford University Press, 2011, 5; J. VANDE LANOTTE and Y. HAECK, "Het nieuwe Europese Hof te Straatsburg aan de vooravond van de 21e eeuw", *RW* 1999-2000, 1417.

<sup>32</sup> S. GREER and L. WILDHABER, "Revisiting the debate about 'constitutionalising' the European Court of Human Rights", *HRLR* 2012, (655) 662-663.

<sup>33</sup> H. KELLER and A. STONE SWEET, *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press, 2013, 707.

<sup>34</sup> A. CALIGIURI and N. NAPOLETANO, "The Application of the ECHR in the Domestic Systems", in F. FRANCONI (ed.), *The Italian Yearbook of International Law* 2010, (125) 127.

and that laws and executive acts are subject to judicial review with reference to the ECHR. For that reason the ECHR has a supra-constitutional, constitutional, supra-legislative, legislative or other special status in the national jurisdictions of its member states (and there seems to be a progressive rapprochement between the European legal orders on this issue<sup>35</sup>).

### 2.3. The right of individual application

This thesis is about finding solutions to the problem of judicial backlog the ECtHR faces resulting from the excessive amount of cases that are brought to the Court pursuant to Article 34 (right of individual application). As will be elaborated on later in this thesis, the right of individual petition is – to a certain extent – disputed (see Chapter 5). It is therefore very important to first understand where this right comes from and to know what the initial reasons were for establishing this right of petition for every person (natural as well as legal persons) living under the jurisdiction of the High Contracting Parties.

From the WEU to the ECSC and the CoE, all European organisations can be traced back to the ‘European Movement’. This is an organisation acting as a platform for the co-ordination of European organisations created in the wake of WWII. Very important in this context was the Congress of Europe in May 1948. On this Congress more than 750 delegates from all over Europe gathered to discuss Europe’s future and the proposed ‘European Union’. At the end of the Congress a ‘Message to Europeans’ was sent out to the world. It warned Europeans of the new dangers and disunity that was lingering over Europe with the escalating frictions between its Western and Eastern part. Apart from that it proclaimed Europe’s mission: *“to unite her peoples in accordance with their genius of diversity and with the conditions of modern community life, and so open the way towards organised freedom for which the world is seeking. It is to revive her inventive powers for the greater protection and respect of the rights and duties of the individual of which, in spite of all her mistakes, Europe is still the greatest exponent.”*<sup>36</sup> To achieve this goal the participants of the Congress pledged that they desired a United Europe, with a ‘Charter of Human Rights’ *“guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition”*<sup>37</sup> and a ‘Court of Justice’ *“with adequate sanctions for the implementation of this Charter”*.<sup>38</sup>

One year later, in July 1949, the European Movement produced a ‘Draft European Convention on Human Rights’. In Part I of this Draft ECHR the current substantive rights of the ECHR were listed. In Part II the establishment of a European Commission for Human Rights was suggested to which all persons in the territory of any State a party to the Convention would have the right to petition in respect to any infringement of Part I of this Convention. *“In proper cases”* there would also be a European Court of Human Rights to deal with such cases.<sup>39</sup>

---

<sup>35</sup> A. CALIGIURI and N. NAPOLETANO, “The Application of the ECHR in the Domestic Systems”, in F. FRANCONI (ed.), *The Italian Yearbook of International Law* 2010, (125) 133-134.

<sup>36</sup> International Committee of the Movements for European Unity, Message to Europeans, 1948, [www.cvce.eu/obj/message\\_to\\_europeans\\_the\\_hague\\_10\\_may\\_1948-en-b14649e7-c8b1-46a9-a9a1-cdad800bccc8.html](http://www.cvce.eu/obj/message_to_europeans_the_hague_10_may_1948-en-b14649e7-c8b1-46a9-a9a1-cdad800bccc8.html), 16.

<sup>37</sup> *Ibid.*, 16.

<sup>38</sup> *Ibid.*, 16.

<sup>39</sup> Preparatory Commission of the Council of Europe, *Collected Edition of the “Travaux Préparatoires”*, Volume I, The Hague, Martinus Nijhoff, 1975, 296-302.

In the later preparations to the Convention within the CoE it became clear that not all States were in favour of a mandatory individual right of petition (nor of a Court) though. Initially only three States (Greece, the Netherlands, and the UK) were against the inclusion of such a right, while nine countries (Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway, Sweden, and Turkey) were in favour of this proposal. In the end, 12 out of 13 participating States agreed on an optional right of individual petition (Article 25 of the original Convention).<sup>40</sup> The Irish representative, SEAN MACBRIDE, – correctly – remarked that a Convention that lacked the right of individual petition was “*not worth the paper it was written on*”.<sup>41</sup>

The final draft only foresaw an optional right of petition before the Commission, made the court optional as well and excluded certain rights that were at first meant to be part of the future convention (the right to property, free elections and education). The final draft did foresee a mandatory interstate procedure. All this made PAUL-HENRI SPAAK announce the signing ceremony for the Convention as following: “*It is not a very good Convention, but it is a lovely Palace!*”<sup>42</sup>, referring to the Palazzo Barberini in Rome where the Convention was signed and his disappointment about the outcome of the negotiations.

At its inception the interstate process was thus considered the *modus operandi* by the Drafters and *not* the individual right of petition. As GREER puts it: “*At its inception [...] the Convention was much more about protecting the democratic identity of member states through the medium of human rights, and about promoting international cooperation between them, than it was about providing individuals with redress for human rights violations by national public authorities.*”<sup>43</sup> Given that the interstate procedure has only been rarely used in the entire history of the Court and that the right of individual application was only optional at first, it is not a surprise that in the first decades of its existence, the Convention was consequently largely ignored.

Fortunately the right of individual petition evolved during the years, with more and more High Contracting States accepting it. It took quite some time though. France for example only accepted the right of individual petition in 1981<sup>44</sup> (and only ratified the ECHR in 1974<sup>45</sup>), it took Belgium even longer to accept the right of individual petition: 7 September 1992<sup>46</sup>. It took the CoE until Protocol No. 11, which was drafted in 1994, to replace the system whereby the High Contracting Parties had to issue a declaration of acceptance of the individual recourse right

---

<sup>40</sup> M. RASK MADSEN, “*Legal Diplomacy: Law, Politics and the Genesis of Postwar European Human Rights*”, in S.-L. HOFFMAN, *Human Rights in the twentieth century*, Cambridge, Cambridge University Press, 2010, (62) 65.

<sup>41</sup> E. BATES, “The Birth of the European Convention on Human Rights—and the European Court of Human Rights”, in J. CHRISTOFFERSEN and M. RASK MADSEN, *The European Court of Human Rights between Law and Politics*, Oxford, Oxford University Press, 2011, 13.

<sup>42</sup> E. BATES, “The Birth of the European Convention on Human Rights—and the European Court of Human Rights”, in J. CHRISTOFFERSEN and M. RASK MADSEN, *The European Court of Human Rights between Law and Politics*, Oxford, Oxford University Press, 2011, 13.

<sup>43</sup> S. GREER, “What’s Wrong with the European Convention on Human Rights”, *Hum. Rts. Q.* 2008, (680) 682.

<sup>44</sup> M. O’BOYLE, “The Future of the European Court of Human Rights”, *GLJ* 2012, (1862) 1877.

<sup>45</sup> J.-P. COSTA, *La Cour Européenne des droits de l’homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 50.

<sup>46</sup> S. GREER, “What’s Wrong with the European Convention on Human Rights”, *Hum. Rts. Q.* 2008, (680) 694.

before the Commission or ECtHR<sup>47</sup> to a compulsory right of individual petition before the European Court of Human Rights. By 1998, when Protocol No. 11 came into force, all High Contracting Parties had already accepted the right of individual application out of themselves though.<sup>48</sup>

The goal of the Convention system was and still is to provide a statement of common values and reinforce a sense of common identity (against authoritarianism in Europe and anywhere in the world) through the enhancement of human rights protection in Europe.<sup>49</sup> The right of individual petition is but a means to achieve this aim.<sup>50</sup> Nevertheless the right of individual petition has currently become such an inherent part of the Convention system as an important signal function towards the High Contracting Parties and the entire globe, that any restriction of this right would need strong argumentation. If ensuring a strong protection of human rights in Europe can be called ECHR's goal and its *raison d'être*, then the right of individual application surely is its heart and soul.

## **2.4. General principles concerning the application of the ECHR and the functioning of the ECtHR**

The High Contracting States to the ECHR have pledged to secure everyone within their jurisdiction the rights and freedoms defined in the ECHR and its Protocols (Article 1). If an individual is of the opinion that a certain State has failed to do so, (s)he can file a complaint with the ECtHR (Article 34). However, as is mentioned at the end of subchapter 2.2., national implementation is key to the success of the Convention. National governments and courts are in principle better placed to shape the law towards the needs of their community.<sup>51</sup> That is also how the Drafters of the ECHR saw it. The ECtHR is subsidiary to the High Contracting Parties' primary responsibility to secure the rights and freedoms of the Convention and its Protocols. This is what is called (the procedural aspect of) the principle of subsidiarity. The effect of this principle is found in the presence of several of the admissibility criteria for individual applications to the ECtHR: the requirement to have exhausted all domestic remedies (Article 35(1)) or inadmissibility in case the applicant has not suffered a significant disadvantage (Article 35(3)(b)). For more information on the admissibility criteria, see Chapter 3.3.2.

The ECtHR should thus only intervene as a second layer of protection when the domestic authorities have had the chance to deal with the issue at hand themselves and have failed to do so<sup>52</sup> and only in cases worthy of an international court. This is indeed a very important principle. The ECtHR cannot play the role of a Court of fourth instance, otherwise it would literally drown in its applications. The Court is, as WILDHABER explains it, "*a fail-safe device designed to catch the*

---

<sup>47</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 50.

<sup>48</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 50.

<sup>49</sup> S. GREER, *The European Court of Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, 170.

<sup>50</sup> Y. HAECK and J. VANDE LANOTTE, "Desperately Trying to Keep the Titanic Afloat: the Reform Proposals concerning the European Convention on Human Rights after Protocol nr. 14", *Int.Am. & Eur.Hum.Rts. J.* 2008, 115.

<sup>51</sup> P. LEACH, *Taking a Case to the European Court of Human Rights*, New York, Oxford University Press, 2011, 161-162.

<sup>52</sup> P. LEACH, *Taking a Case to the European Court of Human Rights*, New York, Oxford University Press, 2011, 159-160.

ones that get away from the rigorous scrutiny of the national constitutional bodies.”<sup>53</sup> The importance of this principle has been reaffirmed in the Interlaken, Izmir and Brighton Declarations and is now part of the new Protocols Nos. 15 and 16. For more information on these evolutions, see *infra* in Chapter 6.<sup>54</sup>

In addition, the subsidiarity principle has a substantive aspect. The ECHR is applicable in 47 states that differ strongly on the economic, social and cultural level. This implies that these states do not completely share the same values regarding to human rights. There are heavily differing views in Europe concerning LGBT-rights for example<sup>55</sup>; likewise, Europe also seems to struggle when it comes to religion<sup>56</sup>; and more recently there has been a lot of debate in the UK concerning the Court’s judgements in cases concerning unconditional whole-life imprisonment and prisoner’s voting rights<sup>57</sup>, leading to an outright British attack on the Court and the ECHR. This debate which was originally concerned with substance has evolved in a debate on the very existence of the Strasbourg system, in which a lot of emphasis is placed upon the subsidiarity principle and the sovereignty of states. This debate has certainly also influenced the most recent reforms of the EC(t)HR, but more on this later in Chapters 5 and 6. The subsidiarity principle thus has a substantive aspect as well. Led by this principle the Court has developed certain rules to cope with difficulties concerning the *scope* of certain fundamental rights and freedoms (the common grounds principle) and concerning the *appreciation of the application* of certain ECHR rights and the necessity of restrictions to these rights by national authorities (the margin of appreciation doctrine).<sup>58</sup> The application of these principles by the ECtHR allows a harmonious application of the ECHR, while still allowing divergences throughout Europe within the outline shaped by the ECtHR.

For the sake of completeness and without elaborating too much on this, the ECtHR also uses other principles to interpret the rights and freedoms inscribed in the ECHR and its Protocols. Some of the most important principles are the principle that the Convention should be interpreted as a living instrument<sup>59</sup> and the principle that the ECHR is not intended to guarantee rights that are theoretical or illusory but rights that are practical and effective.<sup>60</sup> By applying these principles the Court has ensured an evolutive and progressive case law balancing between

---

<sup>53</sup> L. WILDHABER, *The place of the European Court of Human Rights in the European Constitutional landscape*, May 2002, [www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf](http://www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf), 2.

<sup>54</sup> Interlaken Declaration of 19 February 2010, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=), Preamble and Articles 2 and 9 (b); ECtHR, Interlaken Follow-up: principle of subsidiarity, 8 July 2010, 1; Izmir Declaration of 27 April 2011, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c), Clause 5 of the Preamble, Article 4 of the Declaration and Articles A and H of the Follow-up Plan; Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=), Article 3; Article 1 of Protocol No. 15 to the ECHR, adding this principle to the Preamble of the Convention; Preamble of Protocol No. 16 to the ECHR.

<sup>55</sup> ECtHR, *Schalk and Kopf v. Austria*, 24 June 2010.

<sup>56</sup> For example: ECtHR, *Eweida and others v. The United Kingdom*, 2013 or ECtHR, *Dogru v. France*, 2008.

<sup>57</sup> See for example the interview of the President of the ECtHR, Dean Spielmann, in the BBC program ‘Hardtalk’: BBC, *Hardtalk: Dean Spielman*, 14 January 2014, [www.bbc.co.uk/programmes/p01pzkcn](http://www.bbc.co.uk/programmes/p01pzkcn); It concerns *i.a.* the cases ECtHR, *Hirst v. UK (No. 2)*, 2005 and ECtHR, *Vinter and Others v. UK*, 2013.

<sup>58</sup> For more on these principles, read: J. GERARDS, *EVRM algemene beginselen*, Den Haag, Sdu Uitgevers, 2011, 74-96.

<sup>59</sup> ECtHR, *Vo v. France*, 2004, 82.

<sup>60</sup> ECtHR, *Airey v. Ireland*, 1979, para. 24.

the ‘Societies shape Rights’-doctrine, which stipulates that it is for society to define what constitutes human rights, and the ‘Rights shape Societies’-doctrine, which stipulates that it is for human rights to shape and change societies’ opinions and behaviours.<sup>61</sup>

## 2.5. Conclusion

The existence of the ECHR and the ECtHR, with its right of individual petition, is pivotal to ensure effective human rights protection in Europe. In the present Chapter a general introduction to the EC(t)HR was given. The ECHR and ECtHR were located within the myriad of European and international organisations and institutions and it was briefly explained what the ECHR is and how the ECtHR functions. Furthermore, attention was given to both the right of individual application and some of the principles regarding the EC(t)HR that are of interest to this thesis.

What this Chapter did not explain is whether this system runs smoothly and whether it is effective in ensuring its goal of protecting human rights throughout Europe. In order to really attain a high degree of human rights protection Europe needs a *strong* Convention and *good* case law. An *effective* procedure at the ECtHR is likewise necessary as to ensure that the right of individual application to the ECtHR is not merely a theoretical right.

Before going further into that discussion, it is important to explain in a more detailed way how the European Court of Human Rights has evolved and how it functions nowadays. This elucidation *de lege lata* is what the next Chapter will bring. An analysis and discussion on the Court’s present (in)efficiency, the (serious) deficiencies of the contemporary procedure at the ECtHR and what to do next in the future follows in the Chapters thereafter.

---

<sup>61</sup> E. BREMS, Course: Advanced Course on Human Rights Law, Universiteit Gent, 2012-2013.



### 3. The procedures before the ECtHR: 1950-present

#### 3.1. Procedural reforms since Protocol No. 11

There's no space within the limits of this thesis to elaborate on the Court's history prior to Protocol No. 11, so let us keep it short. In a first phase, until 1998, there were three main organs of the ECHR: the quasi-judicial European Commission of Human Rights, the CoM and the optional, non-permanent European Court of Human Rights.

There were many reasons why the old system was reformed by Protocol 11.<sup>62</sup> Firstly, the workload had to be reduced urgently, given the ever increasing number and complexity of cases that were brought to the Commission and the Court.<sup>63</sup> Secondly, and related to the first reason, the post-Cold War accession of Central and Eastern European countries to the ECHR meant a serious challenge for the Commission and the Court. The original Convention was not designed for such a great number of member States. Thirdly, problems occurred because of certain overlaps in powers and functions between the Commission and the Court, causing rivalry<sup>64</sup>, whereby the Court deemed itself privileged to redo certain appreciations concerning facts and admissibility drawn up by the Commission. Fourthly, there was a lot of criticism on the functioning of the CoM and sixthly, individuals were hindered to an important extent in bringing their case to the Court.

For all these reasons an important reform of the Court was prepared in the 1980s and 1990s leading towards the adoption of Protocol No. 11 on the 11<sup>th</sup> of May 1994. The Protocol did not enter into force until the 1<sup>st</sup> of November 1998, after Italy – who had objected to the Protocol due to the future constitutional character of the ECtHR – had finally ratified it.<sup>65</sup>

Protocol No. 11 radically altered the Court's structure. It put an end to the filtering function of the Commission by replacing this old European Commission and the – then part-time – ECtHR by a permanent ECtHR.<sup>66</sup> It also limited the CoM's direct tasks with regard to the protection of human rights to its core competence: supervision of the execution of the judgments of the ECtHR (Article 46(2)). Furthermore, it abolished the restraints that were present for individuals to petition to the ECtHR against a state and made this right of individual petition mandatory (Article 34).<sup>67</sup> Additionally, it changed the entire organisation of the Court. After Protocol No. 11 the Court functioned in four different formations: the Plenary Court in which all judges reside for administrative matters, The Grand Chamber composed out of 17 judges for exceptional cases of great importance, Chambers of 7 judges for decisions and judgments on cases which cannot be settled unanimously and Committees of 3 judges to declare cases inadmissible or to strike them

---

<sup>62</sup> As a source for all the mentioned reasons: COUNCIL OF EUROPE, *Human Rights, A continuing challenge for the Council of Europe*, Strasbourg, Council of Europe Press, 1995, 16 and 19; J. VANDE LANOTTE and Y. HAECK, "Het nieuwe Europese Hof te Straatsburg aan de vooravond van de 21e eeuw", *RW* 1999-2000, 1420.

<sup>63</sup> J. VANDE LANOTTE and Y. HAECK, "Het nieuwe Europese Hof te Straatsburg aan de vooravond van de 21e eeuw", *RW* 1999-2000, 1419; W. VERRIJDT, "De gevolgen van het Elfde Protocol bij het E.V.R.M.", *Jura falc.* 2002-2003, 571.

<sup>64</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 57.

<sup>65</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 59.

<sup>66</sup> COUNCIL OF EUROPE, *History of the Court's reforms*, 29 August 2013, [www.echr.coe.int](http://www.echr.coe.int).

<sup>67</sup> COUNCIL OF EUROPE, *Human Rights, A continuing challenge for the Council of Europe*, Strasbourg, Council of Europe Press, 1995, 17; J. VANDE LANOTTE and Y. HAECK, "Het nieuwe Europese Hof te Straatsburg aan de vooravond van de 21e eeuw", *RW* 1999-2000, 1418.

out of the Court's list of cases (old Articles 26-31). Apart from these four formations, Protocol No. 11 also introduced a Panel of 5 judges that decides on the referral of cases to the Grand Chamber (Article 43(2)). Some minor issues were changed as well, *e.g.* the mandate of the judges was altered to a term of twice 6 years, with a limit on the age of 70 (old Article 23).

The goal of this Protocol was to prepare the ECtHR for a new era – since 1990 the number of High Contracting Parties to the ECHR has doubled – with an expected increase in the number of individual cases. The reform itself was one of the most significant reforms of the ECHR of all time. It is clear from the ever increasing judicial backlog at the ECtHR, before and even more so after the coming into force of Protocol No. 11, that this Protocol did, however, not have any effect when it came to reducing the ECtHR's backlog. It even had quite the opposite effect, partly because this reform – radical as it was – was not far reaching enough for the massive increase in incoming cases since the fall of the Berlin Wall and the accession to the ECHR of Eastern European countries.<sup>68</sup>

## 3.2. Protocol No. 14

### 3.2.1. Preparations leading up to the Protocol

Given the ever increasing caseload of the Court there had been continual discussions on a further reform after Protocol No. 11. The official start of these discussions came with the Ministerial Conference on human rights in Rome on 3 and 4 November 2000.<sup>69</sup> It was followed by the report of the Evaluation Group on Human Rights the next year.<sup>70</sup> Concurrently the CDDH worked on new proposals and it was later instructed to prepare the new Protocol. It sent its draft protocol to the CoM in April 2004 and finally, on the 13<sup>th</sup> of May 2004, Protocol No. 14 got adopted by the CoM.<sup>71</sup> It was not until the 1<sup>st</sup> of June 2010 that the Protocol entered into force though due to Russian opposition to it, in response to perceived discrimination<sup>72</sup>. The ratification process of this Protocol had thus lasted even longer than the one of Protocol No. 11. Due to the continued Russian opposition to Protocol No. 14, the other states adopted a temporary protocol, Protocol No. 14bis, in the meantime. Protocol No. 14bis allowed the Single Judge formation to be put in place and the Committees' competences to shift to repetitive cases towards those states that ratified it.<sup>73</sup> This Protocol was adopted on the 27<sup>th</sup> of May 2009 and entered into force on the 1<sup>st</sup> of October 2009. After the Russian ratification of Protocol No. 14 in February 2010, Protocol No. 14bis was replaced by Protocol No. 14.

---

<sup>68</sup> J-P. COSTA, "Les réformes de la Cour européenne des droits de l'homme – Avant et après Brighton", *Obs. Bxl.* 2012, No. 89, (30) 31.

<sup>69</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 65.

<sup>70</sup> Evaluation Group, Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, 27 September 2001, EG Court(2001)1, <https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr>.

<sup>71</sup> Explanatory Report to Protocol No. 14, 13 May 2004, para. 29-33.

<sup>72</sup> B. BOWRING, "The Russian Federation, Protocol No. 14 (and 14bis), and the Battle for the Soul of the ECtHR", *Goettingen Journal of International Law* 2 2010, (589) 605.

<sup>73</sup> C. BURBANO-HERRERA, "'SOS European Court of Human Rights': Protocol No. 14bis Urgently Reforms the Institutional Framework while Awaiting the Entry into Force of Protocol No. 14", *Int.Am. & Eur.Hum.Rts. J.* 2010, (115) 129-130.

### 3.2.2. The Protocol

The restructuring that this Protocol has brought to the judicial machinery of the Court has not been that far reaching as the reform brought by Protocol No. 11, but it was nonetheless substantial. Protocol No. 14 was, however, only meant as a solution to the then existing problems of the ECHR (mainly the backlog in clearly inadmissible cases) and it was common knowledge that this reform would not be substantial enough to completely solve the Court's challenges.<sup>74</sup>

The reforms focussed mainly on two aspects. Firstly, providing the Court with means to dismiss applications more easily and secondly, simplifying the management of repetitive applications (= applications arising from systemic or structural issues at the national level, whether already addressed by the Court or not<sup>75</sup>).

The most important novelty was the creation of **the Single Judge formation** (Article 26(1) and 27). These judges have the competence to declare manifestly inadmissible cases inadmissible (a competence that was previously given to the Committees, see subchapter 3.1.). This Single Judge formation is without doubt a huge asset to the Court system as now the Court can easily dispose of clearly unmeritorious cases. It is way more efficient to have one judge deciding over such manifestly inadmissible cases than (the previously) three judges of the Committees. As these manifestly inadmissible cases were the primal causes for the backlog problem in Strasbourg back then<sup>76</sup>, this procedure has thus clearly helped a lot in reducing the judicial backlog of the ECtHR in recent years. However as this formation also requires a lot of time and resources it has been questioned if this system should not be reformed to allow more time and resources to flow to cases that raise serious human rights problems.<sup>77</sup>

With manifestly inadmissible cases now dealt with by the Single Judges, the functions of **the committees** had to be redefined. That is why since Protocol No. 14 they are competent to judge on the admissibility and merits of cases in which the underlying questions are already the subject of well-established case-law of the Court, also known as repetitive cases (Article 28).

This new competence of the committees relieved **the Chambers** of a huge burden and gave them more time to focus on non-repetitive cases and creating new case law (Article 29). The Grand Chamber's competence remained the same.

Protocol No. 14 also added **new grounds for inadmissibility** of individual applications (Article 35(3)). If the individual application is incompatible with the provisions of the Convention or Protocols, manifestly ill-founded, or an abuse of the right of individual application the application will be declared inadmissible since June 2010. Also, if the applicant has suffered no significant disadvantage, his application will also be declared inadmissible since Protocol No. 14,

---

<sup>74</sup> J-P. COSTA, "Les réformes de la Cour européenne des droits de l'homme – Avant et après Brighton", *Obs. Bxl.* 2012, No. 89, (30) 32 ; I. CAMERON, "The Court and the member states: procedural aspects", in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, (25) 25.

<sup>75</sup> CDDH, Draft CDDH report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court, 17 May 2013, GT-GDR-D(2013)R2 Addendum I, 2.

<sup>76</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 65.

<sup>77</sup> M. O'BOYLE, "The Future of the European Court of Human Rights", *GLJ* 2012, (1862) 1870.

unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

As the Explanatory Report to Protocol No. 14 states, the purpose of adding this third paragraph to Article 35 “*is to provide the Court with an additional tool which should assist it in its filtering work and allow it to devote more time to cases which warrant examination on the merits*”. This new admissibility criterion is a necessary tool to give the Court some degree of flexibility to prevent the Convention system from becoming totally paralyzed and as such rendering the right of individual application illusory in practice.<sup>78</sup>

COSTA is of the opinion that the amendments to Article 35(3) have of all the reforms of Protocol No. 14 helped the Court the most at reducing its judicial backlog<sup>79</sup>, although CAFLISCH and MOROWA point out that Article 35(3)(b) has up till now only served as a very limited tool for disposing of unmeritorious applications.<sup>80</sup> In general a slight increase in the percentage of inadmissibility decisions is visible since this article is in use (see Chapter 4.2.4.)

With regard to the execution of the judgments of the ECHR, Protocol No. 14 added a few paragraphs to Article 46. The Grand Chamber was given the competence to render a judgment on the interpretation of a previous judgment whose execution is hindered by a problem of interpretation (Article 46(3)), after referral by the CoM by a two thirds majority. Equally, since then, if a High Contracting Party refuses to abide by a final judgment, the CoM may refer the case back to the Court by a two thirds majority for an investigation on whether the High Contracting Party has failed to abide with the final judgment of the Court (infringement procedure, Article 46(4)).

With regard to the amendments of Article 46 KRENC and VAN DROOGHENBROEK are of the opinion that the fact that these amendments do not prescribe pecuniary sanctions set by the CoM in case the State Party continues its refusal to execute the Court’s judgments even after it has been sentenced in an infringement procedure is a missed opportunity.<sup>81</sup> Indeed, introducing pecuniary sanctions could have been a good idea that would have helped the ECtHR to reduce the backlog in repetitive cases, but would it be wise to have a (*de jure*) political body decide on such sanctions? And would European states really decide by two-thirds majority to sanction their fellow High Contracting Parties with financial sanctions? This is rather doubtful. See Chapter 7.4. for more information on this subject.

Furthermore, Protocol No. 14 opened the door for the European Union to accede to the ECHR (Article 59(2)), once again changed the term of office of the judges (this time to a non-renewable period of nine years) (Article 23), opened the possibility to reduce the number of judges of the

---

<sup>78</sup> Explanatory Report to Protocol No. 14, 13 May 2004, paras. 77-79.

<sup>79</sup> J-P. COSTA, “Les réformes de la Cour européenne des droits de l’homme – Avant et après Brighton”, *Obs. Bxl.* 2012, No. 89, (30) 31.

<sup>80</sup> L. CAFLISCH, “La Cour Européenne des droits de l’homme un chantier permanent”, *ZSR* 2012, (159) 173; A. MOROWA, “The European Court of Human Rights’ Rejection of Petitions where the Applicant Has not Suffered a Significant Disadvantage : A Discussion of Desirable and Undesirable Efforts to Safeguard the Operability of the Court”, *Journal of transnational legal issues* 2012, 1 (19).

<sup>81</sup> F. KRENC and S. VAN DROOGHENBROECK, “Le protocole n° 14: “cautère sur une jambe de bois” ou véritable “garantie de l’efficacité à long terme de la Cour européenne des droits de l’homme”?”, *JT* 2010, (493) 498.

Chambers from seven to five (Article 26(2)), changed the system to select *ad hoc* judges (Article 26(4)), expanded the possibility for third party intervention to an explicit and non-conditional right for the CoE Commissioner for Human Rights to submit written comments and take part in hearings before the Chambers and the Grand Chamber (Article 36(3)) and enabled the opportunity for parties to engage in friendly settlements to cases “*at any stage of the proceedings*” (Article 39(1)).<sup>82</sup>

### 3.3. Current procedure pursuant to Article 34 (individual application)

In this subchapter a summary explanation of the current procedures and proceedings before the ECtHR will follow, highlighting those aspects that are important to this thesis.

#### 3.3.1. General proceedings

When an individual wants to bring his complaint to the ECtHR he has to start by submitting his application to the Court in writing, in full conformity with Rule 47 of the Rules of Court (which has been made stricter since the 1<sup>st</sup> of January 2014) and the Practice Direction on the Institution of Proceedings<sup>83</sup>.

After a complete application has been submitted to the Court, the Registry will assign the case to one of the Sections of the Court (Rule 52(1) of the Rules of Court), where after decisions will be struck within the Sections to assign cases to the different judicial formations.<sup>84</sup> Manifestly inadmissible cases will be assigned to the Single Judges, while the other cases will first be examined by a Judge Rapporteur. This Judge, designated by the President of the Section, shall first examine the applications and decide whether to assign the application to a Committee (repetitive cases) or the Section’s Chamber (non-repetitive cases) (Rule 49 of the Rules of Court). This entire procedure is called ‘triage’.

Cases that are assigned to a **Single Judge** are first evaluated by a non-judicial rapporteur (Article 24(2)). Thereafter the Single Judge will, at his sole responsibility, declare the case inadmissible or strike it out of the Court’s list of cases, without any written or oral submissions, nor a right of appeal (Article 27(1-2)). Alternatively he may also find that the case should be dealt with by a Committee or Chamber for further examination, in which case he will so decide (Article 27(3)).

Cases that are assigned to a **Committee** of three judges by the Judge Rapporteur or a Single Judge fall under a contentious procedure. The Committee will render a decision or judgement on the case by unanimity (Article 28(1)), without a right of appeal (Article 28(2)). The admissibility decision and judgment on the merits are to be taken at the same time (Article 28(1)(b)). If the Committee declares the case admissible and finds a violation, it may decide on just satisfaction for the applicant (Rule 53(2) of the Rules of Court). If no unanimity is found – which implies that the case clearly does not concern well-established case law – the case will be referred to the Chamber (Rule 53(6) of the Rules of Court).

---

<sup>82</sup> For more on these reforms, see in Dutch: Y. HAECK en L. ZWAAK, “De hervorming van het Europees Verdrag en het Europees Hof voor de Rechten van de Mens ingevolge het 14e Protocol: pompen en/of verzuipen?”, *T.B.P.* 2006, 3-17.

<sup>83</sup> Registry of the European Court of Human Rights, Practice Direction on the Institution of Proceedings, 1 January 2014, [www.echr.coe.int/Documents/PD\\_institution\\_proceedings\\_ENG.pdf](http://www.echr.coe.int/Documents/PD_institution_proceedings_ENG.pdf).

<sup>84</sup> Y. HAECK, *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2011, 194.

If a case is referred to a **Chamber** of seven judges by the Judge Rapporteur, a Single Judge or a Committee, it undergoes a procedure whereby the parties do get the opportunity to have their arguments heard in writing and/or orally, if the Chamber or the President of the Section so decides (Rule 54(2 and 5) of the Rules of Court). The Chamber has to include the national judge, as opposed to the proceedings before the Single Judge formation where this is forbidden, and as opposed to the proceedings before the Committees where this is not a prerequisite but only optional if requested by the Committee (Article 28(3)). The Chamber may decide to have a joint examination of admissibility and merits or a separate one (Article 29(1)). Also, it is not necessary for the Chamber to render a judgement by unanimity: separate and differing opinions of the judges are allowed (Rule 54A(1) of the Rules of Court)). If a violation has been found, the Chamber may decide on any claims for just satisfaction of the applicant (Rule 60 *j.* Rule 75 of the Rules of Court). Chamber judgements are final only when the case is thereafter not referred to the Grand Chamber by the parties within three months of the judgement, or if the Panel has rejected such request (Article 44(2)).

**The Grand Chamber** of seventeen judges is only referred to in the individual application procedure in two instances:

- 1) Pursuant to Article 30, if a Chamber relinquishes jurisdiction to the Grand Chamber. Such a relinquishment of jurisdiction is mandatory for the Chamber where the resolution of a questioned raised in the pending case might have a result inconsistent with the Court's case-law (Rule 72(2) of the Rules of Court). The parties to the case can object to the relinquishment of jurisdiction, although this objection will not be possible anymore when Protocol No. 15 enters into force (see Chapter 6.2.5. for more information on this issue).
- 2) Pursuant to Article 43, if a case is referred to it within a period of three months from the date of the judgment of the Chamber and **the Panel** of five judges accepts the request.

The provisions governing proceedings before the Chambers apply *mutatis mutandis* to the proceedings before the Grand Chamber (Rule 71(1) of the Rules of Court). The judgments of the Grand Chamber are final in any case.

When a violation has been established the Court can grant the applicant just satisfaction for the moral and material damages suffered and the costs and expenses incurred. Furthermore, it can propose specific measures in order to erase the consequences of the violation (*e.g.* reopening of proceedings, repeal of conviction, re-establishment of contact between a parent and a child) and general measures to avoid further violations in the future (*e.g.* amend legislation, change court practices, improve conditions of detention). **The Committee of Ministers** will supervise the compliance by the High Contracting Party with the judgment. The Party will have to communicate the measures envisaged in the form of action plans and when it considers that it has taken all the necessary measures it sends the CoM an action report. If the CoM accepts the measures it approves the action report and closes the case by a final resolution. The applicant

and civil society organisations can also communicate with the CoM with regard to the compliance in a particular case.<sup>85</sup>

### 3.3.2. Admissibility criteria

After a complete application has been submitted to the ECtHR and the case has been assigned to a designated judicial formation the next step in any procedure will be an evaluation of the admissibility of the concerned case. There are certain criteria a case will have to comply with to be admissible and subsequently be judged on its merits.

For a case to be admissible to the ECtHR it has to be brought forward by someone who can be identified as a 'victim' (Article 34). The ECtHR has identified three types of victims: direct, indirect and potential victims.<sup>86</sup> As only victims can submit a case to the ECtHR, this means that petitions in favour of a third party and the *actio popularis* are not accepted, while they will not be able to prove their status as a victim.<sup>87</sup>

Of course the submitted application should *ratione materiae* relate to a violation of a substantive Convention right (Article 35(3)).

*Ratione temporis* only claims concerning facts that have occurred *after the ratification* by the concerned High Contracting State of the ECHR or one of its Protocols will be declared admissible. However, continuing situations that have started even before that date, such as *e.g.* the applicant's ensuing lack of access to his alleged property, home and graves of his relatives<sup>88</sup>, can ensure ECtHR competence on these enduring situations from the ratification date onwards.

*Ratione loci* only claims concerning facts that have occurred *within the jurisdiction of a High Contracting State* will be declared admissible (Article 1). This can also comprise territory of non-Contracting States if there is effective control over that area and its inhabitants by a High Contracting State.<sup>89</sup>

A next admissibility criterion is that of *the exhaustion of all domestic remedies* (Article 35(1)). The High Contracting States should get the opportunity to live up to their positive obligations and therefore one cannot go to the ECtHR before exhausting all domestic remedies. This requires then of course that the applicant has raised the substance of the complaint to be made to the ECtHR before the domestic courts. This admissibility criterion only concerns remedies that are available, effective and sufficient though. Special circumstances, such as a claim of unreasonable duration of domestic proceedings, can exempt an applicant from this

---

<sup>85</sup> Committee of Ministers, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, 10 May 2006, <https://wcd.coe.int/ViewDoc.jsp?id=999329>; Council of Europe, The supervision of the execution of judgments, [www.coe.int/t/dghl/monitoring/execution/Presentation/Video\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Presentation/Video_en.asp), (last accessed 14 April 2014).

<sup>86</sup> ECtHR, *De Wilde, Ooms and Versyp v. Belgium*, 1972, para. 23; ECtHR, *Politikin v. Poland*, 2004, para. 23; ECtHR, *Yasa v. Turkey*, 1998, para. 66; ECtHR, *Segi and Gestoras Pro-Amnestia v. Germany and others*, 2002; Y., HAECK, *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2011, 213-214.

<sup>87</sup> W. VERRIJDT, "De gevolgen van het Elfde Protocol bij het E.V.R.M.", *Jura falc.* 2002-2003, 584.

<sup>88</sup> ECtHR, *Sargsyan v. Azerbaijan*, Decision on the admissibility, 14 December 2011, para. 91.

<sup>89</sup> ECtHR, *Bankovic and others v. Belgium and others*, 2001, para. 68.

requirement.<sup>90</sup> This criterion can be linked to the positive obligation on states inherent to human rights to set up effective procedures so as to make it possible for potential victims to request the obedience of a particular human right at national level.<sup>91</sup> The existence of this criterion is also protected by the Convention in Article 13.

An application should furthermore be submitted within a period of *six months* – soon to be four months when Protocol No. 15 comes into force – from the date on which the final domestic decision was taken (Article 35(1)).

*Anonymous* applications are inadmissible (Article 35(2)(a)), just as applications that are *substantially the same* as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information (Article 35(2)(b)).

Furthermore, since Protocol No. 14, applications that are considered to be *incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application* will be declared inadmissible (Article 35(3)(a)). The same counts for the applications of applicants who have *not suffered a significant disadvantage*, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal (this last part after “*and provided that ...*” will be deleted when Protocol No. 15 comes into force) (Article 35(3)(b)).

Apart from inadmissibility decisions, the Court may also strike cases off its list of cases in accordance with Article 37.

### 3.3.3. Pilot judgment procedure

Through the years the Court has developed from an institution deciding whether or not the ECHR had been breached by a High Contracting Party (the *jus dicere* role of the Court), to a court that has the ambition to go beyond that role<sup>92</sup>, by being more active in proposing general and specific measures to undue the harm caused by a violation and to avoid further violations in the future.<sup>93</sup> One of the examples of this more active approach by the Court is the development and use of the pilot judgment procedure. This procedure is a creation of the Court itself, formally backed by the CoM<sup>94</sup>.

---

<sup>90</sup> P. LEACH, *Taking a Case to the European Court of Human Rights*, London, Blackstone Press Limited, 2001, 78; Y. HAECK, *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2011, 262.

<sup>91</sup> L. WILDHABER, *The place of the European Court of Human Rights in the European Constitutional landscape*, May 2002, [www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf](http://www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf), 3.

<sup>92</sup> E. LAMBERT-ABDELGAWAD, “The Court as a part of the Council of Europe: the Parliamentary Assembly and the CoM”, in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, (263) 263-264.

<sup>93</sup> Y. HAECK, *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2011, 413-414.

<sup>94</sup> Resolution 2004(3) of the Committee of Ministers on judgments revealing an underlying systemic problem of 12 May 2004.

When a significant number of applications are lodged with the Court deriving from the same root cause, indicating the existence of a structural or systemic problem or other similar dysfunction, the Court may decide to select one or a few of them for priority treatment (Rule 61(1) of the Rules of Court). The proceedings of the other cases may subsequently be ‘frozen’ by the Court for a certain time period (Rule 61(6) of the Rules of Court). The Court will then render a judgment on the selected case(s) that does not merely identify a solution to the particular case(s), but also on the frozen cases that raise the same issue. This is what is called a pilot judgment. In the *dictum* of such a pilot judgment the Court will aim:

- to determine whether there has been a violation of the Convention in the particular case;
- to identify the dysfunction under national law that is at the root of the violation;
- to give clear indications to the Government as to how it can eliminate this dysfunction;
- to bring about the creation of a domestic remedy capable of dealing with similar cases (including those already pending before the Court awaiting the pilot judgment), or at least to bring about the settlement of all such cases pending before the Court.<sup>95</sup>

The Court may direct in the operative provisions of the pilot judgment that the remedial measures be adopted within a specified time (Rule 61(4) of the Rules of Court). This judgment will then serve as a model for the settlement of the frozen cases. The *ratio* behind the entire ‘freezing’ concept is to encourage the national authorities to take the necessary steps to give effect to the *dictum* of the pilot judgment.<sup>96</sup> If the concerned member state is found not to live up to the pilot judgment (within the specified time) the temporary frozen proceedings of the other cases will be resumed (Rule 61(8) of the Rules of Court).

The pilot judgment procedure is a flexible one: not every category of repetitive case is suitable for a pilot judgment procedure, nor will every initiation of the pilot judgment procedure lead to an adjournment of cases.<sup>97</sup>

The advantages of this pilot judgment procedure are that the leverage of this procedure will stimulate High Contracting Parties to fix the dysfunctions in their national legal system, that in this way redress is given to all applicants more speedily than when Strasbourg would process all cases on an individual basis and that – if the pilot judgment is successful – it also spares the Court a future influx of similar (= clone) cases.

*Infra* (Chapter 7.4.) more emphasis will be put on the pilot judgment procedure and how to optimise its effects. Furthermore, certain pilot judgments will be discussed throughout this thesis as well, giving proof of the (in)effectiveness of this procedure in regard to several structural dysfunctions (see *e.g.* the *Ivanov* case in Chapter 4.2.6., the *Hirst (No. 2)* case in Chapter 5.1. and the *Brionowski* case in Chapter 7.4.2.).

---

<sup>95</sup> Registrar of the ECtHR, Note on the pilot-judgment procedure, 2009, [www.echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf), para. 3.

<sup>96</sup> Registrar of the ECtHR, Note on the pilot-judgment procedure, 2009, [www.echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf), para. 5.

<sup>97</sup> Registrar of the ECtHR, Note on the pilot-judgment procedure, 2009, [www.echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf), para. 7.

### 3.3.4. Friendly settlements and unilateral declarations

Because an early satisfactory solution is always the best option, the ECHR foresees in the opportunity for High Contracting States to propose measures to an applicant at any stage of the proceedings that would offer him or her redress for the damage he or she suffered (Article 39). The Registrar will even contact the parties for this purpose himself once an application has been declared admissible (Rule 62(1) of the Rules of Court). The negotiations leading up to the *friendly settlement* will be confidential and without prejudice to any later contentious proceedings (Rule 62(2) of the Rules of Court). When a friendly settlement has been reached, the Court will strike the case out of the Court's list by a decision after verification (Article 39(3) and Rule 62(3) of the Rules of Court). Friendly settlements are supervised by the CoM.

In reality a friendly settlement most of the times comprises of a payment or some other sort of individual redress. In some cases the concerned High Contracting Party has agreed to provide in a structural remedy by ways of changing legislation. In expulsion cases a friendly settlement could concern the provision of a temporary residence permit to the applicant.<sup>98</sup>

*Unilateral declarations* concern friendly settlement proposals that have been refused by an applicant (Rule 62A(1)(a) of the Rules of Court), or exceptionally even in the absence of a prior attempt to reach a friendly settlement (Rule 62A(2) of the Rules of Court). Even without the consent of the applicant, the Court does sometimes accepts such unilateral declarations as sufficient bases of redress and respect for human rights (to fasten proceedings). If it so decides, then it may strike the case out of the list, even if the applicant does not agree on this (Rule 62A(3) of the Rules of Court). The implementation of unilateral declarations is not supervised by the CoM, this falls under the responsibility of the Court.

### 3.3.5. The Court's priority policy<sup>99</sup>

Rule 41 of the Rules of Court provides that the Court shall have regard to the importance and urgency of the issues raised in pending cases in determining the order in which cases are to be dealt with. For this purpose the Court has established different categories of cases based on their respective priority, the essence of which is to concentrate more resources on the cases in the highest categories (I-III) for fast(er) treatment. Such a policy is important to avoid serious human right violations from taking too long to be examined by the Court.

The scheme goes as follows:

- I. Urgent applications (right to life or health cases, applications for interim measures etc.)
- II. Applications raising questions capable of having an impact on the effectiveness of the Convention system (structural or endemic situations, *e.g.* pilot judgment procedures), applications raising an important question of general interest, or inter-State cases
- III. Applications concerning the Articles 2, 3 or 5, §1 which have given rise to direct threats to the physical integrity and dignity of human beings

---

<sup>98</sup> Y. HAECK, *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2011, 340.

<sup>99</sup> ECHR, The Court's Priority Policy, 2009, [www.echr.coe.int/Documents/Priority\\_policy\\_ENG.pdf](http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf), 2.

- IV. Potentially well-founded applications based on other Articles
- V. Repetitive cases (potentially linked to an earlier pilot judgment)
- VI. Applications identified as giving rise to a problem of admissibility
- VII. Applications which are manifestly inadmissible

Regardless of this scheme, the President may still treat an individual case differently if he finds this suitable.

In general the “priority applications”, being the top three categories, are dealt with by the Court’s Chambers and Grand Chamber. Category IV and V cases will also be adjudicated before the Chambers. Nominally the Committees deal with all categories of cases, however given the delimitation of their competence in Article 28(1) the bunch of the applications pending before them will come from category V. Single Judges have competence over the two categories of lowest importance (VI-VII).

### **3.4. Conclusion**

In this Chapter the procedures and proceedings before the ECtHR have been explained. The most recent reforms of the Protocols Nos. 11, 14 and 14bis have also been clarified. Furthermore, attention was given to some both interesting and important features of the procedures: the pilot judgment procedure, the friendly settlements and unilateral declarations and the Court’s priority policy. This Chapter was important as in the next Chapter an evaluation of the proceedings in Strasbourg will follow.



## 4. The ECtHR: defining the problem

The number of individual applications to the ECtHR has increased dramatically since the establishment of the Court. This has resulted in an ever increasing judicial backlog and longer duration of proceedings. For most cases it takes more than two to three years to be processed<sup>100</sup>, but for Committee and Chamber cases this even rises to four years and longer (see *infra*, Chapter 4.2.5.). It is commonly known that the ECtHR is dealing with a huge problem of judicial backlog. Former ECtHR President Sir NICOLAS BRATZA recognised that “*the main issue confronting the Court has been, and continues to be, the sheer quantity of cases*” in his speech at the Brighton Conference in 2012.<sup>101</sup> The judicial backlog is so bad for some cases – certainly for repetitive cases before the Committees – that one can even ask the question if the ECtHR is still in compliance with its own case law relating to the reasonable time of case proceedings.

The main aim of writing this thesis was to investigate how the judicial backlog of the ECtHR can be reduced so as to increase the Court’s legitimacy and authority and in the end enhance human rights protection in Europe. This will be done by analysing the new Protocols Nos. 15 and 16, but also by proposing new reforms that should assure that this Court can effectively observe the protection of human rights in Europe in the future. Before going into that analysis in later Chapters it is important to have an in-depth investigation in the backlog that this Court is facing first though in order to get a grips of what is going wrong where and why. In previous Chapters the functioning of the Court was explained *de lege lata*. Now follows an analysis of this (mal)functioning.

### 4.1. In general: input, output and pending applications

Judicial backlog can be defined as the culminated difference between input and output at a court.<sup>102</sup> Let us thus have a look at these figures on input and output. The figures that are being used in this subchapter are those of the years 1999 until 2013, that is to say from the first full year after the coming into force of Protocol No. 11 onwards (in force since November 1998). The reason why that year is chosen is because Protocol No. 11 prepared the Court for an new era, or at least tried to do so. A huge influx in applications was expected from the new member states in Eastern Europe and therefore a radical reform was necessary. Since then however the judicial backlog problem has only become worse and worse and the call for reform ever more imminent. Apart from the year 1999 it is also important to take into account the dates of the coming into force of Protocol Nos. 14bis and 14, the 1<sup>st</sup> of October 2009 and the 1<sup>st</sup> of June 2010 respectively, when examining the data.

#### 4.1.1. Input

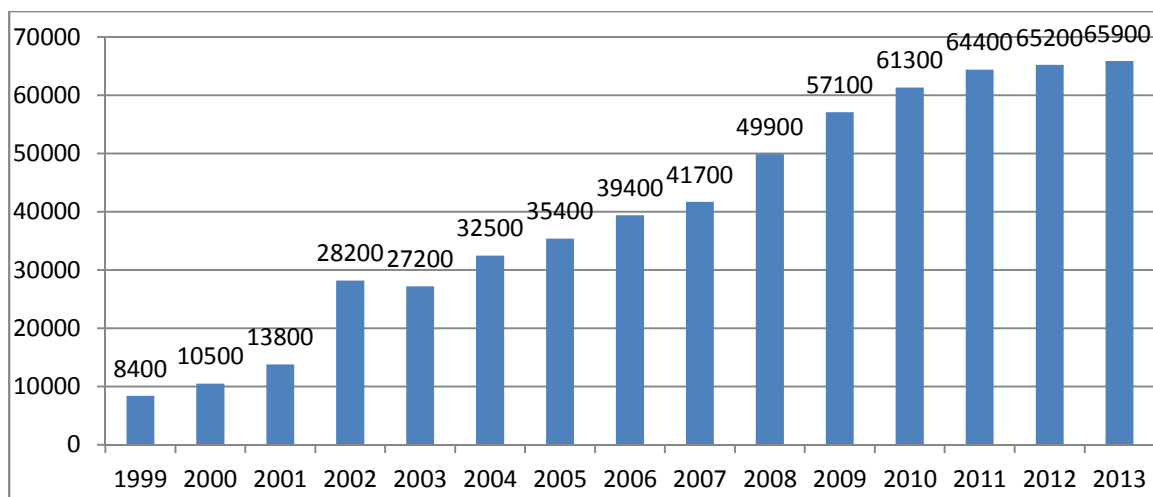
With regard to ‘input’, the figures used reflect the amount of applications allocated to a judicial formation and not just the amount of applications lodged with the Court within a certain timeframe. This is because the latter also include incomplete applications that are being disposed of *administratively*, which do not truly reflect the Court’s workload and do thus not affect the *judicial* backlog.

---

<sup>100</sup> T. BARKHUYSEN and M. VAN EMMERIK, “Legitimacy of European Court of Human Rights Judgments: procedural aspects”, in N. HULS, M. ADAMS and J. BORNHOFF (eds.), *The Legitimacy of Highest Courts’ Rulings*, The Hague, T.M.C. Asser Press, 2009, (437) 440.

<sup>101</sup> N. BRATZA, *Speech at the High Level Conference in Brighton*, 20 April 2012, [www.echr.coe.int](http://www.echr.coe.int), 3.

<sup>102</sup> W. VERRIJDT, “De gevolgen van het Elfde Protocol bij het E.V.R.M.”, *Jura falc.* 2002-2003, 592.



Graph 1: based on: Applications allocated to a judicial formation by the end of each year (Registry of the ECtHR, Annual Report 2012-2013, Strasbourg, 2013-2014).

As you can see there is a yearly increase in the amount of cases that are coming to Strasbourg and are being allocated to a judicial formation. In the previous decade those figures were clearly out of control. For example, the Court issued an internal audit carried out by the CoE in 2001 that predicted that from 2005 onwards there would be 20,000 new applications on a yearly basis<sup>103</sup>, while as can be seen the amount of individual applications had already risen well above that figure by 2002. The increase is slowing down however from a by average 11% yearly increase between 2003 and 2011 to an almost stagnation in the last three years. This is a good sign. Some experts are however of the opinion that there are still not enough cases coming to Strasbourg<sup>104</sup>, but more on this issue in Chapter 5.

To put the figures of the above graph in context: in 2013 there were 65,900 new applications logged before the Court. This means that one in every 12,433 European citizens has lodged a complaint in Strasbourg that year. This also means that – roughly speaking – every judge of the ECtHR has had 1,402 cases new cases before him last year, as there is but one judge for every 17,5 million citizens.

The ratification of the Convention by 7 new States since 1999<sup>105</sup>, the increased visibility of the Court, as well as the ratification of Protocol(s) No(s). 12 (and 13), which have added new substantial human rights to the ECHR, will certainly have had an impact on the increase in incoming cases.

#### 4.1.2. Output

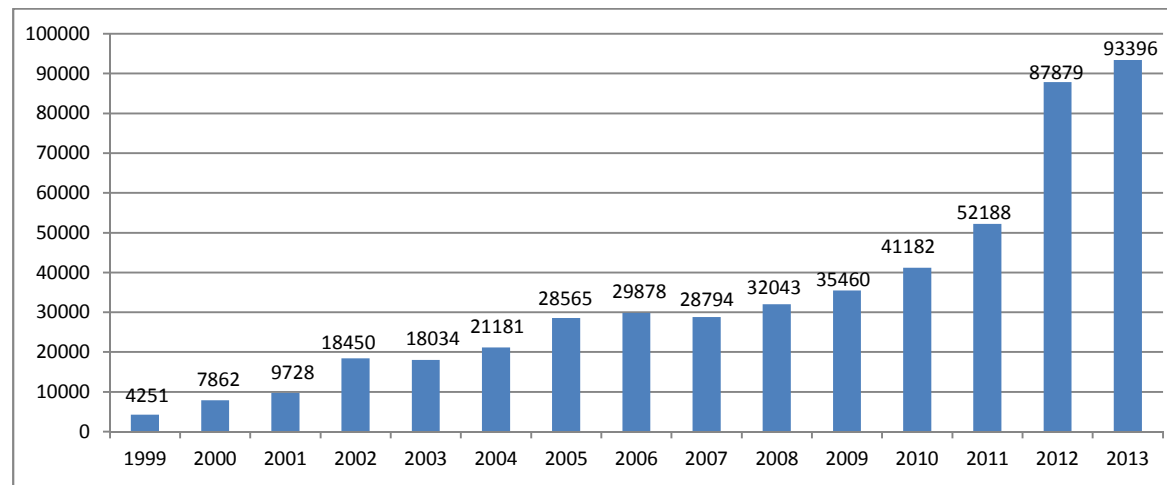
Opposed to the stagnation in the amount of incoming cases at the ECtHR lies an incredible increase in the output of the Court. Although there has always been an upward trend in the output of the Court (parallel to the growing number of incoming applications), the upward trend has been drastically higher in the last two years (+80% since 2011). The coming into force of

<sup>103</sup> L., WILDHABER, *The place of the European Court of Human Rights in the European Constitutional landscape*, May 2002, [www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf](http://www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf), 5; W. VERRIJDT, “De gevolgen van het Elfde Protocol bij het E.V.R.M.”, *Jura falc.* 2002-2003, 592.

<sup>104</sup> E. BREMS, *Advanced Course on Human Rights Law*, Universiteit Gent, 2012-2013.

<sup>105</sup> Georgia, Armenia, Azerbaijan, Bosnia and Herzegovina, Serbia, Monaco, Montenegro, see: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>

Protocol No. 14bis in October 2009 and Protocol No. 14 in June 2010, but most of all the fact that by the summer of 2011 the Single Judge procedure started working at *full speed*<sup>106</sup>, have clearly had a huge effect on the output of the Court. Because of this, since 2012 (and for the first time in the history of the Court), the output has surpassed the input.<sup>107</sup>



Graph 2: based on: Applications disposed of judicially (by judgement or by decision) by the end of each year (Registry of the ECtHR, Annual Reports 1999-2013, Strasbourg, 2000-2014).

The output of the ECtHR is huge. Compare these figures with those of courts such as the German *Bundesverfassungsgericht* (its first *Senat*<sup>108</sup> closed 3,307 cases in 2013<sup>109</sup>), US Supreme Court (received 7,509 cases and rendered 76 judgments in 2012<sup>110</sup>) and the European Court of Justice (1,587 completed cases in 2013<sup>111</sup>) and one understands just how immense the output of the ECtHR is with 93,396 disposed applications in 2013.

#### 4.1.3. Pending applications (backlog)

Now that we have assessed the input and output of cases at the Court, let us see what the result is in terms of judicial backlog.

<sup>106</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 244.

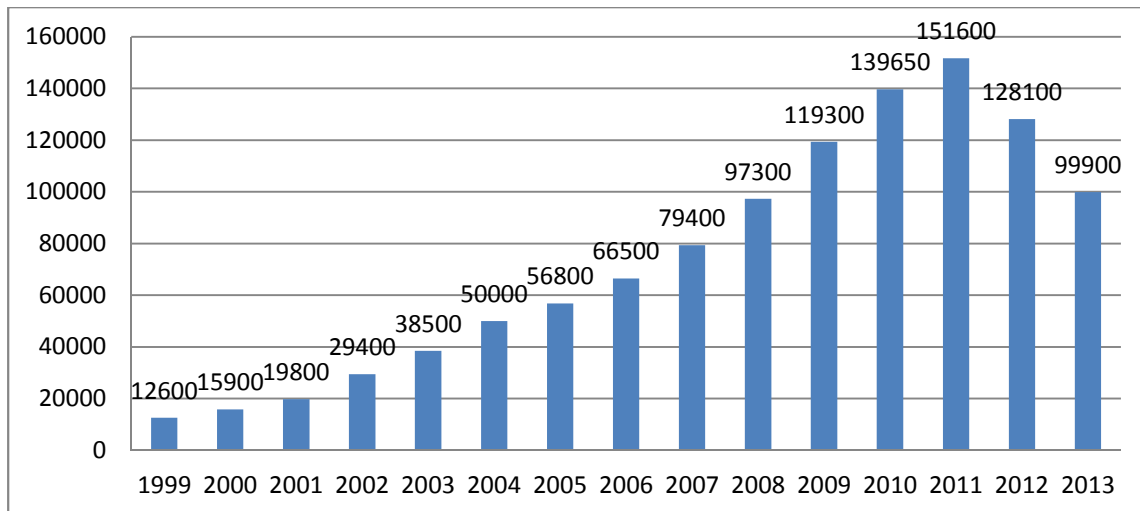
<sup>107</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 245.

<sup>108</sup> Which has authority over the observance of the fundamental rights inscribed in the German Basic Law.

<sup>109</sup> Bundesverfassungsgericht, *Erster Senat – Gesamtübersicht*, 2014, [www.bundesverfassungsgericht.de/organisation/gb2013/B-I.html](http://www.bundesverfassungsgericht.de/organisation/gb2013/B-I.html).

<sup>110</sup> US Supreme Court, *2013 Year-End Report on the Federal Judiciary*, 2013, [www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf](http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf), 12.

<sup>111</sup> CJEU, *The Court in figures*, [http://curia.europa.eu/jcms/jcms/P\\_80908](http://curia.europa.eu/jcms/jcms/P_80908), (last accessed 15 April 2014).



Graph 3: based on: Applications pending before a judicial formation at the end of each year (Registry of the ECtHR, Annual Reports 2012-2013, Strasbourg, 2013-2014).

As was to be expected, the ever increasing amount of new applications has resulted in an enormous expansion in the number of pending cases before the ECtHR. It has led to an increase of a staggering 1,103% in backlog between 1999 and 2011. In September 2011 it reached its all-time maximum of around 160,000 cases.<sup>112</sup> However, thereafter (only) good news has come from Strasbourg. As just mentioned *supra* with regard to the Court's output, the Single Judge procedure began working at full speed in the summer of 2011 and this procedure has not missed its goal. The stagnation in incoming cases from 2011 onwards, together with a steep rise in the output rate of the Court has caused the amount of pending cases to drop significantly in the last two years, with an average decreasing trend of 19% in those two years. This has all the likes of a sustainable decreasing trend (and happily so).

However, sustainable as it might seem, it is not structural enough. The new Single Judge formation allowed the backlog in manifestly inadmissible applications to be tackled (see subchapter 4.2.5.) and the new grounds for inadmissibility in Article 35(3) resulted in a slight increase in the number of inadmissibility decisions (see subchapter 4.2.4.). As will be clarified in subchapter 4.2., structural problems (such as insufficient funds, too few Registry case lawyers, inefficient Committees ...) still face the Court though, resulting in proceedings that are still slow and a backlog that is still long. So let us move on.

## 4.2. In detail: the inner kitchen of the ECtHR

### 4.2.1. Personnel & organisation

The Court has 47 judges, which equals the amount of High Contracting Parties (Article 20). The judges are divided into five Sections of 9 or 10 judges each. These Sections are set up geographically and gender balanced, reflecting the different legal systems among the High Contracting Parties<sup>113</sup> (Rule 25 of the Rules of Court).

<sup>112</sup> A. BUYSE, *Court Statistics over 2013 and Other Strasbourg News*, 6 February 2014, <http://echrblog.blogspot.fr/2014/02/court-statistics-over-2013-and-other.html>.

<sup>113</sup> There are five regional groups: Latin-Western Mediterranean, Balkan-Eastern Mediterranean, Eastern Europe, the Anglo-Scandinavian countries, Central Europe and the former Soviet Union.

47 judges is a lot, although there are larger courts, just as there are many courts that do not follow a 'one judge per country'-rule. For example, the Inter-American Court of Human Rights (hereafter IACtHR) only has 7 judges for 20 member states and the Inter-American Commission on Human Rights (hereafter: IACoHR) only 7 Commissioners for 24 member states.<sup>114</sup> On the other hand the Court of Justice of the European Union (hereafter: CJEU) has 63 judges for only 28 member states (although it is actually composed out of 3 Courts: European Court of Justice (28 judges), General Court (28 judges) and Civil Service Tribunal (7 judges)).<sup>115</sup> To mention a few others: the ICTY has 20 judges<sup>116</sup> and the ICC has 18 judges<sup>117</sup>.

The Court has a Registry of 640 permanent staff members to assist the judges. It is divided into different sections. There are five general sections for each of the regional country groups and further some specific sections for the Grand Chamber, for Common Services and a specific filtering section.<sup>118</sup> The Registry has one (head) Registrar, one Deputy Registrar and a Section Registrar and a Deputy Section Registrar for every Section of the Court.<sup>119</sup> Furthermore, of the 640 permanent Registry members 270 are lawyers and 370 are other support staff.<sup>120</sup>

The Court's Registry has grown quite rapidly in the recent past, in 1999 there were only 250 staff members *e.g.*<sup>121</sup> More specifically, the number of lawyers within the Registry has increased a lot as well: 205 in 2005<sup>122</sup>, 218 in 2008, 260 in 2011<sup>123</sup> and now 270.

Although 640 permanent staff members might seem a lot, it is not that spectacular. The CJEU has 2,139 staff members<sup>124</sup>, the ICTY 760<sup>125</sup> and the ICC 763<sup>126</sup> (figures of 2012) for example. Comparatively speaking, the ECtHR thus has a small Registry. The IACtHR has however but a few dozen staff members and the IACoHR only has 64 of them.<sup>127</sup>

---

<sup>114</sup> OAS, Staff, [www.oas.org/en/iachr/mandate/staff.asp](http://www.oas.org/en/iachr/mandate/staff.asp), (last accessed 15 April 2014).

<sup>115</sup> CJEU, The Court in figures, [http://curia.europa.eu/jcms/jcms/P\\_80908](http://curia.europa.eu/jcms/jcms/P_80908), (last accessed 15 April 2014).

<sup>116</sup> ICTY, Current Permanent Judges, [www.icty.org](http://www.icty.org), (last accessed 15 April 2014).

<sup>117</sup> ICC, Structure of the Court, [www.icc-cpi.int](http://www.icc-cpi.int) (last accessed 15 April 2014).

<sup>118</sup> ECtHR, Organisation Charter, 2014, [www.echr.coe.int/Documents/Organisation\\_Chart\\_ENG.pdf](http://www.echr.coe.int/Documents/Organisation_Chart_ENG.pdf).

<sup>119</sup> W. VERRIJDT, "De gevolgen van het Elfde Protocol bij het E.V.R.M.", *Jura falc.* 2002-2003, 627.

<sup>120</sup> ECtHR, Registry, [www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent\\_1346157759256\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_1346157759256_pointer), (last accessed 15 April 2014).

<sup>121</sup> J-P. COSTA, "Comments on the Wise Persons' Report from the perspective of the European Court of Human Rights" in Directorate General of Human Rights, Applying and Supervising the ECHR: Future developments of the European Court of Human Rights in the light of the Wise Persons' Report, Strasbourg, Council of Europe, 2007, 38.

<sup>122</sup> Y. HAECK and J. VANDE LANOTTE, "Desperately Trying to Keep the Titanic Afloat: the Reform Proposals concerning the European Convention on Human Rights after Protocol nr. 14", *Int.Am. & Eur.Hum.Rts. J.* 2008, 122.

<sup>123</sup> Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012, para. 347.

<sup>124</sup> CJEU, The Court in figures, [http://curia.europa.eu/jcms/jcms/P\\_80908](http://curia.europa.eu/jcms/jcms/P_80908), (last accessed 15 April 2014).

<sup>125</sup> ICTY, Employment and Internships, [www.icty.org/sections/AbouttheICTY/EmploymentandInternships](http://www.icty.org/sections/AbouttheICTY/EmploymentandInternships) (last accessed 15 April 2014).

<sup>126</sup> Report by Ms. MARIE-LOUISE BEMELMANS-VIDEC to the Committee on Legal Affairs and Human Rights, Guaranteeing the authority and effectiveness of the European Convention on Human Rights, Doc. 12811, 3 January 2012, para. 21.

<sup>127</sup> OAS, Staff, [www.oas.org/en/iachr/mandate/staff.asp](http://www.oas.org/en/iachr/mandate/staff.asp), (last accessed 15 April 2014).

A few aspects of the Court's and its Registry's organisation deserve more detailed attention for the purpose of this thesis. For that reason they are discussed hereafter.

### **The Single Judge formation**

For an introduction on what the Single Judge formation is and what it does, see Chapters 3.1.2 and 3.3.1. The introduction of the Single Judge formation did not entail any reinforcement of the Court's resources, a mere reorganization was enough.<sup>128</sup> Between June 2010 and June 2012 20 judges were appointed as Single Judges. They devoted more or less 25% of their time to work on Single Judge cases. Currently all judges (except for the President and Section Presidents) act as Single Judges.<sup>129</sup> About 60 experienced legal officers belonging to the Registry have been appointed by the President to be rapporteurs to the Single Judges.<sup>130</sup> In 2011 less than 11% of the Court's overall judicial working time was devoted to cases pending before this judicial formation.<sup>131</sup>

The overall effect of the Single Judge formation is very positive. The Court had previously estimated that some 32,000 decisions would be delivered per year by the Single Judges (which was based on the output of the committees of 2009), but this has been exceeded to a large extent (80,500 applications in 2013<sup>132</sup>).

### **The filtering section**

As one of the measures to efficiently filter the very large number of inadmissible cases brought before the Court each year (over 90% of all applications) and on recommendation of the Interlaken Declaration<sup>133</sup>, the Court has established a filtering section within its Registry in 2011.<sup>134</sup> This section focusses on streamlining the handling (*triage*) of incoming cases from five of the highest case-count States (Russia, Turkey, Romania, Ukraine and Poland). About 80 Registry lawyers were part of the filtering section in September 2012.<sup>135</sup> In 2012 the filtering

---

<sup>128</sup> Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012, para. 355.

<sup>129</sup> CDDH, Draft CDDH report containing elements to contribute to the evaluation of the effects of Protocol No. 14 to the Convention and the implementation of the Interlaken and Izmir Declarations on the Court's situation, 7 September 2012, GT-GDR(2012)R2 Addendum II, para. 17.

<sup>130</sup> Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012, para. 357.

<sup>131</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 42.

<sup>132</sup> Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 6.

<sup>133</sup> Interlaken Declaration of 19 February 2010, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=C.6.C.i](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=C.6.C.i).

<sup>134</sup> ECtHR, Filtering Section speeds up processing of cases from highest case-count countries, 2013, [www.echr.coe.int/Documents/Filtering\\_Section\\_ENG.pdf](http://www.echr.coe.int/Documents/Filtering_Section_ENG.pdf), 1.

<sup>135</sup> CDDH, Draft CDDH report containing elements to contribute to the evaluation of the effects of Protocol No. 14 to the Convention and the implementation of the Interlaken and Izmir Declarations on the Court's situation, 7 September 2012, GT-GDR-A(2012)R2 Addendum II, para. 11.

section's scope was extended to five more states: Bulgaria, Serbia, Moldova, the UK and Italy.<sup>136</sup> The 2012 External Audit recommended an expansion to *all* High Contracting States.<sup>137</sup>

The work of this section within the Registry will certainly have helped in reducing the number of pending Russian and Polish applications. However this section should not be seen as having achieved an overall success given the still depressing amount of pending applications coming from countries such as Romania, Serbia and Ukraine (see Chapter 4.2.6.).

## **Secondments**

An interesting practice that has helped a lot in enhancing the cooperation between the ECtHR and the national jurisdictions of the High Contracting Parties is the practice called 'secondment'.

Secondment to the ECtHR is a mechanism that allows national (or international) legal experts (lawyers, judges ...) to be integrated in the Court's Registry (or anywhere else within the CoE) for a certain period of time (between several months up to three years). Those seconded experts to the ECtHR perform several tasks that can generally be described as supporting the judges on all sorts of issues (even in writing decisions, judgments and separate/dissenting opinions).<sup>138</sup> It is a flexible approach, given that it is for the Court to decide how many experts will be seconded at each time.<sup>139</sup> The legal basis of the secondment procedure is Resolution (2003)5 of the CoM of the Council of Europe of 22 October 2003.

An intensification of the secondment programme has been commended at several occasions, *e.g.* in the External Audit of the Court of 2012<sup>140</sup>, the Interlaken, Izmir and Brighton Declarations<sup>141</sup>, to handle specific kinds of applications, *e.g.* repetitive cases coming from high case-count countries. As a result of these repeated recommendations the number of seconded experts to the Registry of the Court has indeed increased in recent years.<sup>142</sup> There have been forty-five secondments in 2012<sup>143</sup>, with twenty of them coming from the Russian Federation. The knowledge about their domestic legislation that these seconded lawyers bring is of great value

---

<sup>136</sup> Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012, para. 352.

<sup>137</sup> Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012, para. 317.

<sup>138</sup> X, *Standard report about the long term training period at the European Court of Human Rights in Strasbourg 2008/2009*, 2009, [www.ejtn.eu/Documents/Exchange%20programme%20documents/Reports%20and%20summaries/AT%20-%202008-2009%20-%20Registry%20-%20EN.pdf](http://www.ejtn.eu/Documents/Exchange%20programme%20documents/Reports%20and%20summaries/AT%20-%202008-2009%20-%20Registry%20-%20EN.pdf).

<sup>139</sup> E. FRIBERGH (The Court's Registrar), *Email to Mr. Orlov (Head of the Russian Council of Human Rights Centre "Memorial")*, 5 December 2011

<sup>140</sup> Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012, p. 63, recommendation 34.

<sup>141</sup> Interlaken Declaration of 19 February 2010, [<sup>142</sup> E. FRIBERGH \(The Court's Registrar\), \*Email to Mr. Orlov \(Head of the Russian Council of Human Rights Centre "Memorial"\)\*, 5 December 2011.](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, B., 4., e); Izmir Declaration of 27 April 2011, www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, F., 5.; Brighton Declaration of 20 April 2012, www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, D., 20., b).</a></p></div><div data-bbox=)

<sup>143</sup> Registry of the ECtHR, Annual Report 2012, Strasbourg, 2013, 12.

to the Court. According to the CDDH secondments have helped a lot in increasing the output of the ECtHR.<sup>144</sup> See Chapter 7.3.3.1. for more on secondments.

### **In general**

The amount of decided applications per judge are enormous. 93,396 cases were being decided upon in 2013. This means 1,987 decisions/judgments per judge or 5½ decided applications per judge per calendar day. For the Registry lawyers the figures are not that bearable either. There were 359 cases to be handled for every one of them in 2013 (which is an increase in productivity from the 141 per Registry lawyer in 2007<sup>145</sup>), or roughly 1 case to be dealt with from submission to judgment on just satisfaction by every Registry lawyer each calendar day. Although the number of Registry lawyers increased from 205 in 2005 to 270 in 2014, the Court's input and output increased by 86% and 227% respectively in the same period. LESTER thus rightly described the working methods of the Registry as a "*factory system [...] attempting to achieve high productivity in delivering mass production of mainly negative decisions*".<sup>146</sup> Apart from leading to the conclusion that there are way too few Registry lawyers (and judges?), but that the Court has nonetheless increased its efficiency a lot in recent years, this also leads to the question what the influence on the quality of the judgements of all this would be.

### **4.2.2. Budget**

According to Article 50 the Court's expenditure is to be borne by the CoE. The Court does not have a separate budget, but its budget is part of the general budget of the CoE which is established on a yearly (and recently biennium basis). The Court's budget covers for the Judges' remuneration, staff salaries and operational expenditure (information technology, official journeys, translation, interpretation, publications, representational expenditure, legal aid, fact-finding missions etc.). It does not include expenditure on buildings and infrastructure (such as telephone and cabling costs).<sup>147</sup> The Court's budget for 2014 is € 67,650,400, which is up from € 67,312,800 in 2013, € 41,700,000 in 2005 and € 7,000,000 back in 1989 (the old Commission + the ECtHR).<sup>148</sup> In 2015 it will be € 67,947,900.<sup>149</sup>

A separate part of the budget of the CoE is reserved for the execution of judgments of the ECtHR by the CoM (€ 4,863,800 in 2014 and € 4,880,200 in 2015). For enhancing the effectiveness of

---

<sup>144</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 42-43.

<sup>145</sup> CDDH, Draft CDDH report containing elements to contribute to the evaluation of the effects of Protocol No. 14 to the Convention and the implementation of the Interlaken and Izmir Declarations on the Court's situation, 7 September 2012, GT-GDR-A(2012)R2 Addendum II, para. 20.

<sup>146</sup> A. LESTER, "The European Court of Human Rights after 50 years", in J. CHRISTOFFERSEN and M. RASK MADSEN, *The European Court of Human Rights between Law and Politics*, Oxford, Oxford University Press, 2011, 109.

<sup>147</sup> ECtHR, Registry, [www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent\\_1346157759256\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_1346157759256_pointer), (last accessed 15 April 2014).

<sup>148</sup> S. GREER, *The European Court of Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, 137.

<sup>149</sup> For an overview of the Court's budget in recent years: [www.coe.int/t/cm/BudgetProgramme\\_en.asp](http://www.coe.int/t/cm/BudgetProgramme_en.asp).

the ECHR system at national and European level the CoE (with sponsoring of the EU) has foreseen a separate budget of € 7,114,200 for 2014 and 7,121,200 in 2015 as well.<sup>150</sup>

Also, after the Brighton Conference an additional resource was created with the opening of a special account to which the High Contracting Parties have been invited to contribute. These funds are used to recruit additional staff to work on the backlog of cases pending at Chamber level.<sup>151</sup>

The ECtHR's budget (€ 67,650,400) is but a fraction of that of the CJEU (€ 355,37 Million<sup>152</sup>), half the budget of the ICTY (± € 125 Million<sup>153</sup>), and of the ICC (€ 122 Million<sup>154</sup>), although the ECtHR has a much larger workload than any of them. The CJEU had 1,649 new cases in 2013, completed 1,587 in that year<sup>155</sup> and had 2,358 cases pending before it at the end of 2012<sup>156</sup>. These figures are dwarfed by those of the ECtHR and still the CJEU has 63 judges, compared to the 47 at the ECtHR. The CJEU has 2,139 staff members, compared to 640 for the ECtHR (see *supra* in Chapter 4.2.1). Embarrassing detail: the Court's budget and staff is even smaller than that of the Publication Office of the European Union (€ 90 million in 2012, with 672 staff members).<sup>157</sup>

The ECtHR's budget is however still bigger than that of the IACtHR and IACoHR (± € 6,000,000 in 2013<sup>158</sup>, ± € 4,881,000 in 2010<sup>159</sup>). What this last comparison can lead to is the question if having small budgets is just a human rights courts thing. One has to bear in mind however that these American human rights commission and court have had only 1,605 cases submitted to them in 2010<sup>160</sup>. The IACtHR has only 7 judges and a few dozen staff members for 20 member states and the IACoHR 7 Commissioners and 64 staff members for 24 member states (see *supra* in subchapter 4.2.1.). Consequently their budget is only 6-7% of the overall budget of the Organisation of American States, whereas the ECtHR's budget is over one-third of the CoE's overall budget.<sup>161</sup>

---

<sup>150</sup> Council of Europe, Council of Europe Programme and Budget, [www.coe.int/t/cm/BudgetProgramme\\_en.asp](http://www.coe.int/t/cm/BudgetProgramme_en.asp), (last accessed 15 April 2014).

<sup>151</sup> Registry of the ECtHR, Annual Report 2012, Strasbourg, 2013, 12.

<sup>152</sup> CJEU, The Court in figures, [http://curia.europa.eu/jcms/jcms/P\\_80908](http://curia.europa.eu/jcms/jcms/P_80908), (last accessed 15 April 2014).

<sup>153</sup> ICTY, The Cost of Justice, <http://www.icty.org/sid/325>, (last accessed 15 April 2014).

<sup>154</sup> Institute for War & Peace Reporting, ICC secures budget increase, <http://iwpr.net/report-news/icc-secures-budget-increase>, (last accessed 15 April 2014).

<sup>155</sup> CJEU, The Court in figures, [http://curia.europa.eu/jcms/jcms/P\\_80908](http://curia.europa.eu/jcms/jcms/P_80908), (last accessed 15 April 2014).

<sup>156</sup> CJEU, Annual Report 2012, Luxembourg, Publications Office of the European Union, 2013, 95, 191 and 239.

<sup>157</sup> Report by Ms. MARIE-LOUISE BEMELMANS-VIDEC to the Committee on Legal Affairs and Human Rights, Guaranteeing the authority and effectiveness of the European Convention on Human Rights, Doc. 12811, 3 January 2012, para. 21.

<sup>158</sup> OAS, Proposed program-budget 2014, 5 August 2013, [www.oas.org/budget/2014/Budget%20Proposal%2008-5-13%2011AM.PDF](http://www.oas.org/budget/2014/Budget%20Proposal%2008-5-13%2011AM.PDF).

<sup>159</sup> OAS, Program-budget of the Organization 2012, August 2011, [www.oas.org/budget/2012/Approved%20Program%20Budget%202012%20ENG%20%20No%20posts.pdf](http://www.oas.org/budget/2012/Approved%20Program%20Budget%202012%20ENG%20%20No%20posts.pdf).

<sup>160</sup> IACoHR, Annual report of the Inter-American Commission on Human Rights 2010, 7 March 2011, [www.cidh.org/annualrep/2010eng/TOC.htm](http://www.cidh.org/annualrep/2010eng/TOC.htm).

<sup>161</sup> E. LAMBERT-ABDELGAWAD, "The Court as a part of the Council of Europe: the Parliamentary Assembly and the CoM", in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe, The European Court of Human*

In general the Court's budget is thus rather small, although it takes a bigger and bigger portion of the budget of the CoE. Because of that increment certain other projects of the CoE have to be winded down unfortunately.<sup>162</sup>

The peculiar status of the budget of the CoE and the Convention system has also been recognised by the Parliamentary Assembly of the CoE (hereafter: PACE).<sup>163</sup> In her report to PACE's Committee on Legal Affairs and Human Rights of 3 January 2012, Ms. BEMELMANS-VIDEC even reminds all of us of the fact that the yearly contribution by the High Contracting Parties is so low, that some fifteen High Contracting Parties do not even contribute sufficient funds to pay for their national judge at the Court.<sup>164</sup> This leads to the conclusion that an increase of the CoE's budget is essential to any reform, but more on this later in Chapter 7.3.

To close this topic with a positive note: owing to the increased output of the Court the cost of processing an application has fallen from €1,679 in 2007 to €1,120 in 2011 (-33%).<sup>165</sup>

### **4.2.3. Input and output in detail**

#### **Input**

Of the 65,900 new applications in 2013 45,750 were identified as Single Judge cases (down from 47,300 in 2011). This decrease might be caused by the better information policy by the Court on its inadmissibility criteria towards the public (see *e.g.* in Chapter 6.1.1. on the Woolf Report). 20,150 of the new applications were identified as probable Chamber or Committee cases (up from 17,200 in 2011).<sup>166</sup>

#### **Output**

As is clear from graph 2, the Court's output has significantly increased in the latest years. This is mainly the result of a vast increase in the number of inadmissibility or striking out decisions struck by the Court (up to 89,737 in 2013<sup>167</sup>). The number of judgments rendered by the Court has climbed and fallen during the previous years (from anything between 695 in 2000 and 1625 in 2009). Since 2009 there is a decline in the amount of judgments rendered, probably partly due to the establishment of the Single Judge formation (and the time it consumes), but also due to

---

*Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, (263) 293.

<sup>162</sup> Report by Ms. MARIE-LOUISE BEMELMANS-VIDEC to the Committee on Legal Affairs and Human Rights, Guaranteeing the authority and effectiveness of the European Convention on Human Rights, Doc. 12811, 3 January 2012, para. 22.

<sup>163</sup> Resolution 1856(2012) of the Committee of Ministers, Guaranteeing the authority and effectiveness of the European Convention on Human Rights, 24 January 2012, 6.

<sup>164</sup> Report by Ms. MARIE-LOUISE BEMELMANS-VIDEC to the Committee on Legal Affairs and Human Rights, Guaranteeing the authority and effectiveness of the European Convention on Human Rights, Doc. 12811, 3 January 2012, para. 20.

<sup>165</sup> Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012, para. 348.

<sup>166</sup> ECtHR, Analysis of statistics 2011, 2012, [www.echr.coe.int/Documents/Stats\\_analysis\\_2011\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2011_ENG.pdf), 4; ECtHR, Analysis of statistics 2013, 2014, [www.echr.coe.int/Documents/Stats\\_analysis\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf), 4.

<sup>167</sup> ECtHR, Analysis of statistics 2013, 2014, [www.echr.coe.int/Documents/Stats\\_analysis\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf), 6.

the fact that with its priority policy the Court concentrates its resources on the more complex, time-consuming cases.

What is interesting about the figures of 2013 is that more and more cases are being joined into one judgment<sup>168</sup>: there were 916 judgments in 2013 (down from 1,093 in 2012), 75% of which were adopted by the Committees, for 3,659 applications (up from 1,678 in 2012). Furthermore, there were 12 Grand Chamber judgments last year (generally there are less than 30 each year).<sup>169</sup>

As already mentioned in subchapter 4.2.1. the Single Judges have been very productive in the latest years with an output of 80,500 applications in 2013.<sup>170</sup> But notwithstanding the general increase in the ECtHR's output and that of the Single Judges in particular, the Chambers and Committees are experiencing difficulties (due to a lack of sufficient time and funds<sup>171</sup>). As just mentioned, the amount of incoming cases to these judicial formations has increased by 3000 applications between the end of 2011 and that of 2013. The output figures of the Chambers and Committees are very low however with 5,085 Chamber cases and 7,656 Committee cases decided upon in 2013.<sup>172</sup> This is way better than in 2011 (2,975 and 2,267 respectively<sup>173</sup>), but still far too few given the their input figures. Moreover, most of the decided cases relate to inadmissibility decisions. In 2013 there were 684 Chamber judgments and barely 219 Committee judgments.<sup>174</sup>

Also quite dramatic is the fact that notwithstanding the backlog, still half of all the judgments delivered by the Court relate to repetitive issues<sup>175</sup>, while in an ideal world these cases should not ever be submitted to the Court in the first place as it is for the member states to resolve the underlying structural problems.

The explanation for the existence of such a bottle neck at the level of the Chambers and even more so at the level of the Committees is that the judges there do not get enough time and resources to deal with repetitive cases (category V), due to the Court's priority policy.<sup>176</sup>

The number of friendly settlements has increased in recent years, from 394 in 2007<sup>177</sup> to 1,491 in 2013. Moreover, 409 cases were terminated following a unilateral declaration in 2013.<sup>178</sup>

---

<sup>168</sup> ECtHR, Analysis of statistics 2013, 2014, [www.echr.coe.int/Documents/Stats\\_analysis\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf).

<sup>169</sup> Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 61; K. DZEHTSIAROU and N. O'MEARA, "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control", *Legal Studies* 2014, (1) 16.

<sup>170</sup> Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 6.

<sup>171</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 29.

<sup>172</sup> Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 61-62.

<sup>173</sup> Registry of the ECtHR, Annual Report 2011, Strasbourg, 2012, 65-66.

<sup>174</sup> Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 61.

<sup>175</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 21.

<sup>176</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 29.

<sup>177</sup> ECtHR, Analysis of statistics 2007, 2008, [www.echr.coe.int/Documents/Stats\\_analysis\\_2007\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2007_ENG.pdf), 4.

The conclusion to be drawn from these figures is that although the overall picture appears positive, the Committees and Chambers are still clearly unable to deal swiftly and efficiently with the (increasing) amount of cases they get in, most of which are sadly of a repetitive nature. A future reform should thus focus on tackling this problem.

#### 4.2.4. Percentage of (in)admissible cases

Another important aspect of the inner kitchen of the Court to be discussed is the (in)admissibility rate. The Court's inadmissibility rate has always been quite high, lingering anywhere between 94% and 98% since 2001, although apparently it was as low as 82,3% in 1999<sup>179</sup>. There is only minor change visible since the coming into force of Protocol No. 14 with its new ground for inadmissibility of Article 35(3): from an average of 95% in the three years prior to Protocol No. 14's coming into force (2007-2009), to an average of 97% in the three most recent years (2011-2013).<sup>180</sup> But anyway, with figures so close to 100%, how much more can they rise?

Is it acceptable for a human rights court to declare more than 90% of its cases – 89,737, or 96% of all decided cases in 2013<sup>181</sup> – inadmissible without even duly considering them?<sup>182</sup> One could wonder if the Court is being strict on the admissibility criteria on purpose, to diminish the backlog, without legitimate reasons that have to do with the 'inadmissible' cases themselves.<sup>183</sup> This could possibly harm the Court's credibility and legitimacy.

The UK based Equality and Human Rights Commission stated for example that the Court is sometimes filtering too strict and arbitrary. In one case, it claims a complaint has been declared inadmissible for the failure of the applicant to provide her date of birth as required under Rule 47(1)(a) of the Rules of Court.<sup>184</sup> Also, – at least in 2005 – 94% of the admissible applications were judged in the applicant's favour.<sup>185</sup> Does this mean that the Court confuses admissibility decisions with judgments on the merits? For example by using the discretionary criterion of 'manifestly ill-founded'? Judges LEMMENS and BIANKU stated there is no strategy to be looked for behind that figure though. They stated that 90% inadmissible cases really means 90% *inadmissible cases*; these cases are just inadmissible because they are manifestly ill-founded, submitted too late, etc.<sup>186</sup> Furthermore, it is also apparent that figures for inadmissibility have

---

<sup>178</sup> ECtHR, Analysis of statistics 2013, 2014, [www.echr.coe.int/Documents/Stats\\_analysis\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf), 4.

<sup>179</sup> W. VERRIJDT, "De gevolgen van het Elfde Protocol bij het E.V.R.M.", *Jura falc.* 2002-2003, 589.

<sup>180</sup> Data assembled from the Annual Reports and Analyses of Statistics of the years 2001-2013, to be found back on: [www.echr.coe.int](http://www.echr.coe.int).

<sup>181</sup> ECtHR, Analysis of statistics 2013, 2014, [www.echr.coe.int/Documents/Stats\\_analysis\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf), 4.

<sup>182</sup> Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 193.

<sup>183</sup> W. VERRIJDT, "De gevolgen van het Elfde Protocol bij het E.V.R.M.", *Jura falc.* 2002-2003, 592.

<sup>184</sup> Equality and Human Rights Commission, Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, 2013, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp), 5.

<sup>185</sup> S. GREER, *The European Court of Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, 140.

<sup>186</sup> Interview of Judges LEMMENS and BIANKU of 7 February 2014.

always been that high.<sup>187</sup> The same can be said about the old Commission: between 1955 and 1987 its inadmissibility rate was as high as 95,7%<sup>188</sup>, although it was as “low” as 87% during its entire lifespan.<sup>189</sup>

It is not possible to go further into this topic in this thesis, but let us conclude that the inadmissibility rates of this Court are excessively high, with or without any strategy behind it. As is clear from the current amount of cases the Court gets in and out, it would not survive any lower inadmissibility percentages however. It is for that reason also that Protocol No. 15 has introduced new grounds for inadmissibility (see Chapter 6.2.), bringing the inadmissibility rate even closer to 100%.

#### 4.2.5. Pending applications (backlog) in detail

Now comes the important part of this Chapter. Subchapter 4.1. already indicated that the backlog is decreasing, but in subchapter 4.2.3. it was made clear that there might be strong differences depending on the judicial formation. So let us have a look at the caseload figures for each of the judicial formations at the ECtHR and for each of the priority policy categories:<sup>190</sup>

	2013	2010	
Grand Chamber	27 <sup>191</sup>	25 <sup>192</sup>	≈
Chamber	39,000	47,150	-17.3%
Committees	34,400	4,100	+739.0%
	<b>= 73,431</b>	<b>= 51,280</b>	<b>+43.2%</b>
Single Judges	26,500	88,400	-70.0%

	2013	2011	
Category I	871 (0.9%)	1300 (0.86%)	-33%
Category II	334 (0.3%)	230 (0.15%)	+45%
Category III	6,320 (6.3%)	4,420 (2.9%)	+42.9%
Category IV	17,689 (17.7%)	19,100 (12.6%)	-7.4%
Category V	47,965 (48%)	33,950 (22.4%)	+29.2%

<sup>187</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 56.

<sup>188</sup> W. VERRIJDT, “De gevolgen van het Elfde Protocol bij het E.V.R.M.”, *Jura falc.* 2002-2003, 584.

<sup>189</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 56.

<sup>190</sup> ECtHR, Analysis of statistics 2013, 2014, [www.echr.coe.int/Documents/Stats\\_analysis\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf), 9; ECtHR, Analysis of statistics 2010, 2011, [www.echr.coe.int/Documents/Stats\\_analysis\\_2010\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2010_ENG.pdf); Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 193; Registry of the ECtHR, Annual Report 2010, Strasbourg, 2011, 147.

<sup>191</sup> Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 61.

<sup>192</sup> Registry of the ECtHR, Annual Report 2010, Strasbourg, 2011, 67.

	<b>= 73,179</b>	<b>= 59,000</b>	<b>+24%</b>
Cat. VI-VII	26,712 (26.7%)	92,201 (60.8%)	-71%

What is crystal clear from these figures is that, although the overall picture is positive, the Court still faces serious problems. The Registry is confident that it will be able to resolve the backlog of clearly inadmissible cases (Category VII) by the end of 2015<sup>193</sup>, which was the deadline of the Brighton Declaration<sup>194</sup>. The Court probably will be able to do so. The reduction in the amount of pending cases before the Single Judge formation is enormous, but it is also clear that the reduction of the Court's overall backlog is almost entirely the credit of this formation. For repetitive cases the picture is a whole lot darker. They now represent the largest category of applications. The Registry would like to shift the work of the Court from Single Judge *and repetitive cases* to priority and normal cases after 2015.<sup>195</sup> From the figures above it is evident however that the Court will probably first have to shift its focus *towards repetitive cases* and more specifically to the applications before the Committees – whose caseload figures are alarming – before being able to really focus on category I-III cases. The Committees are clearly suffering from a bottle neck (and the Chambers might as well: their figures are still as high as *medio* 2009<sup>196</sup>). By the way, officially the focus of the Court is already on the cases of Categories I-III. But this is not reflected in the stats above, as the amount of judgments is declining (see subchapter 4.2.3.) and the number of pending applications from the top three categories is rising.

For 2014 (up to the 30<sup>th</sup> of April) the figures are slightly positive, with the total amount of pending cases decreasing, as well as those of the Single Judges and Committees, but not those of the Chambers.<sup>197</sup>

The High Contracting Parties already expressed their concern about the large number of repetitive applications (category V cases) pending before the Court in the Brighton Declaration. For that reason the Declaration called upon the High Contracting Parties, the CoM and the Court *“to work together to find ways to resolve the large numbers of applications arising from systemic issues identified by the Court”*.<sup>198</sup> The same deadline to find a solution for the backlog in clearly inadmissible cases (the end of 2015) was set to see if further measures are needed for the backlog in repetitive cases. The Declaration also hinted to where additional measures are to be taken in the meantime: *“Repetitive applications mostly arise from systemic or structural issues at the national level. It is the responsibility of a State Party, under the supervision of the CoM, to ensure that such issues and resulting violations are resolved as part of the effective execution of*

<sup>193</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 41.

<sup>194</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, D, 20, j\).](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, D, 20, j).)

<sup>195</sup> CDDH, Draft CDDH report on the question of whether or not to amend the Convention to enable the appointment of additional judges to the Court, 19 September 2013, GT-GDR-E(2013)R2 Addendum III, 5.

<sup>196</sup> Registry of the ECtHR, Annual Report 2009, Strasbourg, 2010, 139.

<sup>197</sup> ECtHR, Statistics 1/1-30/4/2014, May 2014, [www.echr.coe.int/Documents/Stats\\_pending\\_month\\_2014\\_BIL.pdf](http://www.echr.coe.int/Documents/Stats_pending_month_2014_BIL.pdf).

<sup>198</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, para. 20.c.](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, para. 20.c.)

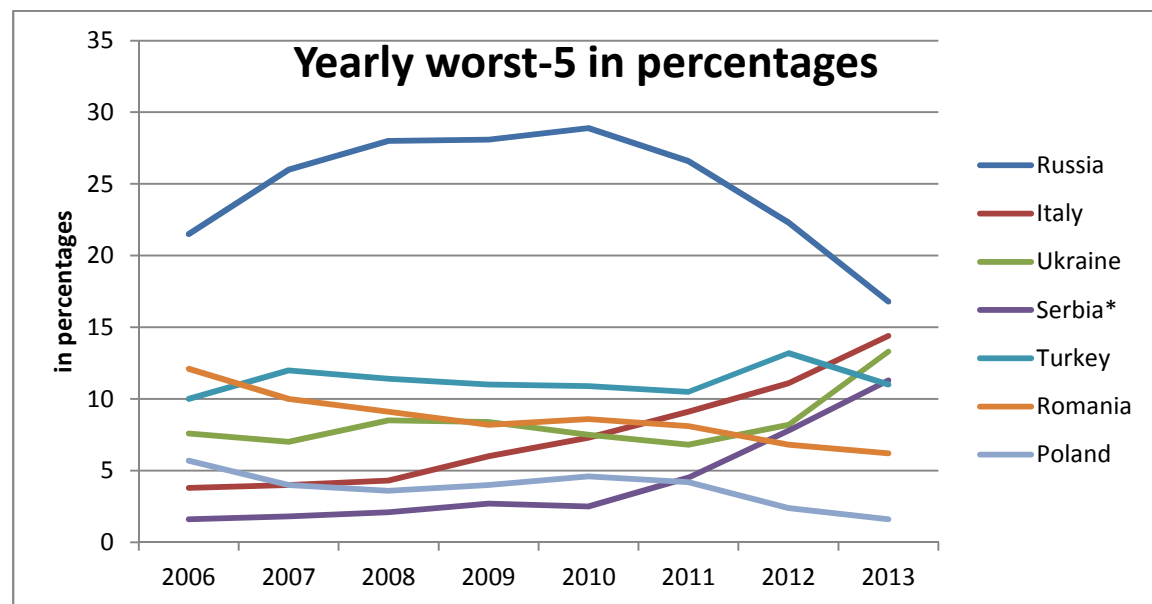
*judgments of the Court*".<sup>199</sup> As indeed, as noted by the ECtHR: "*the examination of such large numbers of repetitive complaints is not compatible with the functioning of an international court.*"<sup>200</sup> The Annual Report of the CoM on supervision of the execution of judgments and decisions of the Court of 2012 also states that "*the major challenges in the supervision of execution [are] repetitive cases and the persistence of certain major structural problems*".<sup>201</sup>

It is obvious that additional measures are needed to ensure that the backlog in the category I-V cases, and certainly in those of Category V, will disappear in the near future. As hinted by several concerned parties, such measures can only succeed in cooperation with efforts taken on the national level.

#### 4.2.6. Backlog figures per high case-count country

As many already know, the caseload of the ECtHR is not equally spread throughout Europe. If you have a look at the annual reports of the ECtHR from 2006 to 2013, you see that 5 States are responsible for 56.9% (2006)<sup>202</sup> to 66.8% (2013) of the total amount of pending applications before the ECtHR, while the 'top-5' countries of 2013 only accounted for 43.3% of the European population. If you have a look at the 10 member states with the highest case-count of 2013 you'll see that they were responsible for 82,1% of the pending cases, representing only 56% of the European population. This means that 37 other states – 44% of the European population – only accounted for 17,9% of the caseload of the Court.<sup>203</sup>

Below is an illustration of the amount of pending cases coming from some of the top high case-count countries in between 2006 and 2013.



<sup>199</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=), para. 18.

<sup>200</sup> ECtHR, Preliminary opinion of the Court in preparation for the Brighton Conference, 20 February 2012, #3841140, 7.

<sup>201</sup> Council of Europe, 6<sup>th</sup> Annual Report of the Committee of Ministers – 2012, Supervision of the execution of judgments and decisions of the European Court of Human Rights, Strasbourg, Council of Europe, 2013, 13.

<sup>202</sup> Registry of the ECtHR, Annual Report 2006, Strasbourg, 2007, 193.

<sup>203</sup> Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 195.

Graph 4: based on: Pending cases allocated to a judicial formation at the end of each year – main respondent states (Registry of the ECtHR, Annual Reports 2006-2013, Strasbourg, 2007-2014). \*: Serbia's figures of 2006 are still those of Serbia and Montenegro.

In general most of the countries that are present in the graph above also come back high in the rankings with regard to countries that have structural problems with the implementation of the ECHR (see Resolution 1787(2011) of PACE), which makes them even more urgent to focus on when reforming the Court. To discuss one of the countries statistics: you can see that Ukraine's figures are souring, not only in relative, but also in absolute numbers (see *infra*). This is partially due to the *Ivanov*-case debacle.<sup>204</sup> At the time of the pilot judgment in 2009 there were approximately 1,400 clone applications against Ukraine pending before the Court.<sup>205</sup> By May 2013 however this had augmented to 4,300 of such cases.<sup>206</sup> This not only explains Ukraine's rising figures in pending applications, but it also indicates how the pilot judgment procedure can actually fail if the respective government is unable or unwilling to effectively resolve the structural problem at hand. In this specific case it concerned the non-enforcement of domestic judgments that obliged the government (here: the military) to pay certain sums to the Mr. Ivanov.<sup>207</sup> Ukraine was unable/unwilling to resolve the matter after the pilot judgment was rendered and subsequently in an 'expedited Committee procedure' all similar cases were communicated to the government's agents in groups of 250 per month. For some applicants unilateral declarations followed, other cases were declared inadmissible, and in general hundreds of judgments on similar cases were rendered by the Court. A staggering 81% of the applications that were the subject of a Committee judgment in 2013 concerned Ukrainian post-*Ivanov* cases. This entire procedure led to an enormous influx of Ukrainian cases in Strasbourg by applicants who were and still are unable to find redress at home and hope to find some in Strasbourg, but given that the government is not sufficiently cooperating, the ECtHR remains with a huge amount of post-*Ivanov* cases. In general Ukraine is certainly not doing a good job either. In February 2014 it even caught up with Russia as joint number ones and since March 2014 it is the country with the highest case-count (18,450 cases pending at the end of April, which is 20% of the court's total docket for a country of only 6% of the population of the CoE).<sup>208</sup>

It is clear that this structural problem should have been dealt with more efficiently by the Court. More on this and on proposed reforms in this regard: see Chapter 7.4.

There are positive examples also however. To discuss one: in Turkey a new law created a Compensation Commission to afford an effective remedy to those people whose criminal proceedings were not conducted within a reasonable time, as was requested by the Court in the

<sup>204</sup> ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, 2009.

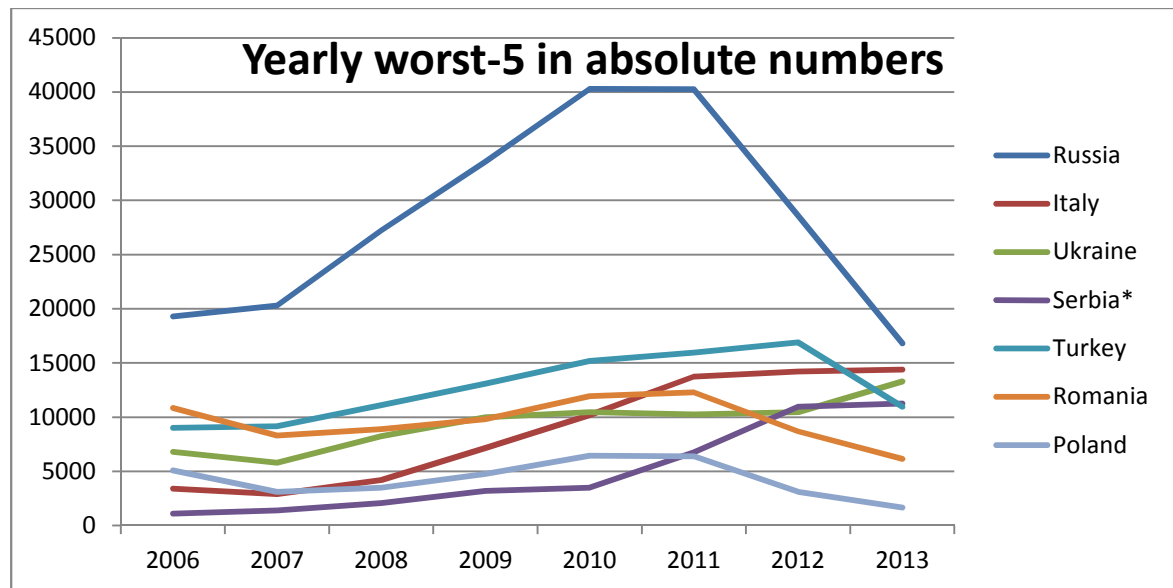
<sup>205</sup> Registrar of the ECtHR, First pilot judgment in respect of Ukraine concerning non-execution of final domestic court decisions, 15 October 2009, [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2896803-3182815#{"itemid":\["003-2896803-3182815"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2896803-3182815#{), 1.

<sup>206</sup> CDDH, Draft CDDH report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court, 17 May 2013, GT-GDR-D(2013)R2 Addendum I, para. 26.

<sup>207</sup> Registrar of the ECtHR, First pilot judgment in respect of Ukraine concerning non-execution of final domestic court decisions, 15 October 2009, [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2896803-3182815#{"itemid":\["003-2896803-3182815"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2896803-3182815#{), 1.

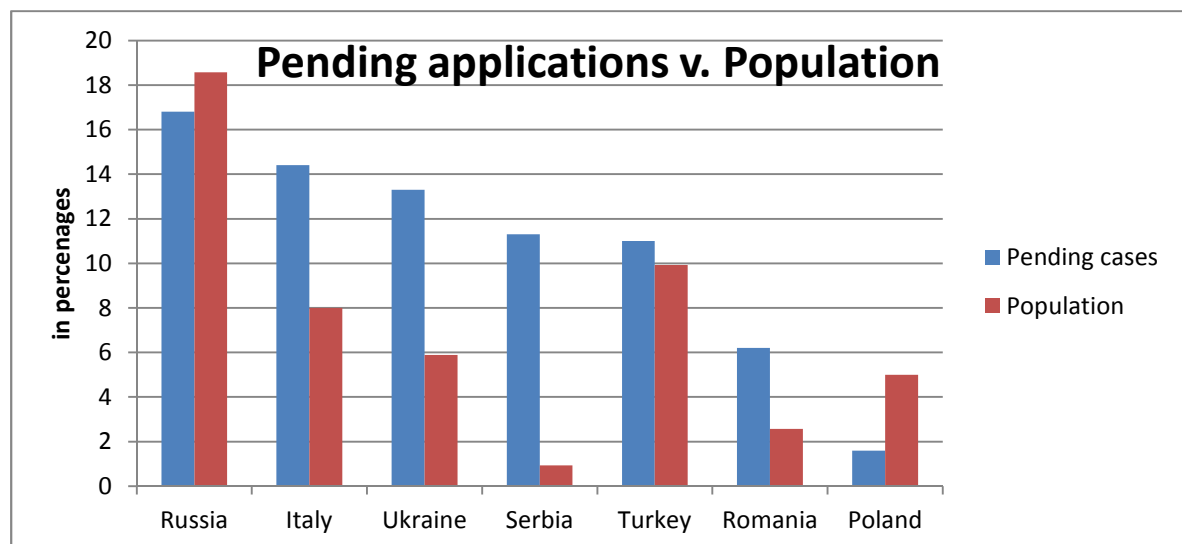
<sup>208</sup> ECtHR, Statistics 1/1-30/4/2014, May 2014, [www.echr.coe.int/Documents/Stats\\_pending\\_month\\_2014\\_BIL.pdf](http://www.echr.coe.int/Documents/Stats_pending_month_2014_BIL.pdf).

*Ümmühan Kaplan* case.<sup>209</sup> This reform enabled the Court to redirect over 2,500 pending applications back to the domestic level.<sup>210</sup>



Graph 5: based on: Pending cases allocated to a judicial formation at the end of each year – main respondent states (Registry of the ECtHR, Annual Reports 2006-2013, Strasbourg, 2007-2014). \*: Serbia's figures of 2006 are still those of Serbia and Montenegro.

When trying to address the judicial backlog before the ECtHR, it is certainly important to specifically address the input coming from the highest case-count countries. However, before doing that it is equally important to have a look at the 'pending applications / population' ratio. Therefore here is an illustration of the relative amount of pending cases for the countries with the highest case-count next to those countries' relative population within the CoE.



Graph 6: based on: Pending cases allocated to a judicial formation at the end of each year – main respondent states (Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014).

<sup>209</sup> ECtHR, *Ümmühan Kaplan v. Turkey*, 2012.

<sup>210</sup> Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 5 and 9.

What is most interesting about the above graph is that while some countries are doing an overall bad job (the Italian, Serbian and Ukrainian figures on pending cases are soaring in the latest years and also high above their relative population mass), others seem to improve (Turkey) and two countries in particular are doing a better job in recent years: Poland and Russia. Most of all the Russian figures are remarkable. The number of pending Russian applications has plummeted, both in absolute as in relative numbers, even to a point where Russia's presence is not even disproportionate in the above graph any longer (compare this to the Serbian figures *e.g.*). Although not represented in the graphs in this Chapter, the same counts for the total amount of incoming Russian cases (down from 40,295 in the *annus terribilis* 2010<sup>211</sup>, to 16,813 in 2013<sup>212</sup>), while the Court's general input figures are still at record height.

This should not be the occasion to cry "*hallelujah*" though: the Russian figures are still sky-high in comparison to those of other big European countries such as the UK, France or Germany. The UK accounted for 2.5% of the pending cases at the end of 2013, while it harbours more than 8% of the European population, France accounted for only 0.6% of the pending cases at the end of 2013 with a population of 8.6% of the European population and Germany accounted only for 0.5% of the Court's docket, with a population of 10.6% of the European populace.<sup>213</sup>

It can be concluded that if it rains in any of the high case-count countries, it will eventually trickle in Strasbourg. The *Ivanov* case is but one example of which there are many others. Structural problems, resulting in repetitive applications in Strasbourg, mostly occur in high state-count countries, while the backlog is the worst in regard to these countries as well. Therefore a future reform should focus on dealing with the – sometimes stubborn – governments of the above mentioned high case-count countries.

#### **4.2.7. Duration of proceedings**

The Court endeavours to deal with cases within three years upon their submission.<sup>214</sup> In an ideal situation clearly inadmissible cases should even be handled in a matter of months upon receipt.<sup>215</sup> As mentioned a few times earlier, the Registry will be able to meet this target with regard to the latter by 2015. The same cannot be said with regard to *prima facie* admissible cases, for it took the Court on average 37 months (3 years and 1 month) in 2012 to *communicate* these cases to the government<sup>216</sup> and 25 months *after the communication* before a Chamber judgment followed and 17 months for a Committee judgment in 2011.<sup>217</sup> This means it took Chamber and Committee cases on average 5 years from submission to judgment in 2011/2012.

---

<sup>211</sup> Registry of the ECtHR, Annual Report 2010, Strasbourg, 2011, 146.

<sup>212</sup> Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 194.

<sup>213</sup> ECtHR, Analysis of statistics 2013, 2014, [www.echr.coe.int/Documents/Stats\\_analysis\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf), 28, 30, 60.

<sup>214</sup> ECtHR, The ECHR in 50 questions, [www.echr.coe.int/Documents/50Questions\\_ENG.pdf](http://www.echr.coe.int/Documents/50Questions_ENG.pdf), 9, (last accessed 15 April 2014).

<sup>215</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 43 and 54.

<sup>216</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 52; CDDH, Information on Cases Pending before the ECHR: Situation end 2011, DH-GDR(2012)005, 2012, 3.

<sup>217</sup> CDDH, Information on Cases Pending before the ECHR: Situation end 2011, DH-GDR(2012)005, 2012, 20; Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012, para. 369.

Even if this would have altered in a positive way to some extent since then – which is probably not the case given the increase in the number of Category I-V applications pending before the Court –, the current duration of proceedings is probably way longer than the endeavoured 3 years. One may hereby not forget that often long domestic proceedings precede these proceedings at the ECtHR. Basically one could even say that the caseload and backlog of the ECtHR is to some extent ‘caused’ by the national caseloads and backlogs of the High Contracting Parties.

An extreme example of how long proceedings at the ECtHR can take is the *Sargsyan v. Azerbaijan* case<sup>218</sup> (the Grand Chamber hearing of said case the author of this thesis was able to attend). The facts in this case go all the way back to June 1992<sup>219</sup> – the author was around 9 months old then – (with alleged ongoing violations up till present). An application was lodged with the ECtHR on the 11<sup>th</sup> of August 2006 where after it was allocated to a Chamber division, but relinquished to the Grand Chamber on the 11<sup>th</sup> of March 2010. The first hearing in this case was held on the 15<sup>th</sup> of September 2010. An admissibility decision followed on the 14<sup>th</sup> of December 2011 and a second hearing on the 5<sup>th</sup> of February 2014. That is 8 years since the case was lodged and 22 years since the first facts. In the meantime both the applicant and his widow<sup>220</sup> have passed away.<sup>221</sup> Since then two of their sons are pursuing the case.<sup>222</sup> A judgment is expected (hopefully) somewhere in 2015 ... but only if the Court does not decide to organise a fact-finding mission first, as has been requested by the Azerbaijani government at the second hearing.

The conclusion to this subchapter is once again that the Court is doing a good job with regard to clearly unmeritorious cases, but that it first will have to reorganise and reform if it would like to realise shorter proceedings with regard to all other categories of applications.

### 4.3. Conclusion

Protocol No. 14 was designed to solve the Court’s immediate – not long-term – problems in respect to the huge backlog it is facing. The Protocol intended to make the Court filter faster and more efficient. Now, almost 4 years after its coming into force, it is clear that the Protocol was successful in its attempt. This is clear from the rapid decline in the amount of pending cases, mostly because of the establishment of the Single Judge formation, the filtering section within the Registry and the introduction of new admissibility requirements. But does this mean that the Court can sit back and relax? No, it does not. Basically this Court is just underfunded and understaffed, which does not only lead to backlog problems, but could also endanger the quality of the Court’s judgments. Furthermore, the amount of incoming cases has not decreased up till now. Apart from that, the amount of pending category V cases is still excessively high. This demonstrates that there are still major deficiencies in the ECHR protection system. Also the duration of the proceedings of admissible cases at the ECtHR is with 5 years unacceptably high. This undermines the entire ECHR project and the Court’s jurisprudence on ‘reasonable time’

---

<sup>218</sup> ECtHR, *Sargsyan v. Azerbaijan*, 40167/06, no judgment yet.

<sup>219</sup> ECtHR, *Sargsyan v. Azerbaijan*, Decision on the admissibility, 14 December 2011, para. 23.

<sup>220</sup> Registrar of the ECtHR, *Sargsyan v. Azerbaijan* (Press Release), 5 February 2014.

<sup>221</sup> ECtHR, *Sargsyan v. Azerbaijan*, Decision on the admissibility, 14 December 2011, para. 1.

<sup>222</sup> Registrar of the ECtHR, *Sargsyan v. Azerbaijan* (Press Release), 5 February 2014.

(Article 6) sounds pretty ironical with this figure. The real next challenges for the Court's future are thus:

- The amount of pending repetitive cases;
- The high case-count countries.

With the figures that were provided in this Chapter targets for the future can be set. Whatever measures are taken with regard to the above challenges, the result should be that the Court is able to bring its duration of proceedings down to:

- A maximum of 2.5 years for Grand Chamber cases;
- A maximum of 6 months for Single Judge cases, repetitive cases (from the date of a related pilot judgment and afterwards from the date of submission) and cases of priority policy Category I;
- A maximum of 2 years for all other cases.

When then determining what a reasonable amount of pending applications could be one has to take into account that the amount of pending cases will never reach zero or anything close to that. In the assumption that the number of incoming cases would remain on the same level, *i.e.* 45,000 Single Judge cases and 20,000 Committee and Chamber cases per year, and taking into account the above mentioned reasonable length of proceedings, the state of equilibrium will be about 22,500 pending Single Judge cases and between 25,000 and 30,000 cases pending before the Committees and Chambers. Anything above these figures will have to be regarded as backlog. These targets are more radical than those set by the CDDH<sup>223</sup>, which are already outdated given that the Single Judges have at present but halve the number of cases pending of what is projected by the CDDH as 'desired', and they are also more radical than those of the Brighton Declaration. In that Declaration the goal was set at one year from submission to communication and two years from communication to judgment or decision.<sup>224</sup>

---

<sup>223</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 42.

<sup>224</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, D, 20, j\)](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=D,20,j).

## 5. Reforming the Court towards a more efficient future: general criticism on the current functioning of the ECtHR and main ideas for its future

### 5.1. Introduction

Now that we have a complete overview of the Court's functioning, have a grasp of the input, output, duration of proceedings, backlog, budget, etc. and know *where which* deficiencies are to be found in the Court's functioning and *why*, we can really start to discuss *how* the judicial backlog of the ECtHR can be reduced so as to increase the Court's legitimacy and authority and in the end enhance human rights protection in Europe – which is the aim of this thesis.

The discussions on how to reform the ECtHR are about more than just increasing the Court's efficiency, which was the main purpose of Protocols Nos. 11 and 14. Discussions often go to the very core of the Court's existence. There are certain politicians and jurists who are highly critical of the EC(t)HR. They accuse the judges of legal activism and forgetting the principle of subsidiarity<sup>225</sup>, only seem to accept the authority of the ECtHR as long as it refrains from determining that their country has violated fundamental human rights<sup>226</sup>, or are even of the opinion that human rights are not that important at all.<sup>227</sup> Others are somewhat more refined in their critique by merely claiming that the Court has become a Court of fourth instance<sup>228</sup> or Compensation Claims Commission<sup>229</sup>.

But apart from this negative discussion there is also a fundamental and intriguing debate going on amongst European human rights jurists. At present the ECtHR has a dual role.<sup>230</sup> Not only does it have a (quasi-)constitutional function to interpret the Convention and set human rights standards in Europe, it also has a function to investigate and adjudicate human rights violations in individual cases. Both functions are fulfilled by means of the right of individual application.<sup>231</sup> The present discussion is about whether the ECtHR should concentrate on playing the role of a 'Constitutional Court of Europe' (in a way that is similar to the US Supreme Court) or if it should be a human rights court where every individual can lodge a complaint concerning an alleged violation of his/her human rights. The former faction puts a lot of emphasis on the principle of subsidiarity and is of the opinion that the Court should have the power to choose freely which

---

<sup>225</sup> General criticisms heard in the months leading up to the Brighton Conference.

<sup>226</sup> BBC, *Theresa May: Tories to consider leaving European Convention on Human Rights*, 9 March 2013, [www.bbc.co.uk/news/uk-politics-21726612](http://www.bbc.co.uk/news/uk-politics-21726612).

<sup>227</sup> J. RAYNER, "ECHR withdrawal 'gift to Putin'", *The Law Society Gazette* 22 March 2012, [www.lawgazette.co.uk/64821.article](http://www.lawgazette.co.uk/64821.article). (concerning Putin's opinion that the ECtHR's judgments are meaningless).

<sup>228</sup> M. BOSSUYT, "The Court of Strasbourg acting as an Asylum Court", *EuConst* 2012, 203-245; L. WILDHABER, *The place of the European Court of Human Rights in the European Constitutional landscape*, May 2002, [www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf](http://www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf), 2.

<sup>229</sup> M. O'BOYLE, "The Future of the European Court of Human Rights", *GLJ* 2012, (1862) 1873.

<sup>230</sup> H. SUCHOCKA, "Main problems related to the reform of the ECtHR" in Council of Europe, *Reforming the European Convention on Human Rights: A work in progress A compilation of publications and documents relevant to the ongoing reform of the ECHR*, Strasbourg, Council of Europe Publishing, 2009, 202.

<sup>231</sup> Y. HAECK, C. BURBANO HERRERA, J. VANDE LANOTTE and A. VAN PACHTENBEKE, "Changing The European Human Rights System Once Again. The Wise Persons Spoke But Did they Speak Wisely?", *Mediterr. J. Hum.Rts.* 2008, (115) 119.

cases it wishes to take up. The latter group believes that the Court exists primarily to redress Convention violations for the benefit of the particular individual making the complaint.<sup>232</sup> So basically this discussion is about the place of the right of individual petition in the Convention system.<sup>233</sup>

Since Protocol No. 11 individual applications clearly are at the heart of the protection and supervision system of the Convention (see Chapter 2.3.). Basically every European now has the right to petition to the ECtHR if he/she alleges that his/her human rights have been violated. An intriguing example is *Hirst v. UK (No. 2) (2005)*<sup>234</sup>. In this case the UK had been found guilty of a violation of the Convention by maintaining a blanket ban on prisoners' voting rights and in the wake of it – and due to the stubborn refusal by the British government to abide with the judgment – many thousand British prisoners applied to the ECtHR for similar reasons. There were so many of them that almost all of the approximately 2,500 currently pending UK cases concern this issue<sup>235</sup>. Apart from highlighting that this amounts to a systemic failure by the British authorities to provide for redress in these cases and that this is once again a failure of the CoE to put pressure on the British government to abide to a final judgment of the ECtHR, it is also a remarkable example of the effects the open-access policy of the ECtHR has in practice (it actually appears to be truly open-access).

This last statement has to be nuanced as a great many of all the individual applications are generally declared inadmissible (see Chapter 4.2.4.), thus basically denying all those claims any sort of redress. Interesting to mention in this regard is the following quote on the cover of the essay *Statement on case-overload at the European Court of Human Rights* by the European Law Institute:

*“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.”*<sup>236</sup>

This quote puts the finger right at the centre of the discussion: is the right of individual petition still a reality or is it rather an illusion given the average inadmissibility rate of 95% and more? Moreover, is the Court still able to deliver individual justice? Or should it abandon that approach

---

<sup>232</sup> S. GREER and L. WILDHABER, “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights”, *HRLR* 2012, (655) 663.

<sup>233</sup> ECtHR, Memorandum of the President of the European Court of Human Rights, 3 July 2009, [www.coe.int](http://www.coe.int), 9.

<sup>234</sup> ECtHR, *Hirst v. UK (No. 2)*, 2005.

<sup>235</sup> O. BOWCOTT, “Backlog at European court of human rights falls below 100,000 cases”, *The Guardian* 30 January 2014, [www.theguardian.com/law/2014/jan/30/european-court-human-rights-case-backlog-falls](http://www.theguardian.com/law/2014/jan/30/european-court-human-rights-case-backlog-falls).

<sup>236</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, cover.

for the constitutional focus? More and more experts are of the opinion the Court cannot efficiently perform both functions given the immense judicial backlog the Court faces.<sup>237</sup>

This discussion has importance to this thesis as choosing which path to take will determine greatly as to which concrete reforms will be proposed in the Chapters to come. Drastically curbing the right of individual petition might easily solve the backlog problem, while holding on to this sacrosanct rule forces the ECtHR to search for alternative measures. What is pivotal to any choice though is the question which one of both will most effectively protect the European people against human rights violations.

## 5.2. Focus on constitutional justice

The ECtHR has become more and more constitutional over the years. The Court already stated that the Convention is “*a constitutional instrument of European public order*”<sup>238</sup> and it is also perceived as such in the jurisdictions of many of its member states.<sup>239</sup> On top of the legal pyramid that is supervising the observance of this ‘constitutional’ Convention stands the ECtHR, which is even said to be the *de facto* Constitutional Court of Europe. To a certain extent the conception of the Court as a constitutional court is thus correct.

However, this is not quite what the present discussion is about. Currently the Court is facing a big challenge due to its excessive case overload. This group of *constitutionalists* claims that due to this the Court is not able to perform all the functions it should be performing at present (filtering, routine adjudication, borderline fine-tuning of the Convention, addressing grave breaches of human rights and confronting structural or systemic problems in national legal orders) in a satisfactory manner.<sup>240</sup> Therefore a choice has to be made in order to determine where to deploy the scarce judicial resources the ECtHR represents. The focus on ‘constitutional justice’ as used in this discussion implies that the Court should focus on delivering “*fully reasoned and authoritative judgments in cases that raise substantial or new and complex issues of human rights law, are of particular significance for the State concerned or involve allegations of serious human rights violations and which warrant a full process of considered adjudication.*”<sup>241</sup> Basically the starting point of those favouring this approach is that “*the right of individual petition is a right to make a complaint, not a right to have it judged on the merits.*”<sup>242</sup> Furthermore, they state that dealing with inadmissible, clearly ill-founded, clearly well-founded

---

<sup>237</sup> I. CAMERON, “The Court and the member states: procedural aspects”, in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, (25) 26; F. DE LONDRAS, “Dual functionality and the persistent frailty of the European Court of Human Rights”, *E.H.R.L.R.* 2013, (38) 38.

<sup>238</sup> ECtHR, *Loizidou v. Turkey*, 1995, 20.

<sup>239</sup> S. GREER and L. WILDHABER, “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights”, *HRLR* 2012, (655) 668.

<sup>240</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 24.

<sup>241</sup> S. GREER, *The European Court of Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, 166.

<sup>242</sup> S. GREER and L. WILDHABER, “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights”, *HRLR* 2012, (655) 675.

and repetitive cases should not be within the core competence of the Court's judges.<sup>243</sup> For example, repetitive cases are a sign of structural violations which are more a problem of implementation of the ECHR and execution of the ECtHR judgements than of claims to be investigated over and over again by the Court. WILDHABER argues that it would not hasten the resolution of a structural human rights problem in a new member state if the ECtHR, after it has found a violation in one case, would deal with the potentially tens of thousands clone of cases. It would only delay the proceedings for all the other cases, he claims. The ECtHR should thus focus on decisions of principle in order to ensure that a common minimum on human rights standards is maintained across throughout Europe.<sup>244</sup>

To some extent the Court is already implementing this policy of constitutional justice. The Court often groups cases together for joint adjudication (see Chapter 4.2.3.), Article 35(3)(b) intends to avoid frivolous applications, the Court has a priority policy since 2009 and it has furthermore developed the pilot judgment procedure. For the constitutionalists these measures do not go far enough though. The Court keeps struggling with its caseload and according to the Court itself 64% of its judgments rendered in 2011 were classified as “*of little legal interest*”.<sup>245</sup> Therefore, according to this group, the Court should have more control over its own docket, so that it will be able to focus on a few of its functions, pursuant to the principle of subsidiarity.<sup>246</sup>

Certain authors have suggested the US Supreme Court practice, called ‘*certiorari*’, as an alternative for the ECtHR, whether or not in a ‘light’ version.<sup>247</sup> That system works as following. The US Supreme Court receives about 5,000 applications or more per year, most of them through this *certiorari* track to appeal the judgments of lower courts. As it is of the opinion it cannot deal with all of them in a properly manner this court selects but approximately 100 applications for a written decision.<sup>248</sup> In recent years far less than 5% of the applications were accepted for decision on the merits.<sup>249</sup> In deciding which cases to accept for a written decision

---

<sup>243</sup> Y. HAECK and J. VANDE LANOTTE, “Desperately Trying to Keep the Titanic Afloat: the Reform Proposals concerning the European Convention on Human Rights after Protocol nr. 14”, *Int.Am. & Eur.Hum.Rts. J.* 2008, (87) 121.

<sup>244</sup> L. WILDHABER, *The place of the European Court of Human Rights in the European Constitutional landscape*, May 2002, [www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf](http://www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf), 6-7.

<sup>245</sup> Registry of the ECtHR, Annual Report 2011, Strasbourg, 2012, 87.

<sup>246</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 24.

<sup>247</sup> S. GREER and L. WILDHABER, “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights”, *HRLR* 2012, (655) 686; P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 33-35; F. DE LONDRAS, Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, 2013, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp), 2; K. DZEHTSIAROU and A. GREENE, Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp), 1-4.

<sup>248</sup> K.H. SMITH, “Certiorari and the Supreme Court agenda: an empirical analysis”, *Okla. L. Rev.* 2001, (727) 729.

<sup>249</sup> S. GREER, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, 183-184.

(‘to grant a petition for *certiorari*’) the US Supreme Court possesses complete discretion.<sup>250</sup> In Rule 10 of the Supreme Court Rules it is stated explicitly that “*review on a writ of certiorari is not a matter of right, but of judicial discretion.*”<sup>251</sup> This practice is very convenient for the US Supreme Court Justices to decide by themselves which cases they want to evaluate. Rule 10 further gives ‘indications’ on the character of the reasons it considers when granting a petition for *certiorari*, but these are still very vague (you can see for yourself<sup>252</sup>). In addition, reasons are rarely given in the decisions granting/not-granting a review.<sup>253</sup> Certworthiness is thus quite correctly described by the following tautology: “*that which makes a case important enough to be certworthy is a case that we consider to be important enough to be certworthy*”<sup>254</sup>.

### 5.3. Focus on individual justice/relief

The model of individual justice maintains that the ECtHR exists primarily to redress Convention violations for the benefit of the particular individual making the complaint.<sup>255</sup> This is a very attractive and quite idealistic thought. It offers victims of human rights violations an alternative opportunity to obtain redress when their own government is unable/unwilling to do so.

In its extreme form it means that every genuine victim of a Convention violation should receive a judgment in their favour (with just satisfaction if necessary), however slight the violation, whatever the bureaucratic cost, whether or not the applicant receives compensation or any other tangible remedy, and whatever the likely impact on the state conduct or practice in question.<sup>256</sup> *De facto* this means that the Court should act as a court of fourth instance. That is not what the ECtHR ever tried to be like however. Take for example the introduction of Article 35(3)(b) by Protocol No. 14 and the further restrictions put on that admissibility criterion by Protocol No. 15. Hereby the slightest, most frivolous violations are barred from the ECtHR. Furthermore, it is simply beyond the Court’s capacity.<sup>257</sup>

In its less extreme form, the path of individual justice is favoured by many legal experts and NGOs. That is because, as they see it, the ultimate cause of this Court’s backlog is not the amount of submitted applications, but rather the on-going failure to secure effective implementation of the Convention and the execution of the judgments of the ECtHR at the

---

<sup>250</sup> K.H. SMITH, “Certiorari and the Supreme Court agenda: an empirical analysis”, *Okla. L. Rev.* 2001, (727) 737.

<sup>251</sup> Rules of the Supreme Court of the United States, [www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf](http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf), 19 April 2013.

<sup>252</sup> Rules of the Supreme Court of the United States, [www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf](http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf), 19 April 2013.

<sup>253</sup> S. GREER, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, 184.

<sup>254</sup> H.W. PERRY JR., *Deciding to decide*, Cambridge (US), Harvard University Press, 1991, 34.

<sup>255</sup> S. GREER and L. WILDHABER, “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights”, *HRLR* 2012, (655) 664.

<sup>256</sup> S. GREER and L. WILDHABER, “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights”, *HRLR* 2012, (655) 664-665.

<sup>257</sup> S. GREER and L. WILDHABER, “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights”, *HRLR* 2012, (655) 676; L. WILDHABER, *The place of the European Court of Human Rights in the European Constitutional landscape*, May 2002, [www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf](http://www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf), 4 and 6.

national level, compounded by chronic underfunding of the Court itself.<sup>258</sup> As Amnesty International and fellow NGOs – strong defenders of the focus on individual justice – state in their Joint Statement in preparation of the Brighton Conference: “*While the UK Government recalls the growing backlog of applications, it would be wrong to treat the number of applications submitted to the Court as the cause of the challenges it faces, rather than the very reason for its existence.*”<sup>259</sup> This is especially true for the many repetitive cases currently pending before the Court. For citizens of high case-count countries – countries where the judicial system is often a fraud – the right of individual petition and the perceived open-access character of the Court is very important in order for them to finally have their complaints heard.<sup>260</sup> Therefore, this faction claims that it would be wrong to restrict the right of individual petition or to bring changes to the way in which the Court decides on which cases to handle. The input – high as it is – is not the challenge, what happens *after* judgments have been rendered by the Court *is*. Therefore, many human rights experts are of the opinion that the Court should find ways, within its current form, to realise faster proceedings (while of course honouring the need for qualitative judgments) and that the implementation of the ECHR by the State Parties and the supervision-function of the CoM should be reinforced or totally reinvented.

#### 5.4. Analysis and conclusion

So which of both is the best approach? Should the Court focus on delivering constitutional justice? Or is it more important for the ECtHR to offer individual relief to its many applicants?

What is clear from the outset is that the extreme form of individual justice is unworkable. With more than 65,000 new applications each year nobody can expect the 47 judges of the ECtHR to afford relief to each and every applicant who could have a justified case. The subsidiarity principle does not allow this, nor do admissibility criteria permit it. Having certain bars on the doors of the ECtHR is necessary to avoid a flooding of this Court.

The other extreme is also inappropriate as a solution to the Court’s challenges. As explained *supra* some European experts have suggested to adopt a *certiorari*-like system in Strasbourg, but such a practice would do more harm than good. It would obviously decrease the Court’s backlog, as the Court would have total control over its docket, but what is the use in choosing for a more constitutional approach as a negative choice only because the Court is said to no longer be capable of delivering individual justice? Moreover, this approach would also infringe upon the right of individual petition in such a way as to basically deny its existence *sensu lato* and restricting it to a right of individual petition *sensu stricto* that only comprises the right to submit

---

<sup>258</sup> E. BREMS, “Crisisplan voor Mensenrechtenhof”, *Juristenkrant 2010*, afl. 205, (6) 6; Equality and Human Rights Commission, Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, 2013, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp), 5.

<sup>259</sup> Amnesty International et al., Joint Statement on the United Kingdom’s Priorities and Objectives for its Chairmanship of the Committee of Ministers of the Council of Europe, November 4 2011, [www.amnesty.org/ar/library/asset/IOR61/013/2011/en/534a56df-2c57-4274-b1c5-1fcb0bfadd7/ior610132011en.pdf](http://www.amnesty.org/ar/library/asset/IOR61/013/2011/en/534a56df-2c57-4274-b1c5-1fcb0bfadd7/ior610132011en.pdf), 2.

<sup>260</sup> I. CAMERON, “The Court and the member states: procedural aspects”, in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, (25) 26.

an application without *any* certainty whether this application will eventually be judged on the merits. In reality the ECtHR already has an admissibility rate that is lower than 5%, but establishing a *certiorari* system would basically replace the current admissibility criteria by a vague cloud of judicial discretion of which nobody knows by which rules it operates – if by any at all. This would be detrimental to the Court’s reputation. What should applicants in Ukraine, Russia or Turkey think about such a court? About Europe? It would deny them justice, just as their own courts do. Indeed, LEACH mentions that many of these proposals restrict the right of individual petition without adequately tackling the problem of the increasing number of Convention violations across Europe.<sup>261</sup> People come to Strasbourg as a means of last resort, therefore, as stated by VERRIJDT, a *certiorari*-like proposal can only be accepted in a Europe where the protection of human rights is well established at the national level, which is not the case at present.<sup>262</sup> According to the Group of Wise Persons such a practice would be perceived as a lowering of human rights protections<sup>263</sup> and furthermore “*a power of this kind would be alien to the philosophy of the European human rights protection system*”<sup>264</sup>. The Evaluation Group also rejected a *certiorari* system in 2001.<sup>265</sup>

Some more European-like versions of a *certiorari* system have also been proposed. DE LONDRAS proposed that the *certiorari* system would only be applied at the Grand Chamber level for example.<sup>266</sup> However it is questionable what the added value of this proposal to the present system would be. Another proposal comes from a group around former president of the ECtHR, LUZIUS WILDHABER. This group is of the opinion that the Court should be able to select a number of cases (around 1,500) that it considers of major public importance<sup>267</sup>, by either broadly applying Article 37(1)(c) or by amending the Convention and replacing all the admissibility requirements by a single ‘seriousness’ test.<sup>268</sup> This reminds of the admissibility requirement under Protocol No. 9 when individual applications were not examined by the Court if they did not raise “*a serious question affecting the interpretation or application of the Convention*” and did not “*for any other reason warrant the consideration by the Court*” (former Article 48)<sup>269</sup>. The

<sup>261</sup> P. LEACH, “Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery?”, *HRLJ* 2006, (11) 23.

<sup>262</sup> W., VERRIJDT, “De gevolgen van het Elfde Protocol bij het E.V.R.M.”, *Jura falc.* 2002-2003, 630.

<sup>263</sup> Y. HAECK, C. BURBANO HERRERA, J. VANDE LANOTTE and A. VAN PACHTENBEKE, “Changing The European Human Rights System Once Again. The Wise Persons Spoke But Did they Speak Wisely?”, *Mediterr. J. Hum.Rts.* 2008, (115) 125.

<sup>264</sup> Ministers’ Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, para. 42.

<sup>265</sup> Evaluation Group, Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, 27 September 2001, EG Court(2001)1, <https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr>, para. 91.

<sup>266</sup> F. DE LONDRAS, Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, 2013, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp), 2.

<sup>267</sup> S. GREER and L. WILDHABER, “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights”, *HRLR* 2012, (655) 686.

<sup>268</sup> S. GREER and L. WILDHABER, “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights”, *HRLR* 2012, (655) 686; P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 33-35.

<sup>269</sup> P. SARDARO, “The Right of Individual Petition to the European Court”, in P. LEMMENS and W. VANDENHOLE, *Protocol No. 14 and the Reform of the European Court of Human Rights*, Mortsels, Intersentia, 2005, 56.

German *Bundesverfassungsgericht* applies a similar approach. It has admissibility grounds such as ‘constitutional relevance’, ‘intensity of the violation of a basic right’, or ‘the likelihood of success’. Only 1 to 2 per cent of applications submitted are accepted for decision on the merits by this Court. Most of the time rejections are not even formally motivated.<sup>270</sup> These approaches seem to be nothing less than the actual *certiorari* system of the US Supreme Court though.

The Court itself was not in favour of “*pick and choose*” either, and made an alternative proposal “*if it were necessary to adopt such an approach*”. It would, by applying the criterion of ‘well-established case-law’, only further adjudicate a case if respect for human rights requires it to do so. In all other situations, the application would be struck out.<sup>271</sup> Yet, this would be too strict as well. The Court should indeed not focus on repetitive cases and should maybe even avoid adjudicating them in the future, but then only because serious dysfunctions do not longer occur and in any case the ECtHR should remain competent to adjudicate them.

In the Brighton Declaration the High Contracting Parties seem to have opened the door for a further debate on constitutionalisation. The Declaration states that the Court should deliver fewer judgments and “*focus its efforts on serious and widespread violations, systemic and structural problems, and important questions of interpretation and application of the Convention*”.<sup>272</sup> Notwithstanding this fact, the door is (still) not wide open as the need to analyse how the Convention system could be preserved in essentially its current form is likewise emphasised.<sup>273</sup>

There has been a lot of critique on the individual justice approach as well. Firstly, it is often remembered that the Convention system was originally set up to prevent a recurrence of the atrocities of the Second World War and to contribute to a democratic and peaceful Europe with common values that safeguards human rights and freedoms and *not* just to grant individuals a right of individual petition.<sup>274</sup> The right of individual petition, although said not to be the goal of the ECHR system, but rather just a means to achieve its goal, has moved throughout the years to the centre of this system though. It cannot be denied that nowadays it even *is* the ECHR system. Secondly, it is said that a judgment in their favour is often a hollow victory for the applicants as levels of compensation are low and other rewards few.<sup>275</sup> This is a meagre argument, if not even a reason to support a stronger sanction system to ensure a better execution of the Court’s judgments.

It is clear that this is not a black versus white debate, both visions hold part of the truth in them. On the one hand certain barriers need to be set on the right of individual petition, to avoid the entire system of collapsing and to allow the upper levels of the ECtHR to render high quality

---

<sup>270</sup> S. GREER, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, 183-186.

<sup>271</sup> ECtHR, Preliminary opinion of the Court in preparation for the Brighton Conference, 20 February 2012, #3841140, para. 34.

<sup>272</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=,), G., 33.

<sup>273</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=,), G., 35, e).

<sup>274</sup> S. GREER and L. WILDHABER, “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights”, *HRLR* 2012, (655) 664-665.

<sup>275</sup> S. GREER and L. WILDHABER, “Revisiting the debate about ‘constitutionalising’ the European Court of Human Rights”, *HRLR* 2012, (655) 666.

judgments of public importance. On the other hand, the current backlog of the Court should not lead to a system where the right of individual petition is curbed in such a way that it would more or less be non-existent. It is not that the Court should render more judgments, but at least its aim should be to deliver individual justice *in due time* to those applications it declares admissible, while still being able to shape the constitutional framework of Europe regarding human rights, consisting of clear minimum standards. It can be concluded that a pragmatic individual justice approach is the eventual aim and target which the Court should pursue in the future, albeit one with the strong constitutional characteristics that are already present in the ECHR system nowadays. A reform should thus lead to a reinforcement of the Court so as to make it able to efficiently perform both tasks. Hereafter, in Chapter 6, the recent reforms of Protocol Nos. 15 and 16 will be discussed, where after in Chapter 7 some concrete reforms for an effective and efficient future of the ECtHR will be suggested, based on the ideal aim that has been put forward in this Chapter.



## 6. Reform put in practice: Protocol No. 15 & 16

Given the urgency of further reform the discussions that had started after Protocol No. 11 and culminated in the adoption of Protocol No. 14 have continued at the same pace after the adoption of Protocol No. 14. The slow ratification process by Russia of Protocol No. 14 can be blamed for this, but the main reason was basically that Protocol No. 14 was designed to solve the Court's immediate, not long-term, procedural problems.<sup>276</sup> In this period after the adoption of Protocol No. 14 two expert groups have reported on further reforms: first there was the audit of the Court by Lord Woolf<sup>277</sup> in 2005 and one year later there was the Report of the Group of Wise Persons<sup>278</sup>. In these two reports several reform proposals have been suggested, some of which have been implemented in Protocol No. 15 and some of which have been implemented by the Court itself. In the years 2010 till 2012 three conferences on the further reform of the Court have taken place in Interlaken<sup>279</sup>, Izmir<sup>280</sup> and Brighton<sup>281</sup>. All these years of discussions, with in the meanwhile the CDDH preparing future reforms, resulted in the adoption of the new Protocols Nos. 15 and 16 in 2013.

### 6.1. Preparation leading up to the Protocols

#### 6.1.1. The Woolf Report (2005)

LORD WOOLF, an eminent British jurist, was asked to make recommendations concerning the working methods of the ECtHR. More specific his duty was *“to consider what steps can be taken by the President, judges and staff of the European Court of Human Rights to deal most effectively and efficiently with its current and projected caseload, and to make recommendations accordingly to the Secretary General of the Council of Europe and to the President of the Court.”*<sup>282</sup> In his report Lord WOOLF made a few very interesting recommendations.<sup>283</sup> For example he proposed to establish Satellite Offices of the Registry in countries that produce high numbers of inadmissible applications. The Council of Europe did effectively did establish similar offices, e.g. in Poland<sup>284</sup>. He was also of the opinion that the Court should deliver a greater number of pilot judgments, and then deal summarily with repetitive cases (see Chapter 7.4. for a similar proposal). Furthermore, the Court implemented several other proposals: e.g. a redefinition of what constitutes an application, a new Registry task to strike out those

---

<sup>276</sup> I. CAMERON, “The Court and the member states: procedural aspects”, in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, (25) 25.

<sup>277</sup> LORD WOOLF, Review of the Working Methods of the European Court of Human Rights, December 2005, [www.echr.coe.int/Documents/2005\\_Lord\\_Woolf\\_working\\_methods\\_ENG.pdf](http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf).

<sup>278</sup> Ministers’ Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203.

<sup>279</sup> Interlaken Declaration of 19 February 2010, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=), February 19 2010.

<sup>280</sup> Izmir Declaration of 27 April 2011, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c).

<sup>281</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c).

<sup>282</sup> LORD WOOLF, Review of the Working Methods of the European Court of Human Rights, December 2005, [www.echr.coe.int/Documents/2005\\_Lord\\_Woolf\\_working\\_methods\\_ENG.pdf](http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf), preface.

<sup>283</sup> LORD WOOLF, Review of the Working Methods of the European Court of Human Rights, December 2005, [www.echr.coe.int/Documents/2005\\_Lord\\_Woolf\\_working\\_methods\\_ENG.pdf](http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf), 5-6.

<sup>284</sup> Ministers’ Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, paras. 18-19.

submissions that are incomplete<sup>285</sup>, and also a practical guide for lawyers<sup>286</sup> and online admissibility checklist<sup>287</sup> to inform applicants and their lawyers on the prospect of success of their applications.

Lord WOOLF mentions of his recommendations that they “do not provide the panacea but, taken together, should provide the Court with some very real assistance, and enable it to cope with its workload pending a more fundamental review of the Convention system.”<sup>288</sup> Indeed, the focus of his Report was on improving the *working methods* of the Court, rather than on *structural changes*, which was the focus of the Report of the Group of Wise Persons (see *infra*).<sup>289</sup>

### 6.1.2. Report of the Group of Wise Persons (2006)

In May 2005 the Heads of State and Government of the CoE member states decided to set up a Group of Wise Persons to consider the long-term effectiveness of the ECHR control mechanism and asked them to submit, as soon as possible, proposals going beyond the measures of Protocol No. 14, while preserving the basic philosophy underlying the Convention.<sup>290</sup> A year and a half later, in November 2006, the Group of Wise Persons submitted its Final Report to the CoM.<sup>291</sup> The Group made a few interesting proposals that are still being discussed today. A few will be mentioned here. For example, they proposed that the Court would establish a Statute, as a level in between the Court’s Rules of Court and the Convention and Protocols which would allow certain reforms to come into force without the need of a ratification by all the member states of the CoE (paras. 44-50). The Group also proposed to establish a new judicial filtering mechanism: the Judicial Committee (paras. 51-65) (a similar proposal will be elaborated on in Chapter 7.3.3.2. and see there for more information). It also proposed the introduction of advisory opinions, an idea that actually made it with Protocol No. 16 (paras. 76-86) (see subchapter 6.3.). The Group also laid emphasis on the improvement of domestic remedies for redressing violations of the Convention (in particular those resulting from structural or general shortcomings in a state’s law or practice) as indeed this “would relieve the Court of a considerable number of cases”<sup>292</sup> (paras. 87-93). This is highly important indeed. Furthermore, the Group of Wise Persons also endorsed the pilot judgement procedure (paras. 100-105), for more on this, see Chapter 7.4.

---

<sup>285</sup> Registry of the European Court of Human Rights, Practice Direction on the Institution of Proceedings, 1 January 2014, [www.echr.coe.int/Documents/PD\\_institution\\_proceedings\\_ENG.pdf](http://www.echr.coe.int/Documents/PD_institution_proceedings_ENG.pdf).

<sup>286</sup> ECHR, Practical Guide on Admissibility Criteria, 2011, [www.echr.coe.int](http://www.echr.coe.int).

<sup>287</sup> ECHR, Admissibility Checklist, <http://appform.echr.coe.int/echrappchecklist/default.aspx?lang=eng&cookieCheck=true>, (last accessed 15 April 2014).

<sup>288</sup> LORD WOOLF, Review of the Working Methods of the European Court of Human Rights, December 2005, [www.echr.coe.int/Documents/2005\\_Lord\\_Woolf\\_working\\_methods\\_ENG.pdf](http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf), 6.

<sup>289</sup> Y. HAECK and J. VANDE LANOTTE, “Desperately Trying to Keep the Titanic Afloat: the Reform Proposals concerning the European Convention on Human Rights after Protocol nr. 14”, *Int.Am. & Eur.Hum.Rts. J.* 2008, (87) 94.

<sup>290</sup> Ministers’ Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, para. 1.

<sup>291</sup> Ministers’ Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)2030.

<sup>292</sup> Ministers’ Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)2030, para. 91.

The report of the Wise Persons was a welcome contribution to the ongoing discussions on the reform of the ECtHR. Some proposals are by now adopted in the new Protocols (e.g. the advisory opinions are the subject of Protocol No. 16), or are part of the Court's present practice (e.g. the pilot judgment procedure, although not new since the Group of Wise Persons, is often used by the Court).

### 6.1.3. Ministerial Conferences of Interlaken, Izmir and Brighton

Three years after the Report by the Group of Wise Men the President of the ECtHR, JEAN-PAUL COSTA, took the initiative of the organisation of a series of conferences on the reform of the ECtHR by issuing a Memorandum on the 3<sup>th</sup> of July 2009.<sup>293</sup> The first Conference was organised on the very same day as the Russian (and final) ratification of Protocol No. 14 and a few months before its entry into force. Still, the High Contracting Parties' representatives already met in Interlaken, Switzerland, to discuss the future of the EC(t)HR *after* Protocol No. 14, because of the urgency of reform and the expectance that Protocol No. 14 would not solve all the Court's problems. On the 26<sup>th</sup> and 27<sup>th</sup> of April 2011 a second conference in Izmir followed and a third one took place in Brighton on the 19<sup>th</sup> and 20<sup>th</sup> of April 2012. For the sake of convenience, all three conferences will be discussed together in this subchapter. Their goals were<sup>294</sup>:

- to make an assessment as of today of the impact of Protocol No. 14;
- (for Izmir and Brighton) to take stock of what has been achieved by the reform process launched in Interlaken;
- following a thorough reflection, lend impetus for further reform.

The conferences took place in the background of a fierce debate between those in favour of further reforming the ECtHR within its present form and the more critical countries that lay the responsibility for the problems within the ECtHR system itself. This was most of all visible in the months leading up to the Brighton Conference, because of some (British) people who brought up the subsidiarity principle in their attempt to strike down the Convention and the Court (see for example Lord HOFFMANN's declarations<sup>295</sup>). The UK has had a difficult relationship with the Convention and the Court in recent years. At the end of July 2011 the British Commission on a Bill of Rights, as part of the Interlaken process and in preparation of the conference the year after, issued an Interim Advice for the later Brighton Conference. Therein a strong emphasis on the principle of subsidiarity was put and it was proposed to establish a new screening mechanism that would allow the Court "*to decline to deal with cases that do not raise a serious violation of the Convention ... or any issues of significant European public importance*".<sup>296</sup> This did

---

<sup>293</sup> ECtHR, Memorandum of the President of the European Court of Human Rights, 3 July 2009, [www.coe.int](http://www.coe.int).

<sup>294</sup> Council of Europe Directorate of Communication, Council of Europe conference in Izmir on the future of the European Court of Human Rights, Press release 361(2011), 21 April 2011, [https://wcd.coe.int/ViewDoc.jsp?Ref=PR361\(2011\)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE](https://wcd.coe.int/ViewDoc.jsp?Ref=PR361(2011)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE).

<sup>295</sup> J. GROVES, 'Europe's human rights court is out of control...we must pull out': Call by top British judge after ruling that prisoners should get the vote, Daily Mail, 7 February 2011, [www.dailymail.co.uk/news/article-1354362/Europes-human-rights-court-control-pull-Call-British-judge-ruling-prisoners-vote.html#ixzz1QNV45SLd](http://www.dailymail.co.uk/news/article-1354362/Europes-human-rights-court-control-pull-Call-British-judge-ruling-prisoners-vote.html#ixzz1QNV45SLd).

<sup>296</sup> Commission on a Bill of Rights, Reform of the European Court of Human Right, our interim advice to government, July 28 2011, [www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf](http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf), paras 8 and 10.

of course raise a lot of controversy and fierce opposition from those who are of the opinion that access to the Court for well-founded human rights violations must not be curtailed.<sup>297</sup> Later the Attorney General for England, Wales and Northern-Ireland even went so far to say that the principle of subsidiarity requires that on issues of social policy, where strong, opposing reasonable views may be held, where Parliament has fully debated the issue, the judgement is for Parliament and that the ECtHR should not interfere with that judgement unless it is manifestly without reasonable foundation.<sup>298</sup> This is to be seen as an outright attack against the judgment in *Hirst v. United Kingdom (No. 2)*<sup>299</sup> (see Chapter 5.1.). Is he then suggesting that every national parliament should be able to veto ECtHR judgments by a majority vote? Quite a strange viewpoint considering the recent Russian anti-gay laws, also issues of social policy. The principle of subsidiarity should of course not be interpreted in such a way as to exclude international judicial organs from having their say on social organisation at the national level (that is how this principle is used in the EU, see article 5 TEU). The principle of subsidiarity, as used in the Convention system, means that safeguarding the ECHR rights and freedoms is a shared responsibility between the High Contracting Parties and the Court, with the domestic governments being the primary level of protection and the ECtHR only intervening in the event the domestic authorities have failed to do so. Or would it just be that he is requesting a different, lighter treatment for ‘great Western democracies’ like his own other than that for ‘evil Russia’? He most probably is asking for such an arbitrary and destructive approach, although he would better understand that human rights are in any case better off with a strong pan-European protection system. Luckily, in later papers<sup>300</sup> and at the preparatory Wilton Conference<sup>301</sup> the British tone became somewhat more nuanced.

At the end of the Interlaken Conference a Declaration and an Action Plan were adopted “to provide political guidance for the process towards the long-term effectiveness of the Convention system”.<sup>302</sup> At the end of the Izmir Conference an Interlaken Follow-Up Plan was attached to its Declaration<sup>303</sup> and the Brighton Conference ended with a Declaration as well<sup>304</sup>.

All three the Declarations addressed several issues for further reforms of the Convention system. The Izmir Declaration reaffirmed the Interlaken Declaration on most points, while the Brighton Declaration was more detailed, surprisingly constructive despite the fierce debate as

<sup>297</sup> Amnesty International et al., Joint Statement on the United Kingdom’s Priorities and Objectives for its Chairmanship of the Committee of Ministers of the Council of Europe, November 4 2011, [www.amnesty.org/ar/library/asset/IOR61/013/2011/en/534a56df-2c57-4274-b1c5-1fcba0bfadd7/ior610132011en.pdf](http://www.amnesty.org/ar/library/asset/IOR61/013/2011/en/534a56df-2c57-4274-b1c5-1fcba0bfadd7/ior610132011en.pdf), 2; E. BATES, *Guest Post on British ECHR Reform Plans*, 11 November 2011, <http://echrblog.blogspot.be/2011/11/guest-post-on-british-echr-reform-plans.html>.

<sup>298</sup> D. GRIEVE, “*European Convention on Human Rights - current challenges*”, October 24 2011, [www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/AttorneyGeneralEuropeanConventiononHumanRights%E2%80%93currentchallenges.aspx](http://www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/AttorneyGeneralEuropeanConventiononHumanRights%E2%80%93currentchallenges.aspx), 3-4.

<sup>299</sup> ECtHR, *Hirst v. UK (No. 2)*, 2005.

<sup>300</sup> United Kingdom Chairmanship of the Council of Europe, *Priorities and Objectives*, 28 October 2011, <http://ukcoe.fco.gov.uk/resources/en/22792210/pdf-priorities-261011>.

<sup>301</sup> [www.wiltonpark.org.uk/conference/wp1139/](http://www.wiltonpark.org.uk/conference/wp1139/)

<sup>302</sup> Interlaken Declaration of 19 February 2010, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=,](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=,) 2-7.

<sup>303</sup> Izmir Declaration, High Level Conference on the Future of the European Court of Human Rights, April 27 2011, 3-7.

<sup>304</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=,](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=,) 12 p.

mentioned *supra*, and even quite timid. The Interlaken Declaration started with reaffirming the right of individual petition (“*The Conference reaffirms the fundamental importance of the right of individual petition as a cornerstone of the Convention system.*”<sup>305</sup>), while emphasis was put on the principle of subsidiarity as well (Clause 2). Recently the principle of subsidiarity has become somewhat controversial, as explained *supra*, but this principle is essential to any reform. Many of the human rights violations originate in a failure to effectively implement the ECHR in the national jurisdictions of the High Contracting Parties (which demonstrates the need for measures on the national level), while equally the Court is sometimes blamed for having turned into a full-blown court of fourth instance.<sup>306</sup> In the Izmir Declaration the principle of subsidiarity was reaffirmed, but here the target of this principle was more the interim measures. It was recalled that the ECtHR is not an Immigration Appeals Tribunal, but at the same time the improvements in the practice of interim measures were welcomed (Follow-up Plan, A., 3). Both the right of individual petition and the subsidiarity principle were reaffirmed in the Brighton Declaration.<sup>307</sup> In the Brighton Declaration it was even concluded that the principle of subsidiarity (and the related doctrine of the margin of appreciation) should be included in the Preamble to the Convention by the end of 2013 (Clause 12, b)) (see Chapter 6.2.).

The Interlaken Declaration thereafter addressed the issue of the right of individual petition (Action Plan, A). With regard to this issue it laid emphasis on two things: (1) the need for the Court to focus on its essential role of guarantor of human rights and to adjudicate well-founded cases with the necessary speed, in particular those alleging serious violations of human rights; (2) the suggestion to examine in particular under what conditions new procedural rules or practices that might contribute to a sound administration of justice could be envisaged, without deterring well-founded applications. With regard to the latter the Court has amended its Rules of Court on what an initial application should include in May 2013.<sup>308</sup> Somewhat further in the Declaration, the Court was also invited to take measures to avoid that the Court would be perceived as a fourth instance court (E., 9., a)). These measures included the possibility to introduce new admissibility criteria related to the principle *de minimis non curat praetor*. Both the Izmir and Brighton Declarations stressed that the Court should correctly apply the admissibility criteria (Izmir, F., 2., a) and Brighton, C., 14). The Brighton Declaration built further on all these points and recommended adjusted admissibility requirements to be implemented in the Convention by the end of 2013: (1) the time limit under Article 35(1) was to be shortened to four months and (2) Article 35(3)(b) had to be amended in order to allow a case to be rejected even when it has not been duly considered by a domestic tribunal (C., 15, a-c)) (see Chapter 6.2. for more on these amendments).

Thereafter the Interlaken Declaration went further on the issue of the implementation of the Convention at national level (Action Plan, B). On this point it was recalled that it is first and

---

<sup>305</sup> Interlaken Declaration of 19 February 2010, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=,), Action Plan, A., 1.

<sup>306</sup> L. WILDHABER, *The place of the European Court of Human Rights in the European Constitutional landscape*, May 2002, [www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf](http://www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf), 2; M. BOSSUYT, “The Court of Strasbourg acting as an Asylum Court”, *EuConst* 2012, 203-245.

<sup>307</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=,), para. 2-3.

<sup>308</sup> See Rule 47 of the Rules of Court.

foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention. For that reason the High Contracting Parties were called upon to commit themselves to take measures accordingly (by introducing new legal remedies, by raising awareness of the Convention with the help of NHRIs, by seconding national experts, etc.). The Brighton Declaration reaffirmed these measures, although it also invited the CoM, the Secretary General of the CoE and the Court to assist the State Parties in this regard by *e.g.* providing technical assistance (A., 9).

A next point addressed in the Interlaken Declaration was the issue of filtering (Action Plan, C). Here the Action Plan called upon the High Contracting Parties and the Court to inform potential applicants more about the application procedures of the ECHR and its case law (as was done in the Report of the Group of Wise Persons as well<sup>309</sup>), stressed the interest to investigate the Court's practice on its inadmissibility decisions and recommended new filtering mechanisms (which the Court did in 2011 by setting up the Filtering Section within the Registry), but equally recommended the CoM to examine the setting up of an entirely new mechanism going beyond the Single Judge procedure to ensure a more effective way of dealing with inadmissible applications (see Chapter 7.3.3.2. for more). In the Brighton Declaration this was further elaborated, although here a proposal was preferred that would enhance the overall capacity of the Court rather than just its capacity to deal with inadmissible applications: the CoM was asked to decide by the end of 2013 whether it would appoint additional judges to the Court to speed up proceedings so that, together with some other minor reforms, the Court would in the future be able to communicate a case to the concerned government within one year and thereafter to make all communicated cases the subject of a decision or judgment within two years of communication (D, 20 e)). The CoM is then invited to determine by 2015 whether the proposed measures in the Declaration have proven to enable the Court successfully to address its workload, or if further measures are thereafter needed. The Brighton Declaration also *"note[d] with appreciation the Court's assessment that it could dispose of the outstanding clearly inadmissible applications pending before it by 2015; acknowledge[d] the Court's request for the further secondment of national judges and high-level independent lawyers to its Registry to allow it to achieve this; and encourage[d] the States Parties to arrange further such secondments."*<sup>310</sup>

Likewise, the Interlaken Action Plan addressed the problem of repetitive applications (Action Plan, D). It promoted the use of friendly settlements and unilateral declarations, called for cooperation by the High Contracting Parties with the CoM on the implementation of general measures after a pilot judgment, stressed the need to further develop rules on the pilot judgment procedure and called upon the CoM to consider whether repetitive cases could be handled by judges responsible for filtering. This last idea seems to have been off the table in the two later Conferences. A new idea was proposed at the Brighton Conference though. In the Brighton Declaration the CoM was invited to consider a new 'representative application procedure' (D, 20., d)) (see Chapter 7.4. for more information on this issue).

---

<sup>309</sup> Ministers' Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)2030, para. 113.

<sup>310</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=,), D., 20., b).

Furthermore, the Interlaken Action Plan stressed the need for a selection procedure to have judges of good quality and also the need for the Court to have the necessary level of administrative autonomy (Action Plan, E). More specific with regard to the Court's case law in the Action Plan the Court was encouraged to make use of the possibility to reduce the number of judges of the Chambers to five, as provided by Protocol No. 14 (see Chapter 7.3.3.2. for more information on this issue) and to continue its priority policy. In the Brighton Declaration it was concluded with regard to the judges to amend Article 23(2) to ensure that judges are not older than 65 years when their term of office commences (E, 25., f)) and concerning the case law to allow Chambers to relinquish jurisdiction to the Grand Chamber even when the parties would object to this (amendment of Article 30) (E, 25, d)). For both amendments the deadline of the end of 2013 was set.

With regard to the supervision of execution of judgments the urgent need for the CoM was stressed in the Interlaken Action Plan to develop means which will render its supervision of the execution of the Court's judgments more effective and transparent, particularly with regard to major structural problems, *e.g.* to "*review its working methods and its rules to ensure that they are better adapted to present-day realities*"<sup>311</sup>. The Brighton Declaration also encouraged the State Parties to abide with the judgments of the Court and to that extent enumerated several possible measures they could take: implementation of Recommendation 2008(2) of the CoM, action plans, involvement of national parliaments, publicity, etc. (F., 29.).

Lastly, the parties to the Interlaken Conference called upon the CoM in the Action Plan to examine the possibility of introducing a simplified procedure for amending the Convention with regard to organisational issues (Action Plan, G), which was also a recommendation by the Group of Wise Persons (see *supra*). The Interlaken Declaration recommended a Statute or a procedure whereby the CoM and PACE would approve the proposed amendment (similar to Article 41(d) of the Statute of the CoE). This recommendation was taken over in the Izmir and Brighton Declarations.

There were a few things that were not addressed in the Interlaken Declaration, that the Izmir and/or Brighton Declarations did touch upon. The Izmir Declaration contains several provisions regarding the interaction between the ECtHR and the national authorities (Follow-up Plan, D). The CoM was invited here to reflect on the advisability of introducing an advisory opinion procedure. This idea was reiterated in the Brighton Declaration and the CoM was invited to draft the text of an optional protocol to the Convention with this effect by the end of 2013 (B., 12., d)). Likewise there was particular focus on the need for more secondments in the Izmir Declaration (Follow-up Plan, I, 5.), the – then – first positive results of the Single Judge formation were noted (Follow-up Plan, C, 1.) and there was also a proposal to introduce fees at the Court (Follow-up Plan, I, 2, a.). This idea was – fortunately – not pursued later.<sup>312</sup>

---

<sup>311</sup> Interlaken Declaration of 19 February 2010, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=), Action Plan, F., 11., b).

<sup>312</sup> I. CAMERON, "The Court and the member states: procedural aspects", in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, (25) 47.

The Brighton Declaration ends with a Chapter on the longer-term future of the Convention system and the Court. It envisages a Court that “*should be in a position to focus its efforts on serious or widespread violations, systemic and structural problems, and important questions of interpretation and application of the Convention, and hence would need to remedy fewer violations itself and consequently deliver fewer judgments.*”<sup>313</sup>. In the Interlaken Declaration the CoM was invited to evaluate, during the years 2012 to 2015, to what extent the implementation of Protocol No. 14 and of the Interlaken Action Plan had improved the situation of the Court. It provided that, on the basis of this evaluation, the CoM should decide before the end of 2015 whether there is a need for further action. It further provided that, before the end of 2019, the CoM should decide on whether the measures adopted have proven to be sufficient to assure sustainable functioning of the control mechanism of the Convention or whether more profound changes are necessary (Implementation, (6)). The Brighton Conference therefore invited the CoM to continue its work and to deliver an interim view on all these issues by the end of 2015 (G, 34.).

#### **6.1.4. Conclusion**

It is a typical characteristic of anybody who is passionate about a certain activity or organisation to be of the opinion that not enough attention or money is given to this activity/organisation by the general public. This is not different for the ECtHR. However, the situation really is quite urgent here. Take a look back at the backlog described in Chapter 4 and then at subchapter 4.2.2. on the Court’s budget: the ECtHR faces serious backlog problems and its budget is unacceptably small and needs a substantial increase as soon as possible. It is very disappointing to see therefore that zero attention was given to this issue in any of the declarations of the latest High Level Conferences. The CoE’s budgets are prepared on the basis of the zero real growth principle (so only taking into account inflation, salary adjustments etc.)<sup>314</sup> and the Brighton Declaration seemed to suggest that it is likely that the Court’s budget will not increase in the future either: “*Where decisions to give effect to this Declaration have financial implications for the Council of Europe, the Conference invites the Court and the CoM to quantify these costs as soon as possible, taking into account the budgetary principles of the Council of Europe and the need for budgetary caution.*”<sup>315</sup>. It is pivotal that awareness is raised about the urgent need to increase the Court’s (and consequently the CoE’s budget).

What is positive, however, is that all Declarations seem to recognize that the future of European human rights protection is in an enhancement of the implementation of the Convention and execution of the Court’s judgments at the national level<sup>316</sup> (see for example the reference to the principle of subsidiarity, the proposal to introduce advisory opinions and the many proposals to

---

<sup>313</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=), G., 33.

<sup>314</sup> A. LESTER, “The European Court of Human Rights after 50 years”, in J. CHRISTOFFERSEN and M. RASK MADSEN, *The European Court of Human Rights between Law and Politics*, Oxford, Oxford University Press, 2011, 106.

<sup>315</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=), H., 38.

<sup>316</sup> A. BURKOV, “Motivation for Direct Application of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts”, *Baltic Yearbook of International Law* 2012, (229) 229.

assist the State Parties with the implementation and execution process). As mentioned in the Interlaken Action Plan NHRIs have an important role in this regard.<sup>317</sup>

For the rest, many interesting suggestions have been proposed in the discussions after Protocol No. 14. The Judicial Committee in the Report of the Group of Wise Men, the representative application procedure in the Brighton Declaration, national ombudsmen in the Woolf Report, ... and of course the advisory opinion procedure. Some of them have made it to the Protocols No. 15 and 16, others have since been considered for later reforms, but many however have been set aside.

## 6.2. Protocol No. 15

After long discussions that eventually resulted in the Brighton Declaration it was concluded that certain reform proposals on the functioning of the ECtHR should be implemented in a new protocol to the ECHR. For that purpose the CoM instructed the CDDH to draft a protocol with regards to what was concluded in the Brighton Declaration on the 23<sup>th</sup> of May 2012.<sup>318</sup> Within the CDDH's Committee of Experts on the Reform of the Court (DH-GDR), Drafting Group B was given this task to prepare a Draft Protocol. After final examination by the DH-GDR (29-31 October 2012) and approval by the CDDH, it was submitted to the CoM on the 30<sup>th</sup> November 2012. On the 16<sup>th</sup> of January 2013 the CoM transmitted the Draft Protocol to PACE for opinion. Where after, on the 26<sup>th</sup> of April 2013, PACE adopted a positive opinion. On the 29<sup>th</sup> of April 2013 the Draft Protocol was transmitted to the CoM and finally on the 16<sup>th</sup> of May 2013 Protocol No. 15 was open for ratification.<sup>319</sup> The protocol concerns five amendments to the ECHR. These will be discussed below.

### 6.2.1. Reference to the principle of subsidiarity and the doctrine of margin of appreciation in the Preamble of the ECHR

At the end of the Preamble to the Convention a new recital will be added:

*"Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,"*

This amendment refers to the conclusion of paragraph 12(b) of the Brighton Declaration. According to its Explanatory Report this new preambular clause is intended to enhance the transparency and accessibility of the principle of subsidiarity and the doctrine of margin of appreciation and to give full effect to the High Contracting Parties' own obligations.<sup>320</sup> It is important to note that, while not explicitly mentioned in the Protocol itself, the margin of

---

<sup>317</sup> Interlaken Declaration of 19 February 2010, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=B., 4., a](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=B., 4., a)).

<sup>318</sup> For reference to all the dates, see: Committee of Ministers, Securing the long-term effectiveness of the supervisory mechanism of the European Convention on Human Rights, 23 May 2012, CM(2012)PVadd1/Item2E, para. 6.

<sup>319</sup> See for all the dates: [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-B\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-B_en.asp).

<sup>320</sup> Explanatory Report to Protocol No. 15 to the ECHR, 24 June 2013, paras. 7-9.

appreciation doctrine only applies to some of the Convention rights (this is made clear in the Explanatory Report as well<sup>321</sup>).

As already mentioned numerous times, the explicit insertion of this provision in the Convention was widely debated, not in the least because of the bad intentions of certain persons. For that reason former President NICOLAS BRATZA stated at the Brighton Conference that subsidiarity “cannot in any circumstances confer what one might call blanket immunity”.<sup>322</sup> However, as a preambular clause, with reference to the supervisory jurisdiction of the Court on these principles and without an elaboration on their content, the present amendment seems an appropriate referral to some of the most important principles of the Convention system. Therefore this amendment is to be considered a good one.

In their first joint preliminary comments on Draft Protocol No. 15, the NGOs regretted however the fact that other principles are not mentioned as well: principles such as the Convention as a living instrument, dynamic and evolutive interpretation, effective rights instead of theoretical and illusory ones and the principle that the very essence of a right must never be impaired.<sup>323</sup>

### **6.2.2. Amendment of Article 21 and 23: Candidate-judges may not have reached the age of 65 upon their proposal to the Parliamentary Assembly**

By article 2 of Protocol No. 15 the following new paragraph 2 will be added to Article 21:

*“Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly, further to Article 22.”* Consequently, the provision that the terms of office of judges expires when they reach the age of 70 (Article 23(2)) is deleted.

This amendment does not have a lot to do with the purpose of this thesis, but it is a good amendment nonetheless. It ensures that the judges that are eventually elected will serve their full nine-year term of office by repealing the current compulsory retirement age. This reform follows the request for amendment made in the Brighton Declaration (Paragraph E., 25, f)), although it departs from the phrasings used there. In the Draft versions of Protocol No. 15 there were two other proposals:

- *“Judges shall be less than 65 years of age at the date on which their term of office commences.”*<sup>324</sup> This is the same phrasing as in the Brighton Declaration.
- *“Judges shall be less than 66 years of age on 1 January in the year during which their term of office commences.”*<sup>325</sup>

The phrasing that has been chosen in the end is to be preferred over these other draft-proposals. That is because its application is less complicated and also because it will avoid possible practical

---

<sup>321</sup> “The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged”, which equals the phrasing used in para. 11 of the Brighton Declaration. (Explanatory Report to Protocol No. 15 to the ECHR, 24 June 2013, para. 9.)

<sup>322</sup> N. BRATZA, Speech at the High Level Conference in Brighton, 20 April 2013, [www.echr.coe.int/Documents/Speech\\_20120420\\_Bratza\\_Brighton\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20120420_Bratza_Brighton_ENG.pdf), 5.

<sup>323</sup> CDDH, Joint preliminary comments on the drafting of Protocols 15 and 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 29 August 2012, DH-GDR(2012)008, 2-3.

<sup>324</sup> CDDH, Draft Protocol No. 15, 14 September 2012, GT-GDR-B(2012)R1 Addendum, Article 2(1).

<sup>325</sup> CDDH, Draft Protocol No. 15, 15 October 2012, GT-GDR-B(2012)R2 Addendum I, Article 2(1) proposal 1.

problems, e.g. if the election procedure would take a long time and one of the candidates would therefore not be eligible any longer.

### 6.2.3. Amendment of Article 35 (1): a time limit of four months

Currently the Court may only deal with cases that have been submitted to it within a period of six months from the date on which the final domestic decision concerning that case was taken. When Protocol No. 15 comes into force this time limit will be shortened to a four months period. This amendment was proposed first in the Brighton Declaration (para. C., 15., a)).

In the Explanatory Report to Protocol No. 15 there is but one sentence that clarifies the *ratio* of this amendment: “*The development of swifter communications technology, along with the time limits of similar length in force in the member States, argue for the reduction of the time limit.*”<sup>326</sup> This phrasing is almost identical as the reasons given by the Court to explain its original proposal in this regard in preparation to the Brighton Conference<sup>327</sup>. The CDDH itself mentioned this proposal as “*relatively straightforward*” to prepare and less challenging than other proposals that eventually became part of Protocol No. 15.<sup>328</sup> In the doctrine not much attention was given to this amendment either. CAMERON stated that this “*might seem radical*”, but did not spill anymore words on it since “*the Court itself suggested it*”.<sup>329</sup> Former ECtHR judge TULKENS reiterated the Court’s reasoning, but added “*encore faut-il s’assurer, afin de ne pas rompre l’égalité entre les requérants, que [ces nouveaux moyens de communication] soient réellement disponibles à travers toute l’Europe*”.<sup>330</sup> And that is exactly it. The NGOs stated that this amendment “*may unduly restrict the ability of individuals to apply to the Court*” for those applicants living in remote geographical areas, those without access to the internet, those with complicated cases or less experienced or qualified lawyers.<sup>331</sup> This amendment is discriminatory as it does not allow exceptions for such applicants. Furthermore, this equally affects potential category I cases as category VII cases and it might also lead to situations wherein the applications are increasingly poor-drafted.

As the NGOs stated further, this amendment has been introduced without adequate time for reflection on its potential impact on applicants, on the substantive quality of applications and on the Court’s effectiveness.<sup>332</sup> How many applications will it affect? Probably the Court knows (hopefully), but this is not reflected in any of the published documents of the CDDH. The

---

<sup>326</sup> Explanatory Report to Protocol No. 15 to the ECHR, 24 June 2013, para. 21.

<sup>327</sup> ECtHR, Preliminary opinion of the Court in preparation for the Brighton Conference, 20 February 2012, #3841140, 37.

<sup>328</sup> CDDH, Report, 1 July 2012, CDDH(2012)R75, para. 6., i.

<sup>329</sup> I. CAMERON, “The Court and the member states: procedural aspects”, in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, (25) 52.

<sup>330</sup> F. TULKENS, “La Cour Européenne des Droits de l’Homme et la Déclaration de Brighton, oublier la réforme et penser l’avenir”, *Cahier de droit Européen 2012-2013*, (305) 342, para. 84.

<sup>331</sup> CDDH, Joint preliminary comments on the drafting of Protocols 15 and 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 29 August 2012, DH-GDR(2012)008, 2.

<sup>332</sup> CDDH, Joint preliminary comments on the drafting of Protocols 15 and 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 29 August 2012, DH-GDR(2012)008, 2.

shortening of the time limit does not seem to have been a big deal for the Court, nor for the CDDH, nor for the State Parties, nor even for PACE<sup>333</sup>.

This amendment will certainly have a big impact on the influx of cases and it might therefore even be a good reform as indeed times and technology have changed, but it is badly prepared and therefore seems to lack vision on human rights protection and appears arbitrary. There are no differences in substance between applications that have been submitted three months after the date of the last domestic decision and those submitted five months after that date. Somewhere a line has to be struck, indeed, but the CoE had better investigated this amendment somewhat longer and deeper before adopting it.

This article will only enter into force after a period of six months following the date of entry into force of this Protocol (Article 8(3) Protocol No. 15) to give potential applicants the time to adapt. In the first two Draft Protocols this was still one year.<sup>334</sup>

#### **6.2.4. Amendment of Article 35(3)(b): a case may be rejected even when it has not been duly considered by a domestic tribunal**

Article 35(3)(b) currently states that the Court shall declare any individual application inadmissible if it considers that: *“the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”* The underlined words will be deleted once Protocol No. 15 comes into force.

This is a controversial amendment, first proposed in para. C., 15., c) of the Brighton Declaration, as the current phrasing of the provision is considered to be an important safeguard against arbitrariness.<sup>335</sup> The European group of NHRIs even mentions that *“the very fact that it was not possible to have the matter examined by a court at national level may be a breach of the ECHR in itself”*.<sup>336</sup> Thus it is feared that this amendment will allow that certain structural deficiencies in domestic jurisdictions are in the future not considered by the Court. However this seems rather unlikely given that Article 35(3)(b) still holds that an individual application shall not be declared inadmissible if *“respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits”*.

This amendment will allow the Court to function more efficiently while still protecting those applicants who need it. As such this is an appropriate step forward to reduce the backlog.

---

<sup>333</sup> Report by the Committee on Legal Affairs and Human Rights of PACE on Draft Protocol No. 15 to the European Convention on Human Rights of 28 March 2013, Doc. 13154, <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19542&lang=en>.

<sup>334</sup> CDDH, Draft Protocol No. 15, 14 September 2012, GT-GDR-B(2012)R1 Addendum, Article 8(4); CDDH, Draft Protocol No. 15, 15 October 2012, GT-GDR-B(2012)R2 Addendum I, Article 8(4).

<sup>335</sup> Equality and Human Rights Commission, Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, 2013, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp), 6.

<sup>336</sup> CDDH, Observations from the European Group of National Human Rights Institutions on the drafting of Protocol No. 15 and Protocol No. 16 to the European Convention for the protection of Human Rights and Fundamental Freedoms, 23 October 2012, DH-GDR(2012)010, 2.

### 6.2.5. Amendment of Article 30: concerning the relinquishment of jurisdiction to the Grand Chamber

Article 30 will in the future no longer allow the parties to the case to object to a relinquishment of jurisdiction by a Chamber to the Grand Chamber. This amendment was proposed in the Brighton Declaration (paragraph E., 25, d)).

With Protocol No. 11 parties were given this right to object to make sure that they would not be robbed off a second hearing of their case (first a judgment by a Chamber and thereafter a possible second after a referral to the Grand Chamber). Usually the power to decide on relinquishment of jurisdiction lays with the judge and not with the parties though.<sup>337</sup> The fact that parties could object to the relinquishment of jurisdiction to the Grand Chamber was therefore a point of critique to Protocol No. 11. This reform will hasten proceedings (although only for a very limited amount of cases) and it will also ensure a higher degree of harmony in the Court's case law with more cases being relinquished to the Grand Chamber. For all these reasons, this is to be considered a good reform.

The CDDH also looked into some related proposals (unanimity requirement for relinquishment; relinquishment only after an admissibility decisions has been struck; a right for the unsuccessful party in the relinquished case to the Grand Chamber to ask for reconsideration of its decision or judgment; motivation requirement for the Chamber; relinquishment only if the resolution might be inconsistent with the well-established case-law of the Court), however all have been rejected because they were considered to be outside the terms of reference of the CDDH, which was to facilitate relinquishment in appropriate cases. The Explanatory Report does mention though that, although relinquishment can take place before a decision on the admissibility of a case has been struck, it is still recommendable *"to narrow down the case as far as possible"* by declaring certain parts inadmissible, if relevant.<sup>338</sup> To compensate this loss of rights the Court is asked to consult with the parties on its intentions. The Court replied that *"[t]his can be accommodated"*.<sup>339</sup>

### 6.2.6. Conclusion

Apart from certain exceptions mentioned in article 8 of Protocol No. 15, this Protocol shall enter into force three months after the date on which all High Contracting Parties have expressed their consent to be bound by the Protocol. In the first Draft of this Protocol this was still one month.<sup>340</sup>

Protocol No. 15 is not so revolutionary as Protocols Nos. 11 or even 14 – certainly not given what was expected in the months leading up to the Brighton Conference. PACE even calls the reforms *"principally of a technical and uncontroversial nature"*.<sup>341</sup> Hopefully this means an obstruction as by Russia of Protocol No. 14 is not so probable this time.

---

<sup>337</sup> J. VANDE LANOTTE and Y. HAECK, "Het nieuwe Europese Hof te Straatsburg aan de vooravond van de 21e eeuw", *RW* 1999-2000, 1442.

<sup>338</sup> Explanatory Report to Protocol No. 14, 14 May 2004, para. 18.

<sup>339</sup> ECtHR, Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights, 6 February 2013, [www.echr.coe.int/Documents/2013\\_Protocol\\_15\\_Court\\_Opinion\\_ENG.pdf](http://www.echr.coe.int/Documents/2013_Protocol_15_Court_Opinion_ENG.pdf), 9.

<sup>340</sup> CDDH, Draft Protocol No. 15, 14 September 2012, GT-GDR-B(2012)R1 Addendum, Article 7.

<sup>341</sup> Opinion 283 (2013) of PACE on the Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms of 26 April 2013, <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19723&lang=EN>.

Overall, the Protocol comprises good reforms. The new time limit of four months and the amendments to Article 35(3)(b) and Article 30 will certainly help the Court to cope with its backlog. However, it is clear from the outset that these adjustments will not be enough to tackle all of the Court's problems. Only the amendment of Article 35(1) will probably have a significant impact on the backlog. Yet, significant as it might be in closing the Court's gates, this Protocol has not changed the structural deficiencies (the Court's dealing with repetitive cases, the malfunctioning of the Committees and Chambers and the Court's handling of structural problems in high-case count countries). Another reform will therefore be necessary in the future.

### **6.3. Protocol No. 16**

#### **6.3.1. Introduction**

The optional Protocol No. 16 gives the highest national courts and tribunals of its High Contracting Parties the right to request advisory opinions to the ECtHR on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. With this new Protocol an entirely new system enhancing the implementation of the ECHR and the case law of the ECtHR at national level is thus introduced. This new procedure is one of the proposed solutions that will (or at least should) in the end lead to a more efficient Court, more human right violation issues being dealt with at an earlier stage in their proceedings (and hopefully in a more efficient way) and thus to less pending cases before the ECtHR. Because of its intention to institutionalise and intensify the links and contacts between the high courts of Europe and the ECtHR the President of the ECtHR, DEAN SPIELMAN, likes to call this Protocol "*le protocole du dialogue*".<sup>342</sup> It will enter into force upon its ratification by 10 State Parties.

Protocol No. 16 was clearly inspired by the preliminary ruling procedure that is applied by the CJEU. Therefore a comparison between both procedures will follow in subchapter 6.3.4. For those who are interested: a similar practice exists before the US Supreme Court, called 'certification' (Rule 19 of the US Supreme Court Rules). It is not to be confused with the *certiorari* practice, which was discussed in Chapter 5. However, the certification procedure is used only very rarely<sup>343</sup> and therefore does not deserve further attention.

#### **6.3.2. Coming into force of Protocol No. 16**

There are proposals known to adopt a certain kind of preliminary ruling or advisory opinion procedure in the Convention system dating back to 1960.<sup>344</sup> More recently this idea was discussed in the Report of the Evaluation Group to the CoM on the European Court of Human

---

<sup>342</sup> D. SPIELMANN, Speech at the 123<sup>rd</sup> session of the CoM, 5 May 2013, [www.echr.coe.int/Documents/Speech\\_20130516\\_Spielmann\\_CM\\_FRA.pdf](http://www.echr.coe.int/Documents/Speech_20130516_Spielmann_CM_FRA.pdf).

<sup>343</sup> H.W. PERRY JR., *Deciding to decide*, Cambridge (US), Harvard University Press, 1991, 27.

<sup>344</sup> Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014, 11; R. HARMSEN, "The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform", in J. MORISON, K. MCEVOY and G. ANTHONY, *Judges, Transition, and Human Rights*, Oxford, Oxford University Press, 2007, (33) 52.

Rights of 2001.<sup>345</sup> Back then the conclusion was that the Court simply did not have the capacity to take on this extra duty. Later, in the Report of the Group of Wise Persons to the CoM<sup>346</sup>, the introduction of a system of advisory opinions was considered interesting in order to enhance the Court's constitutional role and to foster dialogue between the ECtHR and domestic courts though. With this report the start shot was given for the future introduction of an advisory opinion procedure at the ECtHR. A proposal, initially prepared by Dutch and Norwegian experts<sup>347</sup>, was mentioned in a document written by the CDDH in preparation of the conference in Interlaken as part of its medium- and long-term vision for the Convention system<sup>348</sup>, although back then the Court itself was not totally convinced that an advisory opinion procedure would be a good idea<sup>349</sup>. Apparently not much was done with this proposal at the first conference in Interlaken as it did not reappear until the final declaration of the Izmir Conference, where it is mentioned as a means *"to contribute actively to diminishing the number of applications"*<sup>350</sup>. The CoM (and thus the CDDH under its auspices) was hereby invited to reflect on the advisability of introducing such a procedure. In preparation of the third conference in Brighton in 2012 a *Final report on measures requiring amendment of the European Convention on Human Rights*<sup>351</sup> was therefore adopted by the CDDH, further examining what would become the outlines of the future advisory opinion procedure. After the Brighton Conference the DH-GDR was asked by the CDDH to make further progression on the proposed advisory opinion procedure. Under the supervision of the CDDH a sub-commission of the DH-GDR, GT-GDR-B – the same commission that was asked to prepare Protocol No. 15 –, then prepared what was to become the future Protocol No. 16.<sup>352</sup>

On the 15<sup>th</sup> of October 2012 a Draft Protocol No. 16 was issued by GT-GDR-B.<sup>353</sup> The plenary DH-GDR thereafter examined and adopted draft Protocol No. 16 and transmitted it to the CDDH.<sup>354</sup> The draft was further amended by the CDDH after comments made by some (national) experts and an opinion of the ECtHR had been received<sup>355</sup> and the final Draft Protocol was subsequently sent to the CoM in April 2013.<sup>356</sup> The CoM adopted this Draft Protocol at its 1168th meeting on

---

<sup>345</sup> Evaluation Group, Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, 27 September 2001, EG Court(2001)1, <https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr>, para. 84.

<sup>346</sup> Ministers' Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, paras. 76-86; Y. HAECK, *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2011, 10.

<sup>347</sup> CDDH, Draft elements for Protocol No. 16, 2012, GT-GDR-B(2012)005.

<sup>348</sup> CDDH, Opinion on the issues to be covered at the Interlaken Conference, 1 December 2009, CDDH(2009)019 Addendum I, para. 19.

<sup>349</sup> ECtHR, Opinion of the Court on the Wise Persons' report, 2 April 2007, [www.echr.coe.int](http://www.echr.coe.int), 3.

<sup>350</sup> Izmir Declaration of 27 April 2011, [www.coe.int/izmir](http://www.coe.int/izmir), 4.

<sup>351</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I.

<sup>352</sup> These are the two preparatory meeting reports by GT-GDR-B: CDDH, Meeting Report, 14 September 2012, GT-GDR-B(2012)R1 and CDDH, Meeting Report, 15 October 2012, GT-GDR-B(2012)R2.

<sup>353</sup> CDDH, Draft Protocol No. 16 to the Convention, 15 October 2012, GT-GDR-B(2012)R2 Addendum III.

<sup>354</sup> CDDH, Report of 2<sup>nd</sup> meeting, 31 October 2012, DH-GDR(2012)R2.

<sup>355</sup> CDDH, Draft Protocol No. 16 to the Convention, 30 November 2012, CDDH(2012)R76 Addendum V.

<sup>356</sup> CDDH, Report, 8 April 2013, CDDH(2013)R77.

the 10<sup>th</sup> of April 2013<sup>357</sup>, thereby respecting the deadline set up in the Brighton Declaration for the CoM to draft the optional Protocol by the end of 2013.<sup>358</sup> On the 28<sup>th</sup> of June PACE approved the Draft Protocol.<sup>359</sup>

The Protocol is open for signature from the 2<sup>nd</sup> of October 2013 onwards and will finally enter into force after it has been ratified by ten State Parties to the Convention (Article 8).

### 6.3.3. Protocol No. 16: an overview

**Article 1** clearly defines the scope of the advisory opinion procedure:

1. *“Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.*
2. *The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.*
3. *The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.”*

The Protocol starts with *“Highest courts and tribunals”*, without an article at the beginning of the sentence. In the Explanatory Report to Protocol No. 16 (hereafter: the Explanatory Report) it is explained that this was done deliberately in order to give national authorities the opportunity, in accordance with Article 10, to decide on their own behalf which courts and tribunals are considered to be *“highest”* without limiting them to choose only their constitutional or supreme court. Allowing all courts and tribunals within the CoE to request advisory opinions, as is the case with the preliminary rulings before the CJEU, was deemed unsuitable for the ECtHR as it would cause total congestion of the Court.

Originally a phrasing much like the one used in article 267(3) TFEU was favoured.<sup>360</sup> This would have limited the right to request for advisory opinions to national courts against whose decisions there are no judicial remedies under national law, but as this – and similar proposals – did not work consistently across all legal systems, it was abandoned for the more flexible *“highest courts and tribunals”*.<sup>361</sup> Consequently, these highest courts and tribunals need not even be those to which recourse must have been made in order to satisfy the requirement of exhaustion of domestic remedies under Article 35(1) of the Convention<sup>362</sup> – although they must clearly be in the apex of the national judicial system.

While investigating the possibility of introducing an advisory opinion procedure at the ECtHR, the CDDH also took a look at the suggestion to give governments the opportunity to request

---

<sup>357</sup> Ministers’ Deputies, Brighton Declaration – Follow-up – Steering Committee for Human Rights - Draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Explanatory Report thereto, 10 April 2013, CM(2013)31 and CM(2013)31 add.

<sup>358</sup> Brighton Declaration of 20 April 2012, <http://hub.coe.int/20120419-brighton-declaration>, B., 12, d).

<sup>359</sup> Preamble to Protocol No. 16 to the ECHR.

<sup>360</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 57.

<sup>361</sup> CDDH, Meeting Report, 14 September 2012, GT-GDR-B(2012)R1, 3.

<sup>362</sup> Explanatory Report to Protocol No. 16 to the ECHR, 2 October 2013, para. 8.

advisory opinions, *e.g.* on the conformity of envisaged legislation with the Convention. This was however considered to be too risky as politically sensitive requests could be asked to the Court<sup>363</sup> and consequently it was not given further consideration in later reports. In Chapter 7.2. a similar proposal will nonetheless be considered for a future reform.

A further interesting issue of article 1(1) of the Protocol is that it states that courts and tribunals “*may*” request advisory opinions. There is thus, in accordance with the subsidiarity principle which is mentioned in the Protocol’s preamble, no obligation on national courts and tribunals to request an advisory opinion, contrary to what is (partially) the case with the preliminary ruling system at the CJEU (see subchapter 6.3.4.). If it had become an obligation, the ECtHR would probably never survive the additional workload.

As a further consequence of the optional character of this right to request for an advisory opinion the requesting court or tribunal may also withdraw its request at any time<sup>364</sup>, if it is of the opinion that it takes the Court too long to deliver an advisory opinion for example. In any case: the Court remarks that advisory opinions will be given priority over individual applications.<sup>365</sup> An amendment to set a deadline by which the requesting court or tribunal could withdraw its request was however withheld as there was no consensus on where to set the deadline.<sup>366</sup>

The requesting court or tribunal may only seek an advisory opinion “*in the context of a case pending before it*”, **article 1(2)** mentions. This must not necessarily be a contentious case (a reference to which was deleted in the final Explanatory Report at the request of the Polish and French representatives<sup>367</sup>). The only requirements are that the question has arisen in the context of a case pending before the requesting court or tribunal and that there is no abstract review of legislation.<sup>368</sup>

The request of the court or tribunal should pertain “*questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto*” (article 1(1)). This phrasing is inspired by Article 43(2) ECHR and it is thus to be expected that requests for advisory opinions will be granted, for example, in cases where the Court could depart from previous case law or cases on which there is no established case law yet.<sup>369</sup> It has also been suggested to the Court not to accept requests unless the question affects many people or is of general interest.<sup>370</sup> The Explanatory Report mentions that “*the Court would*

---

<sup>363</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 59.

<sup>364</sup> Explanatory Report to Protocol No. 16 to the ECHR, 2 October 2013, para. 7.

<sup>365</sup> ECtHR, Opinion of the Court on the Wise Persons’ report, 2 April 2007, [www.echr.coe.int](http://www.echr.coe.int), 2.

<sup>366</sup> CDDH, Report of 2<sup>nd</sup> meeting, 31 October 2012, DH-GDR(2012)R2, para. 8, iv.

<sup>367</sup> CDDH, Written comments on draft Explanatory Report to Protocol No. 16, 8 February 2013, DH-GDR(2013)007, 2; CDDH, Compilation of written comments on draft Explanatory Report to Protocol No. 16, 26 October 2012, DH-GDR(2012)015, 5.

<sup>368</sup> Explanatory Report to Protocol No. 16 to the ECtHR, 2 October 2013, para. 10.

<sup>369</sup> P. GRAGL, “(Judicial) love is not a one-way street: the EU preliminary reference procedure as a model for ECtHR advisory opinions under draft Protocol no. 16”, *E.L.Rev.* 2013, (229) 234.

<sup>370</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, para. 61.

*hesitate to refuse a request that satisfies the relevant criteria*".<sup>371</sup> This nonetheless immediately leaves the door open to the Court to put further restrictions on courts and tribunals to request advisory opinions (to avoid a further backlog *e.g.*).

For a conclusive answer on what "*questions of principle*" are we will however have to wait until the panel that will decide on whether or not to accept the request (article 2) has delivered its first decisions, as this panel is required to give reasons for any refusal to accept the request (**article 2(1)**). The ECtHR mentioned in a response to this article 2(1) that it would have preferred to only give general guidelines and indicated that now that the panel is required to give reasons, these reasons will not be extensive in order to avoid delays.<sup>372</sup>

To assist the panel and the Grand Chamber in their decisions and advisory opinions the requesting court will be obliged to give reasons for its request and to provide the relevant legal background of the pending case (**article 1(3)**). A detailed list of what this comprises is to be found back in the Explanatory Report<sup>373</sup>.

If the panel – which differs from that of Article 43 ECHR as it will include the national judge (**article 2(3)**) – accepts the request, it is up to the Grand Chamber to deliver an advisory opinion. The fact that there is a panel deciding on whether or not to accept the request for an advisory opinion makes clear that the advisory opinion procedure is not only non-compulsory for the national courts and tribunals, but that it is neither compulsory for the ECtHR itself. It is unsure whether the Court is allowed to reformulate the questions. In the Draft Explanatory Report this was explicitly stated, but the final Explanatory Report remains silent on this issue.<sup>374</sup> In the proceedings leading up to the eventual advisory opinion the CoE Commissioner for Human Rights and the State Party to which the requesting court or tribunal pertains shall have the right to submit written comments and take part in any hearing (article 3). For the national government this right is particularly interesting as it allows the government to further explain the relevant domestic legislation and in that way have an indirect advice on the compatibility of its legislation with the Convention. The parties to the domestic proceedings are excluded from the automatic right to intervene in the advisory opinion procedure. The President of the Court may invite them to submit oral or writing comments, just as he may invite any other third party, but he is not required to do so. The motivation for this rule is that the advisory opinion procedure is non-adversarial, that 'parties' has different meanings in different member states (which makes such a provision too difficult to apply) and that deciding otherwise would cause delays.<sup>375</sup>

There has been strong critique on this exclusion though and rightly so. It is said that certainly in cases where public authorities are parties to the domestic proceedings this article creates an

---

<sup>371</sup> Explanatory Report to Protocol No. 16 to the ECtHR, 2 October 2013, para. 14.

<sup>372</sup> ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, 4 April 2011, [www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions\\_en.pdf](http://www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions_en.pdf), 9.

<sup>373</sup> Explanatory Report to Protocol No. 16 to the ECtHR, 2 October 2013, paras. 11-12.

<sup>374</sup> CDDH, Draft Explanatory report to Protocol No. 16, 2 November 2012, DH-GDR(2012)020, para. 17.

<sup>375</sup> CDDH, Meeting Report, 14 September 2012, GT-GDR-B(2012)R1, 4; CDDH, Report of 2<sup>nd</sup> meeting, 31 October 2012, DH-GDR(2012)R2, para. 8, vi; ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, 4 April 2011, [www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions\\_en.pdf](http://www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions_en.pdf), 5 and 9.

imbalance between the parties to the domestic proceedings, even amounting to a breach of the principle of equality of arms, which is implicitly found back in Article 6 ECHR.<sup>376</sup> Although this last issue can be disputed, it cannot be denied that although the advisory opinions do not bind the national courts and tribunals they are authoritative interpretations of the ECHR by the ECtHR nonetheless. The outcome of the requests thus does matter to the parties in the domestic proceedings. Giving one party, the government, an automatic right to submit written comments and take part in any hearing and the other party not, at least appears to be at odds with the equality of arms principle to some extent.

So let us take a look at how other judicial systems deal with this issue. The ICJ had the same dilemma and solved it by giving all parties to the first case the same rights. Through advisory opinions requested by the Administrative Tribunal of the UN in cases between a UN institution and an individual the ICJ developed a custom to automatically allow all parties to the first case to take part in the advisory opinion procedures. The Court decided that in order to remain faithful to the requirements of its judicial character, advisory proceedings should comply with fundamental principles governing contentious proceedings, and thus with the principle of equality of the parties: *“General principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal.”*<sup>377</sup> The CJEU<sup>378</sup> and the Belgian Constitutional Court<sup>379</sup> also follow this approach.

For that reason it is good that it is stated in the Explanatory Report that it is expected that all parties to the case will be invited to submit written comments and take part in hearings.<sup>380</sup> But why then, one might wonder, is this not included in the Protocol itself?

Concerning the advisory opinions there are a few more features worth mentioning: (1) the proceedings shall be given high priority (category II of the Priority Policy)<sup>381</sup>, (2) of course reasons shall be given for advisory opinions (**article 4(1)**), but also (3) the advisory opinions are non-binding (**article 5**). The latter has been the subject of much debate. The advisory opinions will be as much an authoritative interpretation of the Convention to all the High Contracting Parties as the Court’s judgments and decisions are<sup>382</sup>, but still: why are they non-binding? The *ratio* thereof was nicely put in words in the Draft Explanatory report, and, although this part of the Draft has not made it to the final Explanatory Report, it is still accurate: *“Article 5 states that advisory opinions shall not be binding. This reflects the intention that the procedure be as flexible as possible. The requesting court is not obliged to agree with the Court’s advisory opinion, although*

---

<sup>376</sup> CDDH, Compilation of written comments on draft Protocol No. 16, 26 October 2012, DH-GDR(2012)013, 7-8.

<sup>377</sup> ICJ, *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, (12 July 1973), [www.icj-cij.org](http://www.icj-cij.org), para 36. ; S. NEGRI, “Principle of Equality of Arms and the Evolving Law of International Criminal Procedure”, *Int’l Crim. L. Rev.* 2005, (513) 513.

<sup>378</sup> Article 96 TFEU.

<sup>379</sup> Article 91 and 106 Bijzondere Wet 6 januari 1989 op het Grondwettelijk Hof, BS 7 januari 1989, 315.

<sup>380</sup> Explanatory Report to Protocol No. 16 to the ECtHR, 2 October 2013, para. 19.

<sup>381</sup> Explanatory Report to Protocol No. 16 to the ECtHR, 2 October 2013, para. 17; P. GRAGL, “(Judicial) love is not a one-way street: the EU preliminary reference procedure as a model for ECtHR advisory opinions under draft Protocol no. 16”, *E.L.Rev.* 2013, (229) 239.

<sup>382</sup> Explanatory Report to Protocol No. 16 to the ECtHR, 2 October 2013, para. 27.

*given that it is optional to make a request, it is expected that there would only be disagreement in exceptional circumstances and for good reason.*<sup>383</sup> Moreover, the sanction for non-compliance with a non-binding advisory opinion would be the finding of a violation in a subsequent individual application and this should be enough to deter national courts and tribunals of actually not following the advisory opinion. Binding advisory opinions are furthermore said to be damaging to the relationship with national courts and tribunals.<sup>384</sup> Many other international courts render advisory opinions that are non-binding as well.<sup>385</sup>

Although one can feel sympathy for the opinion that non-binding advisory opinions are the best recipe for enhancing the dialogue between the ECtHR and the national authorities, which is important to improve national implementation of the ECHR and to improve the reputation of the ECtHR in the countries that are parties to the ECHR, still advisory opinions should be binding. That is because non-binding advisory opinions can lead to the loss of a potential gain this Protocol is expected to provide: less incoming individual applications. It is like this: in the Explanatory Report it is stated that it is expected that an individual application in a case that was subject to an earlier advisory opinion by the ECtHR will only be declared inadmissible or struck out in relation to such elements of the application that relate to the issues addressed in the advisory opinion where the advisory opinion was effectively followed by the domestic court or tribunal.<sup>386</sup> Individual applications by applicants in whose case an advisory opinion was received in their favour that was subsequently not followed by the domestic court or tribunal will thus be admissible. Such situations will however only cause hideous delays in the proceedings of these cases, damage the reputation of the ECtHR and eventually also damage the relationship between the national courts and tribunals and the ECtHR. For this reason advisory opinions should be binding.

To put it bluntly, the European Group of NHRIs argued that *“where a national court seeks an advisory opinion, it should be willing to abide by it in delivering its final judgment”*.<sup>387</sup> The group of NGOs even pleaded for *erga omnes* effect of advisory opinions.<sup>388</sup>

As a middle way it is interesting to have a look at an idea brought forward by the Slovenian government in preparation of this Protocol. The Slovenian government argued that article 5 should read as follows: *“Advisory opinions shall not be binding, but the requesting national court shall, in accordance with domestic law, address the positions from the advisory opinion in its decision”*.<sup>389</sup> This would make courts and tribunals think twice before deciding not to follow the advisory opinion. Also, it would add extra value to the continuing dialogue between national

---

<sup>383</sup> CDDH, Draft Explanatory report to Protocol No. 16, 2 November 2012, DH-GDR(2012)020, para. 26.

<sup>384</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 62.

<sup>385</sup> P. GRAGL, “(Judicial) love is not a one-way street: the EU preliminary reference procedure as a model for ECtHR advisory opinions under draft Protocol no. 16”, *E.L.Rev.* 2013, (229) 244.

<sup>386</sup> Explanatory Report to Protocol No. 16 to the ECtHR, 2 October 2013, para. 26.

<sup>387</sup> CDDH, Draft Protocol No. 16 to the Convention and interim measures – Comments received, 15 March 2013, CDDH(2013)010, 8.

<sup>388</sup> CDDH, Compilation of written comments on draft Protocol No. 16, 26 October 2012, DH-GDR(2012)013, 8.

<sup>389</sup> CDDH, Written comments on draft Protocol No. 16, 27 November 2012, CDDH(2012)021, 2.

courts and tribunals on the one side and the ECtHR on the other side, eventually contributing to a more sophisticated human rights standard in Europe.

#### 6.3.4. Preliminary rulings at the CJEU

Given the similarities between both procedures and the probable question: “*Why then did the CoE not opt for the EU example?*”, a short comparison of the advisory opinion system of Protocol No. 16 to the system of preliminary rulings at the CJEU is at its place. Actually, first, it is worth mentioning that the EU has a true advisory opinion procedure as well: one on the compatibility of international agreements and the EU Treaties (Article 218(11) TFEU), but given its different scope *ratione materiae* and *personae*, a comparison would not be very informative for the purpose of this thesis.

In order to ensure the uniform application of European Union law national courts and tribunals may request the CJEU to give a binding preliminary ruling concerning the interpretation of the EU Treaties or the validity and interpretation of acts of institution, bodies, offices or agencies of the EU when they consider that a decision on the question is necessary to enable them to give judgment. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to bring the matter before the Court (article 267 TFEU). There is however no obligation in cases where the question is irrelevant, when there is no reasonable doubt concerning the requested interpretation (*acte clair*), or when the question has already been interpreted by the CJEU (*acte éclairé*).<sup>390</sup> On the other hand there is still an obligation to request for a preliminary ruling when the national court or tribunal wants to differ from an earlier interpretation of the CJEU.

This preliminary ruling system has a much broader scope than the advisory opinion procedure at the ECtHR. In the Luxembourgian system not only highest courts and tribunals, but *any* court or tribunal can request for a ruling. Furthermore, they are sometimes even obliged to request a ruling, which will never be the case in Strasbourg (the Protocol itself is optional and the courts and tribunals *may* request for an advisory opinion). Establishing a preliminary ruling system like this in Strasbourg would be inappropriate as it would overburden the ECtHR. Also, as mentioned in the previous paragraph, the goal of the preliminary ruling system is to ensure a uniform application of EU law. This is not the case with the ECHR. The Member States to the ECHR have a certain margin of appreciation when applying some of the Convention’s provisions. It is the ECtHR’s task to establish a harmonious framework for the implementation of the ECHR at national level with national divergences accepted within certain limits.<sup>391</sup> It is for these reasons that eventually the Luxembourgian preliminary ruling system, although a clear inspiration for Strasbourg, was deemed inappropriate for the ECtHR.<sup>392</sup>

---

<sup>390</sup> ECJ C-283/81, *CILFIT v. Italy*, 1982.

<sup>391</sup> H. SUCHOCKA, “Main problems related to the reform of the ECtHR” in Council of Europe, *Reforming the European Convention on Human Rights: A work in progress* A compilation of publications and documents relevant to the ongoing reform of the ECHR, Strasbourg, Council of Europe Publishing, 2009, 202.

<sup>392</sup> Ministers’ Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, para. 80.

### 6.3.5. (Dis)advantages of the new procedure

Let us be short on this: the new advisory opinion procedure has been promoted for several reasons. It is believed that it will ameliorate the dialogue and relationship with the national courts and tribunals<sup>393</sup>, that it will allow for a judge driven approach, that it will ensure a better and more harmonious implementation of the ECHR at the national level<sup>394</sup>, that it will heighten the legitimacy and the authority of the ECtHR<sup>395</sup>, that it will equally strengthen the subsidiary nature of the ECtHR (see preamble), that it will make the Court function more efficiently and thus in the end lead to less individual applications.<sup>396</sup>

Said disadvantages are that this Protocol will only augment the workload of the ECtHR<sup>397</sup>, that it would come at the expense of the individual application procedure<sup>398</sup>, that the non-binding character of the advisory opinions will undermine the authority of the ECtHR and will work contra-productive<sup>399</sup>, that it runs counter to the principle of subsidiarity even<sup>400</sup>, that it allows the national courts and tribunals to shift their responsibility to the Court when encountering a fierce domestic debate<sup>401</sup>, thus potentially harming the ECtHR's reputation, but most of all, that if it was the aim of the drafters to adopt a more proactive approach with this Protocol, they failed, as the only proactive and preventive advisory opinion is the one rendered before any human rights violation takes place: one on envisaged legislation (more on this in Chapter 7.2.).

### 6.3.6. Conclusion

It is too early to jump to real conclusions, as Protocol No. 16 has not come into force yet, but that does not mean one is not allowed to have an opinion. Protocol No. 16 is a leap in the dark. Indeed, it is an asset for an international court to have an advisory opinion track, but it probably

---

<sup>393</sup> Preamble to Protocol No. 16 to the ECHR; ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, 4 April 2011, [www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions\\_en.pdf](http://www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions_en.pdf), 2.

<sup>394</sup> M. O'BOYLE, "The Future of the European Court of Human Rights", *GLJ* 2012, (1862) 1874.

<sup>395</sup> Ministers' Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, para. 81; ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, 4 April 2011, [www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions\\_en.pdf](http://www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions_en.pdf), 1; E. FURA-SANDSTRÖM, "Amplifying the effect of the Court's case-law in the states parties" in Directorate General of Human Rights, Applying and supervising the ECHR: Towards stronger implementation of the European Convention on Human Rights at national level. Colloquy organised under the Swedish chairmanship of the CoM of the Council of Europe Stockholm, 9-10 June 2008, 2008, [www.coe.int](http://www.coe.int), 78; F. KRENC, "Une nouvelle compétence consultative pour la Cour européenne des droits de l'homme: une fausse bonne idée?", *J.T.* 2012, (600) 600.

<sup>396</sup> Izmir Declaration of 27 April 2011, [www.coe.int/izmir](http://www.coe.int/izmir), 4.

<sup>397</sup> S. GREER and L. WILDHABER, "Revisiting the Debate about 'constitutionalising' the European Court of Human Rights", *HRLR*, 2012, (655) 659. ; P. EGLI, "Another Step in the Reform of the European Court of Human Rights: The Report of the Group of Wise Persons", *ZaöRV* 2008, (155) 166.

<sup>398</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, paras. 56-60.

<sup>399</sup> P. EGLI, "Another Step in the Reform of the European Court of Human Rights: The Report of the Group of Wise Persons", *ZaöRV* 2008, (155) 166.

<sup>400</sup> F. KRENC, "Une nouvelle compétence consultative pour la Cour européenne des droits de l'homme: une fausse bonne idée?", *J.T.* 2012, (600) 600-601.

<sup>401</sup> W. THOMASSEN, "Relations between the Court and States Parties to the Convention" in Council of Europe, *Reforming the European Convention on Human Rights: A work in progress A compilation of publications and documents relevant to the ongoing reform of the ECHR*, Strasbourg, Council of Europe Publishing, 2009, 257.

comes too early for this court (or too late?<sup>402</sup>). Last year the Grand Chamber delivered 12 judgments and in general it does not deliver more than 30 (see Chapter 4.2.3.). Now, not all Member States of the CoE will ratify the Protocol in the nearest future (and it is doubtful if countries such as Russia will ever ratify it or if its courts will ever make use of the Protocol), but even supposing only half would do so within two years' time and supposing half of these states would have only one of their highest courts requesting an advisory opinion to the ECtHR in 2015 (so around 12 requests) this will already *seriously* overburden the Grand Chamber. And will this advisory opinion procedure really diminish the backlog in the long-term? It can be feared that, with this Protocol, the CoE has just opened a second 'highway' to Strasbourg. The good results of the Single Judge formation in 2012 seem to have caused some sort of euphoric feeling in Strasbourg, probably hastening the drafting of Protocol No. 16. It is to be hoped the Grand Chamber's Panel will not similarly euphorically accept every request for an advisory opinion. Also, as pleaded for *supra*, some imperfections should be amended as soon as possible:

- 1) Article 3 should allow the parties to the domestic proceedings to take part in the advisory opinion proceedings.
- 2) Article 5 should state that the advisory opinions are binding or at least that the requesting national court shall, in accordance with domestic law, address the positions from the advisory opinion in its decision.

The here proposed reforms are incorporated in Annex IV as 'Draft Protocol No. 19'.

---

<sup>402</sup> K. DZEHTSIAROU and N. O'MEARA, "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control", *Legal Studies* 2014, (1) 6-7.



## 7. Future reform of the Court: proposals & analysis

### 7.1. Introduction

Now we have come to the most important part of this thesis. In Chapter 2 and 3 the Court as it functions nowadays has been discussed. In Chapter 4 an analysis on the problems of the Court's current organisation followed. Chapter 5 was about the two fundamental options for a further reform and Chapter 6 about how the reform process is progressing in recent years. In this Chapter an overview of certain critical reform proposals for a future reform will be proposed and evaluated. Three proposals are suggested on three different levels: one with a proactive approach to ameliorate the national implementation of the ECHR in the domestic jurisdictions of the member states of the CoE, a second that concerns the organisation of the Court itself and a third that should ensure that the execution of the judgments of the ECtHR is smoothened.

In selecting the reform proposals three main questions were asked that relate to the central question posed at the beginning of this thesis:

- 1) How will this reform proposal help to structurally and substantially decrease the Court's caseload to an acceptable level, especially with regard to repetitive (Category V) cases and structural problems occurring in high case-count countries? (see Chapter 4.3.)
- 2) What is its benefit for human rights protection in Europe?
- 3) And how will this proposal increase the legitimacy and authority of the ECtHR?

In this Chapter there will be a focus on three (groups of) proposals. Certainly, the ECtHR can use more than just these reforms, but a thorough analysis of three strong proposals might already provide part of the *panacea*. On the basis of the answers to the questions above it was decided that the following three proposals are to be implemented as soon as possible by the CoE:

- 1) *A priori* advisory opinions on (draft) legislation by the governments of the High Contracting Parties;
- 2) Expansion of the capacity of the Court, *i.a.* by an enlargement and internal division of the Court in a Lower and Higher Court;
- 3) Enhancement of the execution process through optimisation of the pilot judgment procedure and the introduction of default judgments and pecuniary sanctions.

### 7.2. Improvement of national implementation of the Convention: *A priori* Advisory opinions

#### 7.2.1. Introduction

The High Contracting Parties to the ECHR have to ensure that their domestic legislation is in substance compatible with the Convention.<sup>403</sup> It is for the High Contracting Parties themselves to decide how they will do this<sup>404</sup>, although substantial compatibility with the Convention will usually necessitate direct applicability and judicial enforcement of the provisions of the Convention and judicial review of legislative and executive acts on their compatibility with the

---

<sup>403</sup> A. CALIGIURI and N. NAPOLETANO, "The Application of the ECHR in the Domestic Systems", in F. FRANCONI (ed.), *The Italian Yearbook of International Law* 2010, 125.

<sup>404</sup> See for example: ECtHR, *Swedish Engine Drivers Union*, 1976, para. 50.

Convention. To ensure a correct national implementation of the Convention advisory opinions are a great asset. However as mentioned in the previous chapter, Protocol No. 16 seems to have adopted the wrong approach. In that regard it is interesting to take a look at the advisory opinion procedure at the IACtHR and to investigate the possibility of establishing a similar procedure at the ECtHR.<sup>405</sup> The CoE already has a Commission that gives opinions to governments on (envisaged) legislation with regard to constitutional questions, *the European Commission for democracy through law* (better known as the Venice Commission (hereafter: VC)), but these advisory opinions could be given more authority if they would be rendered by the ECtHR.

This proposal serves as an alternative to Protocol No. 16 to enhance the dialogue with the High Contracting Parties in a way that would strengthen the level of human rights protection in Europe in a probably more effective way because of its proactive, *a priori* approach. It is in any case to be read in conjunction with the proposals of subchapter 7.3., as first the Court's capacity has got to be expanded. It is not the intention to recommend this idea as an *ideal* alternative to Protocol No. 16, but the purpose of this proposal is to provide a suggestion to think about and reflect on in the future.

### **7.2.2. Advisory opinions at the IACtHR**

Article 64 of the Pact of San José, the American Human Rights Convention (hereafter: ACHR), provides the legal framework for the advisory opinion procedure at the IACtHR. This procedure is reserved to the organs of the Organisation of American States (hereafter: OAS) and the member states of the OAS. *Ratione materiae* and *ratione personae* there are five different ways to request for an advisory opinion. First, the member states of the OAS may consult the IACtHR regarding the interpretation of the ACHR. Second, these states can consult the IACtHR regarding the interpretation of other treaties concerning the protection of human rights in the American states. Third, the different organs of the OAS may also consult the IACtHR regarding the interpretation of the ACHR, within their sphere of competence. Fourth, these organs of the OAS can also consult the IACtHR regarding the interpretation of other treaties concerning the protection of human rights in the American states. Fifth, there is also an option open for the IACtHR to provide a member state with an opinion regarding the compatibility of any of its (proposed) domestic laws with the aforesaid international instruments. Generally speaking, the American system thus does not provide in an option for the national courts and tribunals to request for an advisory opinion on specific interpretational questions that arise in pending cases at the IACtHR, as in Europe, but in a procedure to ask for abstract questions of interpretation to the ACHR and to screen (proposed) domestic laws on their compatibility with the human rights as protected in the ACHR.

The American system has some interesting benefits that are lacking in the future European system. For instance, the advisory opinion procedure at the IACtHR has a broad scope. The fact

---

<sup>405</sup> The African Court of Human Rights also has an audacious advisory opinion procedure, with a very broad scope: "At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the [African Charter on Human and Peoples' Rights] or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission." (Article 4(1) of the Protocol on the Establishment of an African Court on Human and Peoples' Rights). This Court has however not delivered any advisory opinions yet, so its effectiveness cannot be evaluated.

that, apart from interpreting the ACHR, the IACtHR is also authorised to interpret *any other treaty* that is concerned with the protection of human rights in the American states has made this advisory opinion procedure unique in our world. The IACtHR has for instance already given an advisory opinion on article 36 of the Vienna Convention on Consular Relations.<sup>406</sup> This kind of advisory jurisdiction can also be called truly preventive, contrary to the procedure of Protocol No. 16. Under the new European system it is still a precondition that a violation of human rights has occurred before an advisory opinion can be requested, while in America it is possible to already request for an advice on proposed legislation. It is evident that this is quite a significant advantage of the American system.

Another minor advantage of the American system is that the IACtHR has the explicit right to reformulate the request. Equal to the European human rights system however, the advisory opinions of the IACtHR are non-binding either.

The Council of Europe has once also considered to introduce a system whereby her member states could request the ECtHR for an advisory opinion regarding their (proposed) legislation. In the end the Council of Europe did however not opt for such a system, because it feared that this would lead to a lot of highly political disputes to be sent to Strasbourg.<sup>407</sup> This is however a fairly weak argument. The IACtHR solves this problem for example by just refusing such requests for further examination.<sup>408</sup>

### **7.2.3. Opinions of the Venice Commission**

Established in May 1990, the VC is the Council of Europe's advisory body on constitutional matters. Its individual members are university professors of public and international law, supreme and constitutional court judges, members of national parliaments and a number of civil servants. They are designated for four years by the member states, but act in their individual capacity. The VC provides legal advice to the member states of the CoE (and 12 other countries) to help them in bringing their legal and institutional structures in line with European standards and international experience in the fields of democracy, human rights and the rule of law. As such it also helps to ensure the dissemination and consolidation of a common constitutional heritage and provides emergency constitutional aid to states in transition. The VC works in three areas: (1) democratic institutions and fundamental rights, (2) constitutional justice and ordinary justice and (3) elections, referendums and political parties. It *i.a.* delivers non-binding opinions on these matters upon request submitted by the CoM, PACE, the Congress of Local and Regional Authorities of Europe, the Secretary General, or by a state (parliament, government, head of state and judiciary) or international organisation or body participating in the work of the Commission (EU, OSCE, etc.) (article 3(2) of the Revised Statute of the European Commission for Democracy through Law). The VC acts as an advisor for governments on draft legislation – but it declines to propose texts or parts of texts itself – and acts as an auditor of legal text which are

---

<sup>406</sup> IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999.

<sup>407</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 59.

<sup>408</sup> IACtHR, *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*, Advisory Opinion OC-12/91 of 6 December 1991.

already in force. Furthermore, it also engages in writing *amicus curiae* briefs to the ECtHR and to national courts and tribunals.

In its opinions the VC assesses compliance of constitutional and legal texts with hard-law and soft-law standards. These standards include those deriving from the ECHR and the ECtHR case law, but also those deriving from recommendations by the CoM or best practices prepared by the VC itself.<sup>409</sup> The VC refers in the large majority of its advices to the case law of the Court. The case law of the ECtHR is basically its starting point. The VC does however refrain from commentating on the Court's case law as a way of respecting the Court's authority to interpret the Convention.<sup>410</sup> Also, the VC's opinions do differ from the Court's judgments as well. Indeed, as already mentioned, the VC takes into account more than just the ECHR and because of that it sometimes applies a stricter standard than the ECtHR. This is for example the case in the Venice Commission's *Opinion on the Constitutional and Legal Provisions relevant to the prohibition of Political Parties in Turkey*.<sup>411</sup>

Since its inception the VC has rendered about 500 opinions.<sup>412</sup> Its opinions are for a major part comparative constitutional engineering. They are never abstract or merely academic, always aiming at providing viable answers to the questions which underlie any constitutional or legal reform. Before adopting an opinion, the VC delegation often travels to the country in question and meets with the Parliament (both majority and opposition, extra-parliamentary opposition if need be), with the President, the Government, the judiciary, the Constitutional Court, the civil society, media, Ombudsman, etc. The aim of this visit is threefold: (1) to learn and understand more about the domestic system and context; (2) to understand the aims of the reform in question and the arguments in favour and against the reform; (3) to establish a channel of communication and a relationship of trust with the reform stakeholders. The VC's opinions are prepared in constant dialogue with the authorities and the society of the country concerned. This minimizes the risks involved with the fact that the VC's understanding of the domestic context can, admittedly, never be full. Meeting with the political opposition also allows the VC to provide advice that is in the interest of the whole country, not merely in the interest of the ruling majority. As a result its opinions are favoured by both majority and opposition. An example of this are the VC's opinions to the Ukrainian government on its Constitution of 1996 and the constitutional amendments of 2004. These opinions were extensively referred to not only in the debates on the amendments of the Constitution themselves, but also in the debates

---

<sup>409</sup> G. BUQUICCHIO and S. GRANATA-MENGHINI, "The Venice Commission Twenty Years on: Challenge Met but New Challenges Ahead", in M. VAN ROOSMALEN, B. VERMEULEN, F. VAN HOOF and M. OOSTING (eds.), *Fundamental Rights and Principles, Liber Amicorum Pieter van Dijk*, Antwerpen, Intersentia, 2013, (241) 243-244.

<sup>410</sup> P. VAN DIJK, "Europees Hof voor de Rechten van de Mens en Venetië-Commissie, een praktijk van wederzijdse bevruchting", *NJCM* 2010, (884) 893 and 895.

<sup>411</sup> European Commission for Democracy through Law, *Opinion on the Constitutional and Legal Provisions relevant to the prohibition of Political Parties in Turkey*, CDL-AD(2009)006, 13 March 2009, para. 59.

<sup>412</sup> Council of Europe, Venice Commission, [www.venice.coe.int/WebForms/pages/?p=01\\_Presentation](http://www.venice.coe.int/WebForms/pages/?p=01_Presentation) (last accessed 27 April 2014).

surrounding the annulment of the constitutional amendments of 2004 in September 2010 by the Constitutional Court of Ukraine.<sup>413</sup>

Its opinions are always made public and compliance with the VC's opinions is ensured through dialogue with the national authorities and political pressure by the bodies of the CoE.

The opinions by the VC are comparable to the advisory opinions of the IACtHR to a certain extent, although there is some divergence. Firstly, the VC renders opinions not only on request of governments and organs of the CoE, but has also rendered opinions on request of national courts (although only very few<sup>414</sup>). Secondly, while the IACtHR has in the past been requested to render advisory opinions about the compulsory membership in an association prescribed by law for the practice of journalism, naturalization, the death penalty, children rights, etc.<sup>415</sup>, the VC is more concerned with state-building aspects (certainly in its first decennium) and core constitutional issues regarding the political and judicial institutions of states, although it also renders opinions with regard to other human rights issues, such as the freedom of the press<sup>416</sup>. Thirdly, the IACtHR's advisory opinions are much more extensive than those of the VC and fourthly, the VC works by unanimity while the IACtHR allows majority voting. For the rest – and in their essence – both procedures are very comparable though: providing national governments *et al.* advice *i.a.* with regard to (draft) legislation on the compatibility with fundamental rights.

#### **7.2.4. Proposal: advisory opinions on envisaged legislation at the ECtHR**

The VC has a comparable competence *ratione materiae* as that of the European Court of Human Rights, although they both exercise it in a different way. While the Court renders judgments on request of individual applicants and in state versus state cases, the VC delivers opinions on request of governments *et al.* on (proposed) legislation. Moreover, as has been mentioned in the previous subchapter, the VC refers in the large majority of its advices and reports to the case law of the Court.

Would it then not be better to centralise both the function of delivering justice in individual cases and providing governments with advice at the level of the ECtHR, which is after all the supreme authority to interpret the Convention? There are several good arguments why this would indeed be a good proposal. Firstly, there is the risk of diverging legal opinions between the ECtHR and the VC. Certainly now with Protocol No. 16 it seems quite odd that the VC would still, concurrently with the ECtHR, render opinions in the form of *amicus curiae* briefs to national courts, as it does at present. Secondly, the authority of the rendered opinions will be strengthened if the ECtHR would deliver these opinions, not only because it would make these advisory opinions an integral part of the Court's case law of authoritative interpretations of the ECHR, but also because it would make these opinions more visible throughout Europe. This will

---

<sup>413</sup> G. BUQUICCHIO and S. GRANATA-MENGHINI, "The Venice Commission Twenty Years on: Challenge Met but New Challenges Ahead", in M. VAN ROOSMALEN, B. VERMEULEN, F. VAN HOOF and M. OOSTING (eds.), *Fundamental Rights and Principles, Liber Amicorum Pieter van Dijk*, Antwerpen, Intersentia, 2013, (241) 246-250.

<sup>414</sup> P. VAN DIJK, "Europees Hof voor de Rechten van de Mens en Venetië-Commissie, een praktijk van wederzijdse bevruchting", *NJCM* 2010, (884) 889.

<sup>415</sup> IACtHR, Advisory opinions, [www.corteidh.or.cr/index.php/en/advisory-opinions](http://www.corteidh.or.cr/index.php/en/advisory-opinions) (last accessed 30 April 2014).

<sup>416</sup> European Commission for Democracy through Law, Opinion on the Draft Law of Luxembourg on Freedom of Expression in the Media, CDL-AD(2002)18, 23 July 2002.

then lead to higher compliance with the advisory opinions by the requesting authorities and higher human rights protection in Europe. Lastly, the Court – just as the IACtHR – has a broader competence *ratione materiae* than the VC, which makes it more interesting to give the Court the competence to deliver advisory opinions on (draft) legislation. The Court’s case law does not merely touch upon issues of constitutional nature and the establishment of core-democratic institutions, but also on many other branches of the law such as family law, labour law, privacy law, etc.

The aim of this thesis is first of all to reduce the backlog of the ECtHR. It is clear that in any case introducing this procedure at the Court will augment the workload of the ECtHR. Also, as mentioned in subchapter 7.2.2., the CoE does not seem to be keen on introducing a said practice at the Court. Judge BIANKU’s answer to the question whether a similar advisory opinion procedure as the one of the IACtHR should be introduced in Strasbourg was very clear: “*We are not the IACtHR*”, further explaining his statement in stating that the difference in workload made both courts incomparable<sup>417</sup>. But there are a few reasons why reflecting on introducing this procedure in the (distant) future at the ECtHR is worth the time nonetheless. Firstly, it is quite odd that the ECtHR – the most successful human rights court in the world – does not have this *a priori* advisory opinion procedure, while others such as the IACtHR and the African Court of Human Rights do have it. Secondly, this procedure is truly preventive (as opposed to the advisory opinion procedure of Protocol No. 16) and thus far more effective than any other procedure in protecting human rights. Thirdly, on the long term this procedure – far more than the one of Protocol No. 16 – has the potential of alleviating the Court’s workload because the number of individual applications coming to Strasbourg will decline as a consequence of the enhanced implementation of the Convention at the national level that will be the result of this procedure.

It is for all these reasons that here the introduction of an *a priori* advisory opinion procedure at the ECtHR is discussed and proposed. It is not the intention to replace the VC by giving its tasks to the Court. The VC sometimes delivers opinions upon requests that have nothing to do with the compatibility of (draft) legislation with the Convention and it gives advice to non-CoE countries as well. For cases such as these the VC should remain in existence. Moreover, it could even be interesting to have the VC issue *amicus curiae* briefs to the Court in the procedure that is proposed here.

The system would work as follows. The Court’s Grand Chamber<sup>418</sup> would be made competent to render advisory opinions regarding the compatibility of (draft) legislation with the ECHR or the protocols thereto upon request submitted by the High Contracting Parties’ legislative or executive government branches. The Grand Chamber should of course be given the right to refuse to accept controversial questions that would be damaging to the Court’s reputation or any other question it deems irrelevant to respond to as an international court.

It is true that a major advantage of the opinions rendered by the Venice Commission is that the issues raised in the questions are not merely analysed on their compatibility with the ECHR, but also on their compatibility with many other (soft) law rules. As such its opinions are more useful

---

<sup>417</sup> Interview of Judges LEMMENS and BIANKU of 7 February 2014.

<sup>418</sup> The CJEU delivers advisory opinions with 28 judges, the IACtHR with 7.

than an analysis of the issues at stake on their mere compatibility with the Convention. The IACtHR also has an extensive competence as to which rules it can examine the compliance with of the (draft) legislation in question (see subchapter 7.2.2.). Already now, the ECtHR takes into account other instruments (*e.g.* international law standards) apart from the ECHR through the technique of integral interpretation of the ECHR.<sup>419</sup> It is recommendable that the ECtHR uses this same technique when rendering advisory opinions in order to give full utility to this procedure (if it would ever be given the competence to deliver *a priori* advisory opinions). Giving it the explicit competence to render advisory opinions on the interpretation or application of other treaties protecting human rights in Europe (*cf.* IACtHR) would be a step too far. There must always be a clear link to an article of the ECHR or of one of the Protocols thereto.

The advisory opinions of the ECtHR need not be as extensive as those of the IACtHR. The ECtHR simply doesn't have the time and resources to write such extensive advisory opinions. It is of course up to the Grand Chamber to decide on the extensiveness of its advisory opinions by itself.

The advisory opinions should not be binding either. The advisory opinions here are different from those of Protocol No. 16. In those advisory opinions it concerns questions from a court or tribunal on the precise application and interpretation of the ECHR in a specific case and an answer given to that court or tribunal by the supreme authority on the interpretation of the ECHR. Here however it concerns political bodies asking questions concerning issues to be resolved in legislation, which is an issue of political bargaining. In accordance with the principle of subsidiarity, the governments of the High Contracting Parties should be free to determine how a law will be phrased and drafted. It would be good though to oblige governments to provide reasons to the Court why they find it necessary to depart from the opinion of the ECtHR in case they do.

### **7.2.5. Conclusion**

The VC works properly at present and this reform proposal is merely an idea most might even consider unworthy the try or cost. However it is to be preferred to give this Court the competence to deliver *a priori* advisory opinions to CoE organs and governments of the member states for many reasons. It will bring home a procedure that in essence belongs to the Court, will enhance the strength of this procedure because of the authority of the Court, will similarly enhance the Court's authority, will ensure a higher level of observance of the ECHR at the national level and will in the long future eventually lead to less incoming individual applications to the ECtHR.

The VC delivers approximately 20 to 40 opinions per year (and the Court's jurisdiction to deliver such advisory opinions would probably be even somewhat larger). That would indeed imply a heavy burden on the Grand Chamber. It is for that reason that this procedure is only an idea to be implemented later. Also, this proposal is to be read together with the proposals of Chapter 7.3., because the present Court would indeed be unable to administer this procedure.

---

<sup>419</sup> P. VAN DIJK, "Europees Hof voor de Rechten van de Mens en Venetië-Commissie, een praktijk van wederzijdse bevruchting", *NJCM* 2010, (884) 893; P. LEACH, *Taking a Case to the European Court of Human Rights*, New York, Oxford University Press, 2011, 169-171.

This procedure will eventually enhance the Court's authority, it will ensure that less human rights violations take place in Europe and it will on the long term ensure that the Court's workload diminishes. Therefore: think about this idea, and hopefully somewhere in the future this procedure will become the subject of a protocol to the ECHR.

This reform proposal would necessarily require an amendment to the ECHR, to be found back in Annex III as 'Draft Protocol No. 18', but it would also necessitate an amendment of the Statute of the VC<sup>420</sup>.

### **7.3. Concerning the internal structure and working method of the Court: Expansion of the capacity of the ECtHR**

#### **7.3.1. Introduction**

The backlog the ECtHR has been facing for many years now has highlighted to the CoE that an expansion of the Court's capacity is necessary. This has resulted in an enlargement of the Registry, the establishment of the Single Judge formation and the Registry's Filtering Section. As was concluded in Chapter 4, these measures are the primary cause for the increasing output of the Court and the consequential decrease in the amount of pending cases before the judicial formations of the ECtHR in recent years.

In the Brighton Declaration a deadline was set to successfully address the Court's workload with the measures proposed in that Declaration: the end of 2015.<sup>421</sup> The Court's Registry said it was confident that by that time the backlog of clearly inadmissible cases would be resolved with the said measures<sup>422</sup>, and by the looks of it, the Registry might be right. More stringent admissibility criteria and the pilot judgment procedure have had a positive effect on the overall backlog figures as well, but nevertheless, the reduction of the backlog is mainly the credit of the Single Judge formation. Looking at the figures on pending applications before the Committees and Chambers, one sees a different, less positive picture (see Chapter 4.2.5.). Given that the cases pending before these judicial formations relate to (potentially) real human rights violations in Europe, the Court does not really have that much reason for overly enthusiastic behaviour.

The work of the Single Judges – filtering – is less complicated and less time consuming than the work before the other judicial formations of the ECtHR. The Registry has an important role to play at the level of Single Judges as the work there is more 'administrative' than judicial. The applications that are pending before the said judicial formation have been allocated to it by the Registry itself because they are *clearly* inadmissible for procedural reasons. The subsequent inadmissibility decisions can be made rather quickly and do not cause serious difficulties for the judges nor the Registry. The same counts to some extent also for the Committees, who mostly deal with WECL (well-established case law) and thus repetitive cases, but this cannot at all be said with regard to the Chambers. The same successful synergy between judges, rapporteurs and Registry will thus not work in the higher echelons of the Court.

---

<sup>420</sup> Resolution (2002)3 of the Committee of Ministers on the Revised Statute of the European Commission for Democracy through Law of 21 February 2002.

<sup>421</sup> Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=D,20,j](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=D,20,j)).

<sup>422</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 41.

How can a court of 47 judges and a registry of 640 staff members reasonably expect to be able to achieve its aim to deal with 65,000 cases per year in less than two years upon receipt, 90% of which even within a few months? In 2012 it still took the Court 37 months (3 years and 1 month) only to *communicate* a *prima facie* admissible application to the concerned national government (see Chapter 4.2.7.). How can the Court reasonable expect that it will be able to deal with incoming applications before the Single Judge formation and the other judicial formations without an increase of the budget and/or an enlargement of the Court's judiciary or Registry? Because even when the backlog before the Single Judge formation has been dealt with by 2015 and the Registry starts focussing on the backlog that is pending before the Committees and Chambers, still more than 50,000 applications will be allocated to the Single Judge formation each year (cases the Registry aims to deal with within 6 months from their application date). This, together with the rising figure of applications pending before the Commissions, are indications that all is not yet well at the ECtHR. A reform of the Court is thus once more urgently needed, rather before 2015, because the current situation is regrettable for human rights protection in Europe. As long as the backlog on the applications of higher priority does not go down considerably, the ECtHR has no right to be optimistic or euphemistic.

It is for this reason that in this subchapter several reform proposals that concern a further enhancement of the Court's capacity will be proposed. These reforms will ensure that the Court will in the future be able to work swiftly and as thoroughly as necessary on all of the applications it gets in so as to fulfil its aim of a pragmatic individual justice approach, while still ensuring a strong constitutional case law through its Grand Chamber (see Chapter 5.4.). This will in the end enhance the authority of this Court and enhance human rights protection in Europe.

### 7.3.2. Summary exposition of the main proposals

Numerous proposals have been made in the doctrine with regard to boosting the Court's capacity. The CoE's internal reform organ, the Steering Committee for Human Rights (CDDH), has also been very active on this topic. The first group of proposals concerns the Registry. Some concern an entire rethinking of the Registry's functions. It has been proposed to make it the Court's main filtering organ by giving it the authority to decide on clearly inadmissible cases by itself.<sup>423</sup> An alternative concerns making the Registry competent to give applicants of *prima facie* clearly inadmissible applications a provisional advice on the probable outcome of their application (read: on the probable inadmissibility decision).<sup>424</sup> Other proposals in this group concern an enlargement of the Registry to enhance the synergy with the Court's judges. This can

---

<sup>423</sup> Evaluation Group, Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, 27 September 2001, EG Court(2001)1, <https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr>, para. 98; CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 44; Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012, para. 361; P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 27; M. O'BOYLE, "The Future of the European Court of Human Rights", *GLJ* 2012, (1862) 1871; T. DAVIS, "Some starting points for our reflection on the future of the Court" in Council of Europe, *Reforming the European Convention on Human Rights: A work in progress A compilation of publications and documents relevant to the ongoing reform of the ECHR*, Strasbourg, Council of Europe Publishing, 2009, 224.

<sup>424</sup> H. C. KRÜGER, "The European Commission of Human Rights: Aspects of its Past and Possibilities for the Future", in X., *Liège, Strasbourg, Bruxelles: Parcours des droits de l'homme: Liber Amicorum Michel Melchior*, Limal, Anthemis, 2010, (457) 475.

be done by plainly employing more staff members<sup>425</sup>, or by seconding more national judges and lawyers to the Registry<sup>426</sup>. Another group of proposals concerns the Court's judiciary. Most of these proposals concern an enlargement of it, either by simply increasing the amount of judges at the ECtHR<sup>427</sup>, or by introducing a new category of (filtering) judges<sup>428</sup>, whether or not combined with an internal division of the Court into two parts: a Lower Court (previously or alternatively called the Judicial Committee, Filtering Court ...) and a Higher Court.<sup>429</sup> Some minor proposals concern a change to the internal organisation of the Court's judiciary, such as the implementation of Article 26(2) regarding Chambers of five judges<sup>430</sup>, or a shift in work from the Single Judge formations to the Committees and Chambers.

### 7.3.3. An analysis

#### 7.3.3.1. The Registry

As mentioned *supra* there are different proposals with regard to a reform of the Registry. They range from adding staff members to the Registry, to giving it more authority and even to giving it

---

<sup>425</sup> M. EATON, "The New Judicial Filtering Mechanism: introductory comments", in Council of Europe Future developments of the ECtHR in the light of the Wise Persons' Report, Strasbourg, Council of Europe Publishing, 2009, (251) 253; Y. HAECK and J. VANDE LANOTTE, "Desperately Trying to Keep the Titanic Afloat: the Reform Proposals concerning the European Convention on Human Rights after Protocol nr. 14", *Int.Am. & Eur.Hum.Rts. J.* 2008, 122; W., VERRIJDT, "De gevolgen van het Elfde Protocol bij het E.V.R.M.", *Jura falc.* 2002-2003, 627-628.

<sup>426</sup> Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012, p. 63, recommendation 34; Interlaken Declaration of 19 February 2010, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, B., 4., e](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, B., 4., e); Izmir Declaration of 27 April 2011, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, F., 5.](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, F., 5.); Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, D., 20., b](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, D., 20., b).

<sup>427</sup> CDDH, Guaranteeing the long-term effectiveness of the European Court of Human Rights, Addendum to the final report containing CDDH proposals, 21 March 2003, CDDH(2003)006 Addendum final, Proposal B.7; Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, D., 20., e](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, D., 20., e); W., VERRIJDT, "De gevolgen van het Elfde Protocol bij het E.V.R.M.", *Jura falc.* 2002-2003, 625-627.

<sup>428</sup> Interlaken Declaration of 19 February 2010, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, C., 6., c\), ii.](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, C., 6., c), ii.); M. O'BOYLE, "The Future of the European Court of Human Rights", *GLJ* 2012, (1862) 1871; H. C. KRÜGER, "The European Commission of Human Rights: Aspects of its Past and Possibilities for the Future", in X., *Liège, Strasbourg, Bruxelles: Parcours des droits de l'homme: Liber Amicorum Michel Melchior*, Limal, Anthemis, 2010, (457) 473.

<sup>429</sup> PH. BOILLAT, Closing Remarks on the Conference on the future of the European Court of Human Rights of 7-8 April 2014 in Holmenkollen, 3-4; ECtHR, Position Paper of the European Court of Human Rights on proposals for reform of the European Convention on Human Rights and other measures as set up in the Report of Steering Committee for Human Rights, 12 September 2003, CDDH-GDR (2003)024, para. 3 f-g and 47-48; ECtHR, Response of the European Court to the Interim Report of the Steering Committee for Human Rights (CDDH), 2 February 2004, CDDH-GDR (2004)001, paras. 4-7; Ministers' Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, paras. 51-65; M. EATON, "The New Judicial Filtering Mechanism: introductory comments", in Council of Europe Future developments of the ECtHR in the light of the Wise Persons' Report, (251) 253; Amnesty International et al., NGO comments on the Group of Wise Persons' Report, in Council of Europe, Reforming the European Convention on Human Rights: A work in progress A compilation of publications and documents relevant to the ongoing reform of the ECHR, Strasbourg, Council of Europe Publishing, 2009, 265-266; I. KARPEN, *Reformen des Europäischen Gerichts- und Rechtsschutzsystems*, Bremen, Nomos, 2011, (208) 228-229; H. C. KRÜGER, "The European Commission of Human Rights: Aspects of its Past and Possibilities for the Future", in X., *Liège, Strasbourg, Bruxelles: Parcours des droits de l'homme: Liber Amicorum Michel Melchior*, Limal, Anthemis, 2010, (457) 473-474.

<sup>430</sup> L. CAFLISCH, "La Cour Européenne des droits de l'homme un chantier permanent", *ZSR* 2012, (159) 180-181.

the task to take over the Court's filtering function. Enlarging or recomposing the Registry is examined first as these possible reforms will have the least significant impact on the current ECtHR structure.

### 1) Secondments

The least revolutionary proposal to reform the Registry concerns an intensification of the secondment program of national judges and lawyers (the organisation of secondments is explained in Chapter 4.2.1.). This procedure has a few major benefits. The tasks of seconded national experts are quite varied and the entire procedure is flexible, with the Court deciding whether or not, and how many secondments will take place. Furthermore, the more national experts that are being seconded, the more the Registry's capacity to handle applications increases. This then results in a positive impact on the Court's case load. Moreover, it ensures a better implementation of the Convention at the national level. The national lawyers and judges that have served a term of office at the Court for six months, one year, or longer, will ensure a protracted enhancement of the knowledge about the Convention system at home and of the cooperation between their domestic judiciary and the Court. And lastly, secondment has budgetary advantages. Article I, 2. of the Resolution (2003)5 of the CoM on secondment of international or national, regional or local officials to the Council of Europe states that seconded officials shall remain in paid employment at home and shall receive no salary from the CoE.<sup>431</sup>

There is one concern nonetheless. Although seconded national experts have to swear the same oath as the Court's Registry's staff and are carefully chosen by the Court, concerns have been raised about the independence and impartiality of seconded national experts.<sup>432</sup> The cause of this problem might be that seconded national experts are usually only selected for six months to three years which does raise the question if they can stay totally independent from their governments without fearing repercussions at the national level after their secondment. Certainly this raises concerns with regard to seconded experts coming from some of the less stable democracies of Europe. Therefore an extra effort to ensure the impartiality and independence of the seconded officials is advisable.

Apart from the concern about the independence and impartiality of certain seconded lawyers, which might negatively impact human rights protection in Europe, secondments are overall to be applauded. It is however clear that, although secondments have positive results both on the case load, protection of human rights in Europe and budgetary parameters, they are not structural enough to solve the backlog problem on their own. They are, and can further be, *part* of the solution, but they will never be enough to be the solution by themselves.

### 2) Hiring more (legal) personnel

Somewhat more significant would be an outright enlargement of the Registry of the ECtHR by hiring more personnel, preferably case lawyers. Adding more personnel to the Registry of the

---

<sup>431</sup> Resolution (2003)5 of the Committee of Ministers on secondment of international or national, regional or local officials to the Council of Europe states of the Council of Europe of 22 October 2003.

<sup>432</sup> E. FRIBERGH (The Court's Registrar), *Email to Mr. Orlov (Head of the Russian Council of Human Rights Centre "Memorial")*, 5 December 2011.

ECtHR has been proposed at numerous times<sup>433</sup>, and it will probably be proposed till the end of time. This does not prejudice the present claims that an enlargement of the Registry is urgently needed though. Already in 2003 there were concerns about judges who had to do too many administrative tasks due to a lack of administrative personnel.<sup>434</sup> Later in 2005 an internal audit of the Court revealed that the Registry would need around 880 case lawyers in order to deal with the influx of cases in the period 2005-2007 (79,400 applications were pending before the Court in 2007).<sup>435</sup> The situation does not seem to have improved a lot since then though. As mentioned in Chapter 4.2.1., the Registry has seen an enlargement of its workforce from 250 staff members in 1999 to 640 staff members in 2014 (270 case lawyers and 370 other support staff). Since 2005 – the year of the audit – the Registry has however but grown with 65 case lawyers, with now around 100,000 pending applications before the Court. It is obvious that this enlargement is not enough at all.

More personnel means more decisions and judgments. An increase in the size of the Registry has assisted in the recent falls of the number of applications pending before the Single Judges for example. A larger Registry will thus enable the Court to work faster and more efficient. Consequently, human rights cases will be directed with a quicker and thus stronger response and in that way an expanded Registry will have a positive effect on the protection of human rights in Europe. Of course, if the Registry is right with its announcement that by 2015 the backlog before the Single Judge formation will be dealt with and that afterwards the focus of the Registry and the Court could shift to the other judicial formations of the ECtHR, already some (time of the) Registry members will become ‘free’, alleviating the urge for more Registry members to some extent. The Court does however not expect that a similar move of expanding the Court’s Registry before the Committees and Chambers would help decrease the backlog before these other judicial formations in a similar way as it has helped on the level of the Single Judges<sup>436</sup> as the work of these judicial formations is incomparable. Anyhow, more personnel is recommendable. The Single Judge formation is a success story, even a minor follow-up success at the other judicial formations would be great. There will without any doubt however also be budgetary consequences to hiring more judicial personnel, but the extent of these budgetary consequences depends on how many personnel is hired.

An enlargement of the Registry is indispensable (and it surely will be even more so if the number of Judges is increased, see *infra*). To speak in concrete numbers: it seems recommendable to discuss an enlargement of the Court’s Registry with at least 50 to 100 employees at first instance. Most of them should be working as case lawyers at the Court’s Committees (because

---

<sup>433</sup> M. EATON, “The New Judicial Filtering Mechanism: introductory comments”, in Council of Europe Future developments of the ECtHR in the light of the Wise Persons’ Report, Strasbourg, Council of Europe Publishing, 2009, (251) 253; Y. HAECK and J. VANDE LANOTTE, “Desperately Trying to Keep the Titanic Afloat: the Reform Proposals concerning the European Convention on Human Rights after Protocol nr. 14”, *Int.Am. & Eur.Hum.Rts. J.* 2008, 122; W. VERRIJDT, “De gevolgen van het Elfde Protocol bij het E.V.R.M.”, *Jura falc.* 2002-2003, 627-628.

<sup>434</sup> W., VERRIJDT, “De gevolgen van het Elfde Protocol bij het E.V.R.M.”, *Jura falc.* 2002-2003, 627-628.

<sup>435</sup> Y. HAECK and J. VANDE LANOTTE, “Desperately Trying to Keep the Titanic Afloat: the Reform Proposals concerning the European Convention on Human Rights after Protocol nr. 14”, *Int.Am. & Eur.Hum.Rts. J.* 2008, 122.

<sup>436</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 44-45.

of the current backlog there) and Chambers (because of the importance of Chamber judgments). If more are deemed necessary, then this should be an option to discuss later.

### 3) Filtering decisions

Another examined proposal on the expansion of the capacity of the Registry concerns the possibility to give the Registry's lawyers (civil servants) the authority of 'assistant-judges', replacing the present Single Judge formation. This proposal has *i.a.* been suggested by the current Deputy Registrar of the ECtHR, MICHAEL O'BOYLE.<sup>437</sup> TERRY DAVIS, former Secretary General of the CoE, supports this idea as well: "*you don't need a judge in order to count to six [months]*".<sup>438</sup> In the External Audit of 2012 a slightly different idea was proposed: "*it can be asked for what reasons the inadmissibility decision should not be taken by the registry, instead of a judge, with an appeal then lying to a judge.*"<sup>439</sup>

Giving the lawyers of the Registry the function to deal with clearly inadmissible cases – whether or not appealable to a judge – certainly has benefits. The members of the Registry are very experienced and they know what they are doing, because after all most of the work of the lower echelons of the Court is done by the Registry. Also, Single Judges almost never disagree with their non-judicial rapporteurs either (only in less than 1% of the cases).<sup>440</sup> The main advantage would thus be that the time the judges now spend on the Single Judge formation, could in the future be spent on their other tasks.

Notwithstanding the certain advantages this would entail, the said proposal is unacceptable as a matter of principle. Ever since Protocol No. 11 all cases submitted in Strasbourg have been dealt with by judges. Allowing non-judicial members of the Registry to decide on admissibility decisions, even only for clearly inadmissible cases, would be incompatible with Article 34 and, in general, the right of all individuals to petition to a/the *Court*. It would damage the Court's reputation as *the* European human rights court. Moreover, nearly two-thirds of the inadmissible applications concern "manifestly ill-founded cases". This does not touch upon procedural inadmissibility decisions (*e.g.* due to the not respecting of the time limit of Article 35(1), or submission of an anonymous application (Article 35(2)(a))), but upon the scope of substantive rights of the ECHR. Such issues should be dealt with by judges. A comparable proposal to give

---

<sup>437</sup> M. O'BOYLE, "The Future of the European Court of Human Rights", *GLJ* 2012, (1862) 1871.

<sup>438</sup> T. DAVIS, "Some starting points for our reflection on the future of the Court" in Council of Europe, *Reforming the European Convention on Human Rights: A work in progress* A compilation of publications and documents relevant to the ongoing reform of the ECHR, Strasbourg, Council of Europe Publishing, 2009, 224.

<sup>439</sup> Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012, para. 361.

<sup>440</sup> CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights 15 February 2012,, CDDH(2012)R74 Addendum I, 48.

non-judges judicial functions was made by the Evaluation Group back in 2001<sup>441</sup>. This proposal was also highly criticised afterwards.<sup>442</sup>

Even though this proposal is one of the more cost efficient and flexible solutions to the problem the drawbacks with regard to human rights protection and the authority of the ECtHR of this proposal are bigger than its advantages. Giving non-judges judicial functions is not the solution to the Court's problems.

#### 4) Provisional advice

There is an attractive alternative to the previous proposal though, one that would not even require a (significant) enlargement of the Registry's workforce and would still help at reducing the Court's backlog. At present the Registry is *i.a.* responsible for the *triage* of applications and for the preparation of draft decisions. Former Secretary of the old Commission, HANS CHRISTIAN KRÜGER, proposed that the members of the Registry should get an extra function. He recalls a practice within the old Commission. It had the practice to provide provisional advice to applicants concerning the probable outcome of their applications. According to KRÜGER two out of three of the *prima facie* clearly inadmissible applications that got such an advice were not pursued afterwards in the old days.<sup>443</sup> KRÜGER claims that it is therefore recommendable to reinsert this old practice in the Convention system by giving the Registry's case lawyers the authority to give applicants a similar (summary) advice when their application as presented would on first sight appear clearly inadmissible. The Registry's lawyers would explain to the applicants in short the reasons why their case appears *prima facie* clearly inadmissible and warn them that, unless further explanations are provided to the ECtHR, their submissions will not be treated as applications before the Court. If the applicants explicitly insist that their application is brought before the Court, their applications will end up before one of the Court's judicial formations (most probably the Single Judge formation). If the applications are pursued, the ECtHR judge(s) can then apply the same reasoning in his/their decisions as was used in the advice of the Registry to declare the application inadmissible, unless the further explanations given by the applicant add new aspects to the case, or shed new light on the application.

The Registry currently already has the task to ask for additional information and documents to applicants if their applications are incomplete and to strike out those cases following a failure to do so.<sup>444</sup> Furthermore, the legal officers of the Registry nowadays *already* assist the judges on applications in a similar way. Single Judges only very rarely examine the case-files themselves and make their final decision usually on the basis of summaries and proposals prepared by the

---

<sup>441</sup> Evaluation Group, Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, 27 September 2001, EG Court(2001)1, <https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr>, para. 98.

<sup>442</sup> I. CAMERON, "The Court and the member states: procedural aspects", in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, (25) 31.

<sup>443</sup> H. C. KRÜGER, "The European Commission of Human Rights: Aspects of its Past and Possibilities for the Future", in X., *Liège, Strasbourg, Bruxelles: Parcours des droits de l'homme: Liber Amicorum Michel Melchior*, Limal, Anthemis, 2010, (457) 475.

<sup>444</sup> Registry of the European Court of Human Rights, Practice Direction on the Institution of Proceedings, 1 January 2014, [www.echr.coe.int/Documents/PD\\_institution\\_proceedings\\_ENG.pdf](http://www.echr.coe.int/Documents/PD_institution_proceedings_ENG.pdf).

Registry.<sup>445</sup> Introducing the said practice would thus not put an extra burden on the Registry. Moreover, making the Registry competent in the near future to give advice on the further admissibility of the applications would even be recommendable because of the potential of this practice to further cut back the judicial backlog (*cf.* the results at the old Commission). KRÜGER calls it “*simply a question of management and priority*”<sup>446</sup>. This practice is moreover desirable because its budgetary consequences are close to zero. It would however only shorten proceedings and alleviate the judges’ workload with regard to clearly inadmissible applications (although in doing so it would allow more time being put on other applications).

There are two concerns with this proposal. One, is that this *de facto* results in pseudo-decisions on admissibility rendered by the Registry, which could confuse applicants. However one has to think pragmatically: if the authority to give such an advice is only given to the Registry for applications that are manifestly, clearly and without any doubt inadmissible, then there can be no objection to this practice. With or without the advice, the decision in those cases will be the same no matter who decides on it: inadmissible. At present sound reasons are totally lacking for applications that are *de plano* declared inadmissible, so to give applicants a reasoned advice on their applications is in such cases only appropriate.<sup>447</sup> This practice would just be a step forward for the applicants and their lawyers. If then it is made very clear to the applicants that this is just an advice and not a decision of the Court – by putting an unambiguous disclaimer on top of the advice letter for example – there can be no objection to this practice. This proposal can even be a perfect alternative to giving Registry members the authority to render inadmissibility decisions and an alternative to the proposal made in the External Audit of 2012 to create a two-tier system of Registry decisions and decisions on appeal by Single Judges. The second concern is that it could lead to a higher workload for the Court’s Registry, because giving advice on 40,000 applications is a lot. However, together with the enlargement of the Registry, a standard procedure for these advices ensuring a swift procedure, and an expected decrease in the number of pursued applications, the potential gains would outweigh the extra work, which in the end should not be that much even given that the Registry nowadays already advises the Single Judges.

In the end it is maybe all a matter of perception and semantics, but this proposal would allow the principle that judges rule on every application to be lived up to and would not infringe on the right of individual application. As this proposal would further be good both to reduce the backlog and for human rights protection in Europe, but also as it would not include an extra financial burden on the Court, it is to be urged to put this proposal into practice.

### **7.3.3.2. The Court’s Judiciary**

With regard to the Court itself only one reform proposal will be discussed. It is quite a revolutionary proposal. Here the idea to subdivide the Court in two divisions, a Lower and a

---

<sup>445</sup> P. MAHONEY and J. SHARPE, “The Legacy of Carlo Russo: Creation of a Supreme European Court of Human Rights” in M. ROMERIS (ed.), *Liber amicorum Pranas Kūris*, Vilnius, University Vilnius Press, 2008, 281 (282).

<sup>446</sup> H. C. KRÜGER, “The European Commission of Human Rights: Aspects of its Past and Possibilities for the Future”, in X., *Liège, Strasbourg, Bruxelles: Parcours des droits de l’homme: Liber Amicorum Michel Melchior*, Limal, Anthemis, 2010, (457) 475.

<sup>447</sup> Y. HAECK and J. VANDE LANOTTE, “Desperately Trying to Keep the Titanic Afloat: the Reform Proposals concerning the European Convention on Human Rights after Protocol nr. 14”, *Int.Am. & Eur.Hum.Rts. J.* 2008, 121.

Higher Court, is proposed. As the most thorough of all proposed reforms it has the most potential in reducing the present backlog too though. However, given its revolutionary character, it is quite controversial as well (*e.g.* it goes against the one judge per state principle). But controversial or not, this reform is necessary for the Court. Less thorough reforms would not have satisfactory results:

1) As has already been mentioned *supra* with regard to the Registry, when the backlog at the level of the Single Judge formation has been dealt with by the end of 2015, a shift from the work of Single Judges to the other judicial formations would take place.<sup>448</sup> As a consequence less judges would act as a Single Judge, alleviating the other judges of this – boring – job. There have been proposals to reduce the amount of Single Judges in the future to as few as 5 judges.<sup>449</sup> In 2013 the Single Judges received an input of 45,750 cases and they dealt with approximately 80,000 cases. Between June 2010 and June 2012 20 judges were appointed as Single Judges, devoting more or less 25% of their time to work on Single Judge cases, which equals a bit less than 11% of the Court's overall judicial working time. Currently all judges (except for the President and Section Presidents) act as Single Judges (see Chapter 4.2.1.). It is unknown how much time the judges at the ECtHR currently spend on their tasks as Single Judges, but let us assume that given the Court's priority policy the Court does not spend more time on the Single Judge formation since the reorganisation of June 2012 as it did in 2011. Let us assume it has remained at  $\pm 10\%$  of the Court's time, then that means that 5 or 6 judges spending 50% of their time on the Single Judge procedure would indeed be able to render as much inadmissibility decisions (at current productivity levels: between 42,500 and 52,000 decisions) as are necessary to handle the Single Judge formation's input. However 5 or 6 is very tight, therefore it would be better to have some more judges working as a Single Judge. This means that some 5 to 10 judges might do the job, by spending 50% of their time on the Single Judge formation. This would mean there would be 10% of 'free' time for the other 37 to 42 judges. The current input at the level of the Committees and Chambers is 20,000 applications, their output is however but  $\pm 12,700$  decisions/judgments. A 10% increase in productivity would thus not at all be enough to cope with the backlog before these other judicial formations. 47 judges for a jurisdiction of almost 800 million inhabitants is just not enough.

2) Furthermore, it has also been suggested that if the number of the judges of the Chambers is reduced from seven to five, then the other judges might have time for other functions at the Court, which would then enhance the capacity of the ECtHR.<sup>450</sup> Article 26(2) foresees in such a reduction of the number of Chamber judges at the request of the plenary Court and after an unanimous decision by the CoM. The problem is however that Article 26(2) only allows such a reduction "*for a fixed period*". Also, Chamber judgements would lose some of their authority if they are rendered by less judges. Furthermore, this restructuring of the Chambers might have negative consequences for the harmonious interpretation of the Convention and might lead to an overburdening of the Grand Chamber in cases where a larger formation is deemed

---

<sup>448</sup> M. O'BOYLE, "The Future of the European Court of Human Rights", *GLJ* 2012, (1862) 1870.

<sup>449</sup> CDDH, Report of 4<sup>th</sup> Meeting, 7 September 2010, DH-GDR(2010)017, 15.

<sup>450</sup> L. CAFLISCH, "La Cour Européenne des droits de l'homme un chantier permanent", *ZSR* 2012, (159) 180-181.

appropriate to review them. For this and some other reasons<sup>451</sup>, the Court decided that the arguments in favour of requesting this restructuring to the CoM are not sufficiently persuasive (and rightly so). Therefore this proposal should not be taken into account.

Conclusion: internal shifting of work would not be enough and as a result an enlargement of this Court is necessary, certainly in order to achieve the aim set forward in Chapter 4 as well as the one of Chapter 5. As will be explained here an internal subdivision of the Court, together with an enlargement of it is a proposal that might on its own be the key solution to this problem. One does not simply subdivide the Court and increase the number of its judges however. So let us discuss here why and how this idea should be pursued.

The idea is to establish two divisions within the Court: a Lower Court (the current Single Judges and Committees) and a Higher Court (the current Chambers and Grand Chamber). It is a proposal built upon two aspects: new judges would be added to the Court and the Court would be subdivided in a Higher Court with the present (senior) judges and a Lower Court with the new (junior) judges.

Creating two subdivisions within the ECtHR is quite radical, however it is necessary. First, the Court needs more judges, because as is mentioned in the introduction to 7.3. the Court is not able to handle its caseload now and as explained a few paragraphs ago the Court will not be able to do so effectively with mere reorganizational measures. Second, less radical measures to enhance the Court's capacity are not recommendable either as mentioned *supra*. Moreover, (1) plainly adding judges has the disadvantage that it could be damaging to the harmony in the case law of the ECtHR. To cope with this issue it is essential that a strong hierarchy, as currently between the Grand Chamber and the lower Committees and Chambers, is maintained. (2) In the wake of the Brighton conference the CDDH examined the introduction of temporary and junior judges.<sup>452</sup> There is no space to elaborate on these proposals, but from an organisational viewpoint, although these CDDH proposals have good aspects, it is more advanced and efficient to create two internal bodies within the Court that are more compact, than to just add judges in general to the Court, whether regular judges or junior/temporary judges. For these reasons it is more interesting to have a look at the subdivision-proposal that includes two categories of judges (junior and senior judges) and two subdivisions of the ECtHR (Lower Court and Higher Court). This reform will enable the Court to efficiently and swiftly filter inadmissible applications, focus on more structural or imminent problems in the Higher Court, still have enough time and resources left for the handling of repetitive cases in the Committees and ensure harmony within the Court's case law.

The idea that is presented here will not take the Strasbourg system back to the two-tier system as it was known before Protocol No. 11. The Lower and Higher Court will still be part of the same

---

<sup>451</sup> See for more: CDDH, Draft CDDH report containing elements to contribute to the evaluation of the effects of Protocol No. 14 to the Convention and the implementation of the Interlaken and Izmir Declarations on the Court's situation, 7 September 2012, GT-GDR-A(2012)R2 Addendum II, para. 16.

<sup>452</sup> In the end the CDDH came to the conclusion that an increase in the amount of judges is not opportune at this moment, however it is stated in the Report that some members of the CDDH consider that an enlargement is opportune because of the time taken by the Court to deal with Committee and Chamber cases had become too long: CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 41-44-52.

institution: the ECtHR. Here an internal separation between a Lower Court and a Higher Court, that is hierarchically situated above the Lower Court, is proposed, somewhat like the division between the Court of First Instance and the Court of Justice in the Court of Justice of the European Union system. The latter division was also meant to alleviate the pressure on the ECJ.<sup>453</sup>

A comparable idea to the one proposed in this thesis has been proposed by the Group of Wise Persons, where it concerned the establishment of a Judicial Committee<sup>454</sup> and most recently, a seemingly similar idea was proposed on the Conference on the future of the European Court of Human Rights of 7-8 April 2014 in Holmenkollen<sup>455</sup>. Another proposal made in the doctrine was the establishment of a Supreme European court of Human Rights, separate from the ECtHR and taking over the Grand Chamber's tasks.<sup>456</sup> This is a very interesting idea, but its influence on the backlog would only be minimal, as this new Court would only deal with the 20ish cases the Grand Chamber currently adjudicates on a yearly basis and because it would not even be a permanent court. So here's how the Lower Court-Higher Court proposal works.

### *The junior and senior judges*

In its essence having more judges within the ECtHR is not problematic. The 'one Judge per country rule' is not fundamental. The judges at the ECtHR are not representatives of their distinctive countries (which have to be treated as sovereign equal states on the international level, as is for example the case in the Council of Ministers). They are independent magistrates who sit in their individual capacity (Article 21). Indeed, also at the IACtHR the number of judges does not equal the amount of member states to that Court (Article 52 ACHR: 7 judges for 23 active member states). Introducing new (filter) judges has also been proposed at numerous instances in the ECHR-doctrine<sup>457</sup>, by the CDDH<sup>458</sup> and even in the Interlaken and Brighton Declarations.<sup>459</sup> So it is not required for the number of judges to equal the amount of High Contracting Parties.

In the proposal that is discussed here new judges would be added to a 'Lower Court', by adding a second paragraph to Article 20 depicting the required amount for this new category of judges.

---

<sup>453</sup> J-P. COSTA, *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 244.

<sup>454</sup> Ministers' Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, paras. 51-65.

<sup>455</sup> PH. BOILLAT, Closing Remarks on the Conference on the future of the European Court of Human Rights of 7-8 April 2014 in Holmenkollen, 3-4.

<sup>456</sup> P. MAHONEY and J. SHARPE, "The Legacy of Carlo Russo: Creation of a Supreme European Court of Human Rights" in M. ROMERIS (ed.), *Liber amicorum Pranas Kūris*, Vilnius, University Vilnius Press, 2008, 281-294.

<sup>457</sup> M. O'BOYLE, "The Future of the European Court of Human Rights", *GLJ* 2012, (1862) 1871; H. C. KRÜGER, "The European Commission of Human Rights: Aspects of its Past and Possibilities for the Future", in X., *Liège, Strasbourg, Bruxelles: Parcours des droits de l'homme: Liber Amicorum Michel Melchior*, Limal, Anthemis, 2010, (457) 473.

<sup>458</sup> CDDH, Guaranteeing the long-term effectiveness of the European Court of Human Rights, Addendum to the final report containing CDDH proposals, 21 March 2003, CDDH(2003)006 Addendum final, Proposal B.7; CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, 45.

<sup>459</sup> Interlaken Declaration of 19 February 2010, [96](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=C., 6, c), ii) and 7, c), i); Brighton Declaration of 20 April 2012, www.echr.coe.int/Pages/home.aspx?p=court/reform&c=, 20, e).</a></p></div><div data-bbox=)

Each High Contracting Party would get one senior judge in the High Court and a certain amount of junior judges would be allocated amongst the High Contracting Parties. In the report of the Group of Wise Persons on the Judicial Committee a limited number of judges was also proposed.<sup>460</sup> *Supra* it has been mentioned that the Single Judge formation should be able to function properly with 5 to 10 judges putting 50% of their time on that formation. The here proposed Lower Court would encompass both the Single Judge formation and the Committees (which entails more work than the Single Judge formation), see *infra* for more on this. Therefore a Lower Court composed of 16 judges (to fill the new 8 Committees composed of 2 junior judges and 1 senior judge, see *infra*) seems recommendable.

The allocation of junior judges between the High Contracting Parties would work on the basis of a proportionality rule combined with a rotation system. Now, how would this work? Any allocation of judges that does not respect the one judge per country rule is potentially dangerous as an alteration in the composition of the Court might have consequences on the assessments of a national situation in certain cases because of the over/underrepresentation of certain countries in the ECtHR.<sup>461</sup> As a consequence the case law of the Court might alter detrimentally, which would be damaging both to the Court's legitimacy and the protection of human rights in Europe. To avoid such situations it is good to draw inspiration from Rule 25(2) of the Rules of Court on the setting up of the Court's Sections. According to that Rule "[t]he composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties." To ensure the balanced representation of the different legal systems and geographical regions of Europe in each Section, the continent is therefore divided into six regions<sup>462</sup>:

- The Latin-Western Mediterranean with 8 countries: Andorra, France, Italy, Malta, Monaco, Portugal, San Marino, Spain; (24.54% of the European population)
- The Balkan-Eastern Mediterranean with 12 countries: Albania, Bosnia, Bulgaria, Croatia, Cyprus, FYRM, Greece, Montenegro, Romania, Serbia, Slovenia, Turkey; (17.93% of the European population)
- Eastern Europe with 4 countries: the Visegrád group countries (Czech Republic, Hungary, Poland, Slovakia); (8.33% of the European population)
- The Anglo-Scandinavian countries with 7 countries: Denmark, Finland, Iceland, Ireland, Norway, Sweden, the UK; (12.29% of the European population)
- Central Europe with 7 countries: the Benelux and the German-speaking countries; (16.43% of the European population)
- The former Soviet Union with 9 countries: Armenia, Azerbaijan, the Baltic states, Georgia, Moldova, Russia, Ukraine; (27.96% of the European population).

This system can also be used to allocate the future 16 junior judges. This could result in the following allocation of judges (although this will certainly entail a lot of political bargaining to put

---

<sup>460</sup> Ministers' Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, paras. 120-123.

<sup>461</sup> CDDH, Guaranteeing the long-term effectiveness of the European Court of Human Rights, Addendum to the final report containing CDDH proposals, 21 March 2003, CDDH(2003)006 Addendum final, 30.

<sup>462</sup> A. DRZEMCZEWSKI, "The internal organization of the European Court of Human Rights: the composition of chambers and the Grand Chamber", *E.H.R.L.R.* 2000, 233-248.

it in practice): 4 judges for the Latin-Western Mediterranean group, 3 for the Balkan-Eastern Mediterranean group, 1 for the Eastern European group, 2 for the Anglo-Scandinavian group (with at least one common law judge), 2 for the Central European group and 4 for the former Soviet Union group. As not all countries would have their own national judge in the Lower Court the idea of putting into place a rotation system between countries in the same regional group is also advisable. A comparable system at least works in the EU for the appointment of Advocates General at the CJEU.<sup>463</sup>

Each group, with the unanimous support of all countries in that group, would have to propose a list of three candidates to PACE for the election of one judge (respecting the rotation system within each regional group), where after the same election procedure as currently for all judges of the ECtHR would continue (Article 22). The term of office of the junior judges should be three years, so as to ensure a regular rotation of judges. Their remuneration can be lower than that of the senior judges. In the later election for senior judges, the junior judges could be given preferential treatment, given their experience.

Each junior judge would of course need a few assistants. It is recommendable to attach 4 new case lawyers and 2 administrative employees to every junior judge (= 96 new Registry members in total).<sup>464</sup>

The question could be raised what to do when a case is pending before the Lower Court that involves a non-represented High Contracting Party. As there would not be a national judge of every High Contracting Party in the Lower Court, it could be suggested to make use of *ad hoc* judges in the Lower Court, as is done at present to replace the national judge in cases where he is unable to participate (Article 26(4)). This would however be unworkable given the enormous amount of applications pending before the Single Judges and Committees, making such *ad hoc* judge a *de facto* permanent judge. At present it is not compulsory to have a national judge residing in Committees that are dealing with cases concerning the judge's state and this practice is even forbidden for Single Judges (Article 26(3)). It is recommendable to keep these rules in place for the here proposed reforms.

#### *Division of competences*

The judges residing in the Lower Court should not only be given the authority to decide on the inadmissibility of clearly inadmissible applications (which is currently the competence of the Single Judges). One could doubt if national experts would be seduced to leave their job for several years to perform the rather boring (and negative) function of deciding on the inadmissibility of clearly inadmissible applications.<sup>465</sup> Such a court will not attract the right personnel and would thus be unable to do its work properly, although nothing prevents the High

---

<sup>463</sup> M. EATON, "The New Judicial Filtering Mechanism: introductory comments", in Council of Europe Future developments of the ECtHR in the light of the Wise Persons' Report, (251) 253.

<sup>464</sup> Based on: Report by Ms. MARIE-LOUISE BEMELMANS-VIDEC to the Committee on Legal Affairs and Human Rights, Guaranteeing the authority and effectiveness of the European Convention on Human Rights, Doc. 12811, 3 January 2012, para. 51.

<sup>465</sup> H. C. KRÜGER, "The European Commission of Human Rights: Aspects of its Past and Possibilities for the Future", in X., *Liège, Strasbourg, Bruxelles: Parcours des droits de l'homme: Liber Amicorum Michel Melchior*, Limal, Anthemis, 2010, (457) 474.

Contracting Parties from proposing senior Registry members – who perform these tasks on a day to day basis – as junior judges, as were once the current judges in respect of Liechtenstein, Finland, Ukraine and the UK (MARK VILLIGER, PÄIVI HIVELÄ, GANNA YUDKIVSKA and PAUL MAHONEY). Therefore the Lower Court should get the authority to decide on all applications raising questions of admissibility and at the same time render judgements on the merits of all those (repetitive) cases of which the underlying question concerning the interpretation or the application of the Convention or the Protocols thereto is already the subject of well-established case-law of the Court.

Senior judges would then get the functions of judges in the Chambers and the Grand Chamber. The Grand Chamber would render judgments on cases regarding important questions of interpretation and application of the Convention (= constitutional issues), such as cases dealing with novel issues, those which are of particular significance for the State Party (including endemic violations) and serious human rights violations. The Chambers would render judgments on cases regarding novel issues that are primary of importance to the parties only.<sup>466</sup> This would have the advantageous consequence that the Higher Court, consisting of the Chambers and Grand Chamber, will be more perceived as the ‘Constitutional Court of Europe’. The judges in the Higher Court would also be able to specialize in certain fields, while of course still respecting the rule that the senior judges are to sit in every Chamber and Grand Chamber case in which their country is involved (Article 26(4)).

In short: the judges in the Lower Court’s Single Judge formations and Committees would become executors of the (constitutional) case law of the Higher Court’s Chambers and Grand Chamber.

In order to ensure that the harmony in the case law of the ECtHR is ensured, it is recommendable to create mixed Committees. This means that they would be composed of one senior judge and two junior judges. The number of Committees could then be brought back to 8 instead of the current 15 (so 3 Sections would have 2 Committees, 2 Sections would only have 1).

Furthermore, a strict hierarchy and a high degree of cooperation between both Courts should be ensured in order to avoid potential friction. In the Report of the Wise Persons it was proposed to make a member of the Court the Chair of the Judicial Committee. This Chair would be appointed by the Court for a set period.<sup>467</sup> This proposal can be used for the here suggested reform as well. The President of the Lower Court should therefore be appointed by the Plenary Court. In that new Plenary Court, both junior and senior judges would reside. For the same reason the Court’s Registry should be shared between both institutions: a different section of the Registry should exist for the Lower Court, without a rigid separation between both sections. The same should count for the Court’s Sections.

#### *Procedural aspects*

---

<sup>466</sup> K. DZEHTSIAROU and A. GREENE, “Restructuring the European Court of Human Rights”, *P.L.* 2013, (710) 715-716.

<sup>467</sup> Ministers’ Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, paras. 57-58.

Cases would first be examined by the Court's Registry, which would refer cases to the Single Judges, the Committees or Chambers. As is the case with the present Committees, the new Committees would have to decide by unanimity. If no unanimity would be found the case would be referred to a Chamber in the Higher Court (this is the same as is done at present (Rule 53(6) of the Rules of Court). The vote of the senior judge in the Committees would thus be as powerful as the votes of the junior judges. If the Lower Court would be of the opinion that a case is better examined by the Higher Court, because of certain fundamental concerns that are raised with regard to the admissibility of a case or issues regarding the substantive interpretation of the Convention, *e.g.* after it has declared an application admissible that raised *prima facie* questions of admissibility, it should be able to relinquish jurisdiction on such case to the Higher Court as well. These sorts of 'relinquishment' are currently already possible under Article 27(3) (see also Rule 52A(3) of the Rules of Court) and Articles 28 *j.* 29(1) (see also Rule 53(6) of the Rules of Court). A *vice versa* move should equally be possible where a judicial formation of the Higher Court is of the opinion that a case pending before it falls within the jurisdiction of a judicial formation of the Lower Court. This proposal ensures a strong cooperation and would thus preclude a negative impact on the harmony within the Court's case law. The *post*-Protocol No. 15 rules for referral/relinquishment from the Chambers to the Grand Chamber would stay applicable (as would all other compatible current Rules/Articles).

An appeal against decisions by the Lower Court to the Higher Court, making the Lower Court essentially a Court of First Instance, is however not appropriate. This would only jeopardise the aim that is pursued by installing this Lower Court: to further cut back the judicial backlog the ECtHR is facing right now. Only the President of the ECtHR should be given an exceptional right to re-examine a case at the Higher Court, for example when this would benefit the harmony of the case law<sup>468</sup>, or for the reasons mentioned in the previous paragraph. Such a limited form of appeal was also suggested in the Report of the Group of Wise Persons.<sup>469</sup> As there would not be any real form of appeal the Lower Court should be able to decide on just satisfaction.

In order to further enhance the constitutional nature of the new Grand Chamber, the Grand Chamber should be competent to render judgments with *erga omnes* effect.<sup>470</sup> To stem criticism: only judgments of the Grand Chamber adopted by a two-third majority vote where the *erga omnes* effect of the *dictum* is explicitly provided for in the judgment would be given *erga omnes* effect.

### *Critiques*

A critique that will probably be raised is that this proposal runs counter to the principle of subsidiarity. In the past the same has been said about the Judicial Committee of the Group of

---

<sup>468</sup> I. KAPER, *Reformen des Europäischen Gerichts- und Rechtsschutzsystems*, Bremen, Nomos, 2011, 229.

<sup>469</sup> Ministers' Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, paras. 63-64.

<sup>470</sup> An interesting alternative is the call for an explicit recognition of the *res interpretata* effect of the Court's judgments: A. BODNAR, "Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for other States than Those Which Were Party to the Proceedings", in Y. HAECK and E. BREMS, *Human Rights and Civil Liberties in the 21st Century*, Dordrecht, Springer, 2014, 223-262.

Wise Persons.<sup>471</sup> However, as has been established in Chapter 5 this Court should aim for a pragmatic individual justice approach with constitutional elements and to achieve this aim in line with the goals mentioned at the end of Chapter 4 the here proposed enlargement of the Court is indispensable.

Another critique will probably be that the frictions that existed between the old Commission and the Court will exist to the same extent between the Lower and Higher Court or in general that the future Court would risk the production of less coherent case law.<sup>472</sup> Even today the Court is sometimes blamed for a lack of harmony between its different sections. As has been elaborated on *supra* the fact that both internal subdivisions would still be part of the ECtHR, that the Plenary Court would therefore exist of both the senior and the junior judges, that the President of the Lower Court would be elected by the Plenary Court, that the Registry and the Sections would still be covering both courts, that the Committees would be hybrid, that unanimity would be required in the Committees, that a relinquishment of jurisdiction to the Lower or Higher Court would be possible and that the President of the Higher Court/ECtHR would have the privilege to ask for a referral to the Higher Court, should all ensure that frictions between both subdivisions of the ECtHR are kept at a minimum.

Also the aspect of costs will probably be an issue, as will be the issue that there might be insufficient space in the current buildings for such an enlargement.<sup>473</sup> This is indeed a serious issue that might threaten the practical implementation of this reform. Politically a larger budget for the ECtHR is difficult to achieve. However, this thesis is about finding solutions to the Court's backlog problem and this reform here is essential in that regard. As has been concluded in Chapter 4.2.2. the Court's budget is way too small. In a report to PACE, Ms. BEMELMANS-VIDEC, member of PACE, calculated what the additional cost would be of having 5 new filter judges at the Court: *"with five filtering judges (paid at the level of a Section Registrar at the Court), plus 20 assistant lawyers to prepare decisions, with the help of two assistants, the additional annual cost would be around 1.5 million euros in salaries"*.<sup>474</sup> The additional cost of the setting up of a Lower Court would thus result in an additional cost of approximately 4.5 million euros. In the official debate additional funds are not on the table (see Chapter 6.1.4.), although they should be. The cost (and space) issue should be surmountable if the governments of Europe are serious about human rights protection.

There is a (last) possible issue with this reform proposal. Will there be enough work for both subdivisions? Or will they drown under the applications? In the past it has been argued that it is not the judges who have capacity problems, but that this problems is situated within the Court's

---

<sup>471</sup> Y. HAECK and J. VANDE LANOTTE, "Desperately Trying to Keep the Titanic Afloat: the Reform Proposals concerning the European Convention on Human Rights after Protocol nr. 14", *Int.Am. & Eur.Hum.Rts. J.* 2008, 114-115.

<sup>472</sup> S. GREER, *The European Court of Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, 138.

<sup>473</sup> W., VERRIJDT, "De gevolgen van het Elfde Protocol bij het E.V.R.M.", *Jura falc.* 2002-2003, 625.

<sup>474</sup> Report by Ms. MARIE-LOUISE BEMELMANS-VIDEC to the Committee on Legal Affairs and Human Rights, *Guaranteeing the authority and effectiveness of the European Convention on Human Rights*, Doc. 12811, 3 January 2012, para. 51.

Registry.<sup>475</sup> Indeed, this reform would go hand in hand with the enlargement of the Registry that was proposed *supra* in subchapter 7.3.3.1., certainly in the Lower Court, but it is obvious from all the evidence above that the Court has capacity problems in general and that an enlargement of the Court's judiciary is therefore pivotal as well. And if in the future there would be a more relaxed schedule for the judges, then this will only be good for the quality of the Court's case law. If in the future more or less judges seem appropriate nonetheless, then of course the Convention can be amended accordingly.

### *Advantages*

The urgency of this reform is quite obvious: the ECtHR requires additional judges to increase its capacity. It also requires a focus on the current problematic issues: the backlog before the Committees and Chambers and the still vast amount of incoming applications before the Single Judge formation. For these reasons this reform proposal is highly recommendable in order to give the ECtHR some breathing space. By internally dividing the Court into two parts, by adding additional judges and creating two categories of judges, it is ensured that the different judges are able to focus more on the competence of the specific judicial formation(s) they reside in and also specialise in a certain field of human rights law. Both divisions of the Court have different goals also. The Lower Court functions as executor, with the Single Judges mainly for inadmissibility decisions and the Committees for decisions and judgments on clearly admissible cases regarding well-established case law, whereas the Higher Court functions as constitutor: Chambers for individual relief and the Grand Chamber as the "Constitutional Court of Europe" with potential *erga omnes* effect being conferred on its judgments. Both divisions of the Court would be able to effectively focus on their respective missions. Firstly, this will ensure a definite decrease in the current backlog. Secondly, this reform will also protect the consistency and harmony in the case law of the Court and enhance the level of its sophistication, which is of course a good thing for human rights protection in Europe.

### **7.3.4. Conclusion**

The reasons for which a boost to the ECtHR's capacity is necessary are *legio*. Despite the strong credentials of the Single Judge formation, all is not yet well in Strasbourg. The present backlog before the Committees and the Chambers are clear examples of this. Only a thorough reform can reduce the overall backlog pending before this Court's benches sustainably to an acceptable level. One part of such a thorough reform should concern an expansion of the Court's capacity. Several proposals have been examined in this subchapter and of some of them it is established that they will be capable of ensuring a substantial and sustainable reduction of the Court's backlog by increasing its capacity, while also ensuring positive consequences for the protection of human rights in Europe. In the end this will ensure that the authority of the ECtHR is strengthened because of its power to handle all the applications it gets in in an appropriate way – repetitive as much as non-repetitive, coming from high case-count countries or not – and that human rights in Europe are brought to a next level of protection.

Therefore the CoE is advised to implement the following reforms:

---

<sup>475</sup> F. TULKENS, "La Cour Européenne des Droits de l'Homme et la Déclaration de Brighton, oublier la réforme et penser l'avenir", *Cahier de droit Européen* 2012-2013, (305) 342, para. 90.

- The secondment program should be intensified to ensure more secondments of national lawyers and judges to the Registry of the ECtHR on the condition that extra care is taken to ensure their impartiality and independence;
- At the very least 94 additional members should be immediately hired by the Registry of the ECtHR, 64 of them should be case lawyers, more might be required later;
- The Registry should get the authority to provide provisional advice to applicants concerning the probable decision of inadmissibility of *prima facie* clearly inadmissible applications;
- The ECtHR should be subdivided into a Lower and Higher Court as described above so as to ensure experience, efficiency and specialisation on every echelon. For this around 16 junior judges should be hired;
- As proposals 2 and 4 will require additional funds, the budget of the ECtHR and of the CoE would have to be accommodated accordingly; the entire reform is dependent on the budgetary accommodations that are made by the CoE.

Most of the reforms that are recommended here do not require an amendment of the Convention. The secondment program is governed by a Resolution of the CoE and an intensification of it, directed by the Secretary General of the CoE (Article II, 5.), would be enough, without a change to its legal framework being required. The Registry can be enlarged without a need to amend the Convention either. The introduction of the procedure of *prima facie* provisional advice by the Registry only requires a change to the Court's Rules of Court by the Plenary Court (Article 24 ECHR). What will need an amendment to the Convention is the proposal of an internal division of the ECtHR in a Lower and Higher Court. The necessary reforms to the Convention can be found back in Annex II as 'Draft Protocol No. 17'.

## **7.4. Stimulation of the execution of the judgments of the ECtHR process: optimisation of the pilot judgment procedure**

### **7.4.1. Introduction**

When a High Contracting Party is found to have violated the Convention in a certain case it is required to comply with the final judgment (Article 46(1)). This judgement is rather declaratory and it leaves the High Contracting Party the choice as to how it will comply with the judgment's *dictum*. Measures taken will have to be appropriate to the particular case and thus in any case they'll have to be accessible and will have to provide adequate redress for any violation that has already occurred and will have to ensure prevention against the general continuation of a violation.<sup>476</sup> In certain cases individual measures will be enough (*restitution ad integrum* or just satisfaction), but in other cases, where a legal provision or practice is at the origin of the violation, general measures will have to be taken. Recently the Court tends to indicate which individual or general measures it finds suitable.<sup>477</sup>

However as mentioned numerous times, the execution of final judgements of the ECtHR encounters difficulties from time to time, certainly in high case-count countries (see Chapter 4.2.6.). The CoM risks to drown under its caseload as well. For that reason measures are needed.

<sup>476</sup> ECtHR, *Surmeli v. Germany*, 2006, para. 99.

<sup>477</sup> A. CALIGIURI and N. NAPOLETANO, "The Application of the ECHR in the Domestic Systems", in F. FRANCONI (ed.), *The Italian Yearbook of International Law* 2010, (125) 146.

This thesis does not allow an extensive elaboration on all measures that would have a positive impact on the execution of ECHR judgments, nor a thorough analysis of the CoM (whose situation is actually pretty depressing: a caseload of 11,018 cases<sup>478</sup> for only 30 members of staff, more than half of whom are employed on temporary basis (not exceeding 6 months), or are seconded by governments<sup>479</sup> and a tiny budget of 4.6 million Euro), however hereafter an elaboration will follow with regard to some measures the Court could take of which it is hoped that they can and will effectively improve the execution process.

#### **7.4.2. Pilot judgments, default judgments and pecuniary sanctions**

As explained throughout this thesis, repetitive cases are the current challenge of the ECtHR, not in the least because high case-count countries are also the major ‘suppliers’ of these applications (see Chapter 4.2.6.). There are way too many of them in the Court’s docket (48% of the pending cases at the end of 2013, see Chapter 4.2.5.). Not only are there too many of them, such cases also have the particular characteristic that they demand a lot of time of the Registry and judges due to their numbers. However, as stated in Chapter 4.2.4., dealing with repetitive cases should not be the competence of an international court. In accordance with the principle of subsidiarity they should be resolved at the national level. Reality is however what it is: repetitive cases keep on being submitted at the ECtHR. Through the years the Court has developed from an institution deciding whether or not the ECHR had been breached by a High Contracting Party (the *jus dicere* role of the Court), to a court that has the ambition to go beyond that role<sup>480</sup>, certainly with regard to repetitive cases, by effectively taking up role of the CoM and the national governments. It is clear that this is overburdening the Court and that therefore more of the burden of processing repetitive cases has to be shifted away from the Court again.<sup>481</sup> Therefore the ECtHR should find more speedy ways to deal with these cases that equally ensure that the underlying structural human rights-violating problems cease to exist. That is why the CoM was invited to consider new ways of dealing with such repetitive cases in the Brighton Declaration.<sup>482</sup> The CDDH was requested to investigate if a ‘representative application procedure’ would be appropriate, but it considered that this would not be the case as “*it is in fact difficult to see what specific characteristics such a procedure could have that would usefully distinguish it from existing procedural tools*”<sup>483</sup>.

---

<sup>478</sup> Council of Europe, 7<sup>th</sup> Annual Report of the Committee of Ministers – 2013, 2014, [www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2013\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf), 37.

<sup>479</sup> D. BYCHAWSKA-SINIARSKA, “Why (and How) the CoM needs to Be Reformed in Order to Enhance Implementation of ECtHR Judgments”, in W. BENEDEK, F. BENOÎT-ROHMER, W. KARL, M. C. KETTEMANN and M. NOWAK, *European Yearbook on Human Rights* 2013, Antwerp, Intersentia, 2013, (313) 316.

<sup>480</sup> E. LAMBERT-ABDELGAWAD, “The Court as a part of the Council of Europe: the Parliamentary Assembly and the CoM”, in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, (263) 263-264.

<sup>481</sup> CDDH, Draft CDDH report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court, 17 May 2013, GT-GDR-D(2013)R2 Addendum I, 7, para. 23.

<sup>482</sup> Brighton Declaration of 20 April 2012, [<sup>483</sup> CDDH, CDDH report on the advisability and modalities of a “representative application procedure”, 21 March 2013, CDDH\(2013\)R77 Addendum IV, 8.](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=D, 20, d).</a></p></div><div data-bbox=)

The Court does however already have a well-established practice of dealing with repetitive cases: the pilot judgment procedure (for more information see Chapter 3.3.3.). Furthermore, the Court is experimenting with several other practices to handle large groups of judgments, depending on the characteristics of the applications. They include<sup>484</sup>:

- judgments of principle: one judgment in an individual case with a *dictum* of general application on all other cases of the group;
- joinder of applications to be decided in one single judgment;
- ‘expedited Committee procedure’ (see *infra*)
- grouping of cases at the very outset;
- (the not used yet) default judgment procedure: a request for friendly settlement or unilateral declaration is sent to the respective government on the basis of a previous pilot judgment and if not followed by the provision of redress within a fixed period of time a default judgment on all cases of the group would follow, awarding compensation to the applicants.

All of these procedures are very interesting, they allow a coordinated approach towards structural problems and the resulting repetitive cases at the Court. For example, the *Broniowski* pilot judgment is a clear example of success. Although not all victims filed a complaint with the ECtHR, some 80,000 Polish citizens eventually benefited from the structural measures that were taken by the Polish government to abide with the Court’s judgment in this case.<sup>485</sup> The pilot judgment procedure is not perfect however. Figures show that what happened after the *Ivanov* case (see Chapter 4.2.6.) was totally out of hand, with now over 4,000 clone cases pending without an assurance on redress. The Court’s Director of Common Services, Mr. LIDDELL, stated it this way: “*This is in effect a pilot judgment procedure which failed*”<sup>486</sup>. The same counts for the *Gaglione* case<sup>487</sup>, in which case 475 applications were judged together and thereafter followed by almost 6,000 new clone applications submitted with the Court.<sup>488</sup> The UK even plainly refused to abide with the pilot judgment *Hirst v. UK (No. 2)* on prisoners voting rights, resulting in over 2,500 pending repetitive cases in this regard. With regard to Hungary new major problems are occurring on the issue of pension cases (over 11,500 individuals have a case pending at the ECtHR<sup>489</sup>). These are just a few examples.

A few things are to be concluded:

- Pilot judgments are very promising and have potential to both efficiently protect human rights in Europe and reduce the Court’s backlog in regard to repetitive cases;

---

<sup>484</sup> CDDH, CDDH report on the advisability and modalities of a “representative application procedure”, 21 March 2013, CDDH(2013)R77 Addendum IV, 3-5.

<sup>485</sup> ECtHR, *Broniowski v. Poland*, 2004.

<sup>486</sup> CDDH, Notes on a default judgment procedure: Intervention of Mr Roderick Liddell, Registry of the European Court of Human Rights, at the 1<sup>st</sup> meeting of the GT-GDR-D, 11 April 2013, GT-GDR-D(2013)005, 4.

<sup>487</sup> ECtHR, *Gaglione and others v. Italy*, 2010.

<sup>488</sup> CDDH, CDDH report on the advisability and modalities of a “representative application procedure”, 21 March 2013, CDDH(2013)R77 Addendum IV, 4.

<sup>489</sup> CDDH, CDDH report on the advisability and modalities of a “representative application procedure”, 21 March 2013, CDDH(2013)R77 Addendum IV, 5.

- Many hundreds or thousands of repetitive cases may follow in the wake of a structural problem in a High Contracting State and pilot judgments even seem to stimulate many victims to file an application with the Court after such a judgment, causing obstructions at the ECtHR when the pilot judgment has effectively failed;
- As promising as pilot judgments and alike might be, their success stands or falls with the cooperation of the concerned government with the Court on solutions for the underlying problems.

More in general, repetitive cases are somewhat left behind by the Court.<sup>490</sup> They are but priority category V cases (pilot judgments themselves are category II cases though) and accordingly the number of committee judgments has also been small in recent years (a meagre 380 in 2011<sup>491</sup> and barely 219 in 2013<sup>492</sup>). The Court clearly lacks the resources and time to handle the low-priority repetitive cases (see Chapter 4).

To solve the current problems with regard to the handling of repetitive cases it is pivotal that the pilot judgments and similar practices are further optimised to ensure a swifter and more effective approach towards repetitive cases.

**Firstly**, the practices of grouping cases for joint adjudication, judgments of principle and pilot judgments should be used in regard to more cases. Up to now only about 20 pilot judgments have been rendered.<sup>493</sup> Joining of cases is however done more and more (see Chapter 4.2.3.). In any case the Court should in these judgments also be very clear in explaining what the specific problems are and how general and case specific reform measures should look like (maybe by even listing a set of options that the State could consider<sup>494</sup>). Making more use of these procedures will necessitate additional funds though. Although it is stock-still in the official debate about additional funds, they are urgently needed.<sup>495</sup>

**Secondly**, the main problem with pilot judgments is their execution. As pilot judgments attract additional applications in hordes, the Court should in a second – post-pilot judgment – track, find efficient ways of dealing with these repetitive cases. Already in the Woolf Report of 2005 this was recognized.<sup>496</sup> The expedited committee procedure is a start at this. In this highly automated and simplified procedure, which was used for the post-*Ivanov* cases, the State Party is sent a certain amount of applications every month (250 in regard to Ukraine) for unilateral declarations. Only key facts are entered in the case-management information system of the file

<sup>490</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 29.

<sup>491</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 29.

<sup>492</sup> Registry of the ECtHR, *Annual Report 2013*, Strasbourg, 2014, 61.

<sup>493</sup> CDDH, *CDDH report on the advisability and modalities of a “representative application procedure”*, 21 March 2013, CDDH(2013)R77 Addendum IV, 5 3, para. 8.

<sup>494</sup> B. ANTONIO, *Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights*, 2013, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp), 1-2.

<sup>495</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 29.

<sup>496</sup> LORD WOOLF, *Review of the Working Methods of the European Court of Human Rights*, December 2005, [www.echr.coe.int/Documents/2005\\_Lord\\_Woolf\\_working\\_methods\\_ENG.pdf](http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf), 6.

and the government is only sent the application itself if it asks for it. If a unilateral declaration does not follow, a judgment of the Court will be given within six months. As a result of this new approach, new cases are disposed of within a year or less.<sup>497</sup>

This can however be optimised even more (clearly, given the failure in regard to these post-*Ivanov* cases). As dealing with repetitive cases is overburdening the Court the burden of processing repetitive cases has to be shifted away from the Court.<sup>498</sup> For that reason the Court has been considering to use 'default judgments' "*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*".<sup>499</sup> However, this would still overburden the Court as it would be the ECtHR that is supervising the *entire* procedure. The European Law Institute elaborated on a variant of this procedure: "*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 [...] All follow-up or 'clone' cases that concern precisely the same problem as the one that was adjudicated in the pilot judgment case, should be treated as already being decided on the merits by virtue of the pilot judgment*" and be sent to the respective government for redress under the supervision of the CoM.<sup>500</sup>

This is a very interesting idea, as indeed once the Court has decided on the merits in one case in a pilot judgement, all follow-up/clone cases basically concern the same problem occurring in the same country. By further fully adjudicating these cases the Court would just be taking over the function of the CoM of supervising the execution of that first pilot judgment. Also, requests for friendly settlement or unilateral declarations (as presently still done by the Court and its Registry) are not at their place after a pilot judgment. Before the issuing of the pilot judgment applications will already have been communicated to the government for such requests, resulting in nothing. For all applications for which this has not been done yet after the rendering of the pilot judgment such procedures are therefore useless. It should be to the CoM to supervise the execution of all cases together and to find solutions together with the national government. The Court's task should thus be limited to 'unfreezing' the remaining applications and rendering a default judgment on all follow-up cases together shortly after it has rendered the pilot judgment. The communication to the government of these cases should set very strict deadlines in order not to lose time. This default judgment should only very summarily state the facts and should encompass two main things: first it should establish the finding of a violation of the Convention and second, reference should be made to the Court's previous pilot judgment so as to put all these clone cases within the pilot judgment's framework of the general measures of execution to be taken at the national level. If more applications would be lodged after the first

---

<sup>497</sup> CDDH, CDDH report on the advisability and modalities of a "representative application procedure", 21 March 2013, CDDH(2013)R77 Addendum IV, 4.

<sup>498</sup> CDDH, Draft CDDH report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court, 17 May 2013, GT-GDR-D(2013)R2 Addendum I, 7, para. 23.

<sup>499</sup> ECtHR, Preliminary opinion of the Court in preparation for the Brighton Conference, 20 February 2012, #3841140, para. 21.

<sup>500</sup> P. MAHONEY, *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 29.

default judgment the Court should just render a second default judgment. The Court should with this procedure ensure swift default judgments on all clone cases within 6 months of the related pilot judgment or of their later submission. This ensures that the right of individual petition is respected, while it still saves the Court from collapsing under its caseload.

To align this proposal with the reform of subchapter 7.3.3.2.: the pilot judgments will be delivered by the Higher Court's Grand Chamber, while the Lower Court's Committees will be rendering default judgements. Also, the enhanced secondment program will allow the Court in delivering default-judgments.

**Thirdly** (and most of all), governments should be stimulated harder to take appropriate measures of (general and individual) relief in general, not only with regard to repetitive cases. The examples of *Hirst (no. 2)* and *Ivanov* show how stubborn State Parties can be. In its Contribution to the Brighton Conference, the CDDH proposed to strengthen the supervisory role of the CoM on the execution of the judgments of the ECtHR. One of its suggestions was “*greater application of pressure, including possibly in the form of sanctions, on States that do not execute judgments, including notably those relating to repetitive cases and serious violations of the Convention*”<sup>501</sup>. This is very important and it is something that is currently lacking in the entire ECHR system. Building upon the previous proposal of a combination of pilot judgments and default judgments, the applicants are helped in no way if the government just blatantly refuses to execute the Court's judgments, just as Russia did after the *Burdov*<sup>502</sup> and *Burdov (no. 2)*<sup>503</sup> judgments. Currently there is already the option for the CoM to refer a case back to the Court to establish whether that High Contracting Party has failed to fulfil its obligations under Article 46(1) in an infringement judgment (Article 46(4)). The CoM has up to now never made use of this article – although requests have been made to it by applicants<sup>504</sup> – as it lacks the political will to make use of the procedure. Its Rules of Procedure mention that this measure should only be used in “*exceptional circumstances*”<sup>505</sup> and the ECHR provides for the harsh requirement of a two-thirds majority in the CoM before this procedure can be initiated (Article 46(4)). Therefore this article has to be amended to allow the Court to deliver an infringement judgment and at the same time to sanction the State Party with financial sanctions (and just satisfaction) if and as it sees fit. Inspiration for such a procedure can be drawn from the procedure that is used at the EU (article 260(2) TFEU). If a member state of the EU has failed to fulfil an obligation under the EU Treaties, e.g. by not implementing an EU directive, the Commission can bring the matter before the CJEU (article 258 TFEU). If the member state is found to have indeed failed to fulfil its obligations, the Court will accordingly render a judgment (article 260(1) TFEU). If the Commission considers that the member state is not taking the necessary measures to comply with this judgment, it may bring the case before the CJEU once more, requesting the Court to

---

<sup>501</sup> CDDH, CDDH Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee Of Ministers, 15 February 2012, CDDH(2012)R74 Addendum III, 7, para. 13, (v).

<sup>502</sup> ECtHR, *Burdov v. Russia*, 2002.

<sup>503</sup> ECtHR, *Burdov v. Russia (No. 2)*, 2009.

<sup>504</sup> CDDH, Draft CDDH report on whether more effective measures are needed in respect of States that fail to implement Court judgments in a timely manner, 19 September 2013, GT-GDR-E(2013)R2 Addendum I, 8.

<sup>505</sup> Article 11(2) of the Rules of Procedure of the Committee of Ministers on the supervision of the execution of judgments of the Court of 10 May 2006.

impose a lump sum or penalty payment (article 260(2) TFEU). The Court will then decide on the appropriate sanction. The sanction mechanism is only used very rarely as an *ultimum remedium*, but already the mere possibility that the Court can eventually set financial sanctions functions perfectly to convince member states to comply with the Court's judgement in the end. As such it has become an indispensable tool to make the member states of the EU comply with EU law.<sup>506</sup> The CoE should introduce a similar system. After the Court has delivered a judgment (with or without a deadline), the CoM should be allowed to refer a case back to the Court for an infringement judgment if the State Party is failing to comply with the judgment. In such a judgment the Court should be allowed to set financial sanctions on the State Party (lump sum and/or penalty payment). If the CoM is unwilling to refer cases back to the Court, it should be for another organ of the CoE, to refer a case back to the ECtHR for an infringement judgment if it is of the opinion this is required. It would be best to make the PACE, as the most democratic organ of the CoE, competent to usurp the CoM in this way.<sup>507</sup> This can be done for example by majority vote after back and forth communication with the CoM after the lapse of the deadline set by the Court or if no such deadline was set, after the lapse of a certain amount of time (18 months for example). If the Court has set penalty payments as sanction it should be for the Court to thereafter decide when the State Party has complied with the judgment and when the penalty payments thus take an end. For further details on how to set specific sanctions the ECtHR might best take a further look at the practice of the CJEU.

The Court must be able to guide through pilot judgments and compel through financial sanctions. It is highly controversial to call for financial sanctions, but in some cases it might just be the decisive incentive for the State concerned to abide with the Court's judgment (even just the threat of it may do the job).<sup>508</sup> Most recently it has been examined by the CDDH in 2013 but there was no consensus<sup>509</sup>, although word has it that financial sanctions are once again considered by the CDDH. Of course financial sanctions are not the solution to every failure to execute judgments of the ECtHR (*e.g.* when financial difficulties are the main reason for non-execution), but it is clear that the mere existence of these sanctions will be able to force States at least in some occasions to abide with a judgment (*e.g.* when political reluctance or general inertia is the issue) and as such further make the EC(t)HR system more efficient in tackling human rights violations.

### 7.4.3. Conclusion

In this Chapter proposals were made that would ensure that the process of execution of the judgments of the ECtHR will be enhanced, because many of the major backlog problems are the result of failed execution by the national government, which is then again the cause of further

---

<sup>506</sup> T. JORIS and S. VAN DER JEUGHT, "Tien jaar financiële sancties in de Europese inbreukprocedure ex artikel 260 lid 2 VWEU. Tijd voor een stand van zaken", *SEW* 2010, 432 and 443.

<sup>507</sup> The Netherlands Committee of Jurists for Human Rights (NJCM), Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, 2013, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp), 3.

<sup>508</sup> A. BULTRINI, "The Future of the European Convention on Human Rights after the Brighton Conference", in *INSTITUTO AFFARI INTERNAZIONALI, IAI working papers 12*, 23 September 2012, 6-7.

<sup>509</sup> CDDH, Draft CDDH report on whether more effective measures are needed in respect of States that fail to implement Court judgments in a timely manner, 19 September 2013, GT-GDR-E(2013)R2 Addendum I, 9-10.

backlog by new clone applications being submitted with the Court. The proposals that were suggested are the following:

- More use of the pilot judgment and similar procedures and the proposal of clear reform options to the State Parties;
- The introduction of a default judgment procedure for all clone cases following a pilot judgment;
- The introduction of financial sanctions in infringement judgments and the reform of the infringement judgment procedure (making the PACE competent to initiate it if the CoM refuses to do so).

The entire default judgment procedure puts a lot of pressure on the CoM. It might be incapable to deal with the influx of cases that will follow. Is this reform then in the interest of the applicants and of human rights protection in Europe? Yes, it is. The present procedures are not functioning well (massive backlog with regard to repetitive cases, some successful pilot judgments, but others that have clearly failed (*e.g. Hirst (no. 2)* and *Ivanov*) and basically repetitive cases should not be the competence of an international court. It is to the national governments to find solutions to these structural problems and therefore for the CoM to supervise their efforts. It is therefore good that these reforms would reemphasize the fact that it is for the CoM and not for the Court to supervise the execution of the judgments of the ECtHR.

The here proposed reforms can however only work properly if the CoM is radically reformed or/and substantially reinforced as well. It should have enough facilitative and enforcing tools at hand – with the help of the Human Rights Trust Fund<sup>510</sup> – to assist states in the execution of judgments of the ECtHR. Let this thus be a call to those who care for the ECHR's future: a reform of the CoM is urgently needed.

The first proposal does not need any amendment of the Convention, a mere rewriting of Rule 61 of the Rules of Court will do. The introduction of the default judgment procedure will only need a formal invitation by the CoM in a Recommendation and an amendment to the Rules of Court (the same was done with the pilot judgment<sup>511</sup>). The introduction of financial sanctions and the amendment of the infringement procedure will necessitate an amendment Protocol, making changes to Article 46(4) and if necessary the addition of an additional paragraph to that Article.

## 7.5. Conclusion

At the beginning of this Chapter three main questions were asked:

- 1) How will this reform proposal help to structurally and substantially decrease the Court's caseload to an acceptable level, especially with regard to repetitive (Category V) cases and structural problems occurring in high case-count countries?
- 2) What is its benefit for human rights protection in Europe?
- 3) And how will this proposal increase the legitimacy and authority of the ECtHR?

---

<sup>510</sup> See for more: [www.coe.int/t/dghl/humanrightstrustfund/default\\_en.asp](http://www.coe.int/t/dghl/humanrightstrustfund/default_en.asp).

<sup>511</sup> Resolution 2004(3) of the Committee of Ministers on judgments revealing an underlying systemic problem of 12 May 2004.

It is believed that the three reform 'groups' that were proposed in this Chapter will, each on their own level, ensure that the answers to these questions are positive. Firstly, *a priori* advisory opinions will ensure that legislation is passed in the member states that is in conformity with the ECHR. This will ensure less structural human rights problems in Europe and as such bring the level of human rights protection to a higher level. Because of the dialogue with the national governments that this procedure entails the Court's legitimacy and authority will also be enhanced. Secondly, an enlargement of the Court and its Registry, together with the introduction of a system of advices issued by the Registry and the creation of two subdivisions of the Court (the Lower and the Higher Court) will in a very direct and quick way ensure that the current backlog that the ECtHR is facing will diminish structurally to the levels set as aims at the end of Chapter 4. They will furthermore ensure that the ECtHR can work more efficiently and thoroughly on all cases, not in the least because of the expected higher level of specialisation of each judge. In the end this will ensure that human rights protection in Europe is enhanced and because of the diminishing backlog and the introduction of *erga omnes* judgments rendered by the Grand Chamber ensure an even higher authority of the ECtHR. Lastly, making more use of pilot judgments, introducing default judgments and giving the Court the authority to issue pecuniary sanctions against States that violate Article 46(1) will ensure that the Court's judicial backlog will disappear as these reform proposals will ensure that states are pushed harder to comply with the Court's case law, thus avoiding future clone cases. Moreover, they will enhance the level of human rights protection in Europe because of this strong approach and will as such increase the legitimacy and authority of the ECtHR amongst European citizens. As mentioned in the introduction to this Chapter certainly the ECtHR can use more than just these reforms, but they might already provide part of the *panacea*.

## 8. Conclusion

It seems the ECHR is slowly recovering from the deepest crisis since its inception. The backlog figures are finally going down since two years and this decline has all the looks of being structural. The reform that has been put in place by Protocol No. 14 was thus a success. However the Court is only experiencing a partial recover. The decline in the backlog is almost completely the credit of the Single Judge formation (where the backlog is almost gone), while the Court's Committees and Chambers are still seriously overloaded with *i.a.* Category V cases, which now represent  $\pm 50\%$  of the Court's docket. The backlog figures before these judicial formations have augmented by 43.2% since 2010. Furthermore, it still takes the Court between 4 and 5 years to deal with Committee and Chamber cases. Also, the Court is seriously overburdened by cases coming from high case-count countries. At the end of April 2014 Ukraine, Italy, Russia, Turkey and Romania (in that order) accounted for 68.5% of the number of pending cases, while representing only 44.96% of the CoE's population. Other issues that the ECHR system has problems with are the implementation of the Convention and the execution of the Court's judgments at national level.

Basically many of the Court's problems come down to a lack of sufficient funds and manpower to cope with the challenges it faces. This Court is understaffed. The Court's judges and Registry members are working at an incredible pace:  $5\frac{1}{2}$  decided applications per judge per calendar day and roughly 1 case to be dealt with from submission to judgment on just satisfaction by every Registry lawyer each calendar day. The Court's working methods can rightly be described as being comparable to those of a factory delivering mass production of decisions and judgments. The Court's budget is part of the overall CoE budget, a budget that operates under the principle of 'zero real growth', a principle that prohibits the ECtHR to operate efficiently. Moreover, the Court's budget is small in comparison to those of other international courts. This all makes clear that there is still a lot of work to be done in order to 'heal' this court of its backlog problem.

In the introduction to this thesis the following question was asked: *how* can the judicial backlog of the ECtHR be reduced so as to increase the Court's legitimacy and authority and in the end enhance human rights protection in Europe? At the end of the evaluation of this Court carried out in Chapter 4 goals were set to establish *what* would be a satisfactory reduction of the Court's case load. It was decided that case durations should not be longer than 2.5 years for Grand Chamber cases, 6 months for Single Judge cases, Category I cases and repetitive cases (from the date of a related pilot judgment and afterwards from the date of submission) and 2 years for all other cases. Furthermore, 22,500 cases pending before the Single Judge formation and between 25,000 and 30,000 Committee and Chamber cases pending would be the targets to determine whether or not this Court is still facing a backlog. Thereafter in Chapter 5 it was decided that the future aim of this Court should be to strive for a pragmatic individual justice approach while equally warranting that the Court can act as the quasi-constitutional court of Europe. It was stated that the right of individual petition is a cornerstone of the Convention which should not be curbed by the introduction of *certiorari*-like proposals. Such proposals do not serve human rights protection in Europe. They restrict the right of individual petition without adequately tackling the problem of the increasing number of Convention violations across Europe. People come to Strasbourg as a means of last resort, therefore *certiorari*-like

proposals are only acceptable in a Europe where the protection of human rights is well established at the national level, which is not the case at present.

In Chapter 6 and 7 an investigation followed on *how* to achieve all these goals. Firstly, Protocols Nos. 15 and 16 were evaluated. Protocol No. 15 is not so revolutionary and has even been called “*principally of a technical and uncontroversial nature*” by PACE.<sup>512</sup> Overall, Protocol No. 15 will introduce good reforms. The new time limit of four months – although an arbitrary and ill-prepared reform – and the amendments to Article 35(3)(b) and Article 30 will certainly help the Court to cope with its backlog. However, these reforms will not be structural enough to tackle the Court’s backlog problem in its entirety and do not touch upon the Court’s structural deficiencies (the Court’s dealing with repetitive cases, the malfunctioning of the Committees and Chambers and the Court’s handling of structural problems in high-case count countries). Protocol No. 16 will be a leap in the dark. Indeed, it is an asset for an international court to have an advisory opinion track, but it will be too much a burden for this Court, while the advisory opinion procedure that is introduced with this protocol will not be that much more effective than the individual application procedure. It can be feared that this procedure will not really help at diminishing the Court’s backlog problem in the long-term. Last year the Grand Chamber delivered 12 judgments and in general it does not deliver more than 30 (see Chapter 4.2.3.). Even supposing only half of the member states of the CoE will ratify the Protocol within two years’ time and supposing half of these states would have only one of their highest courts requesting an advisory opinion to the ECtHR in 2015 (so around 12 requests) this will already *seriously* overburden the Grand Chamber. It can be feared that, with this Protocol, the CoE has just opened a second ‘highway’ to Strasbourg. The good results of the Single Judge formation in 2012 seem to have caused some sort of euphoric feeling in Strasbourg, probably hastening the drafting of Protocol No. 16. For these reasons it is to be hoped that the Grand Chamber’s Panel will only accept the most urgent requests for advisory opinions. Also, article 3 of Protocol No. 16 should be amended so as to allow the parties to the domestic proceedings to take part in the advisory opinion proceedings and article 5 of Protocol No. 16 should be amended so as to state that the advisory opinions are binding or at least that the requesting national court shall, in accordance with domestic law, address the positions from the advisory opinion in its decision (certainly if it decides not to follow it). Both reforms can be found back in the ‘Draft Protocol No. 19’ in Annex IV.

Secondly, given that Protocols Nos. 15 and 16 will not be the solution to the Court’s problems, some further structural reform proposals were suggested in Chapter 7. The three suggested reform ‘groups’ will, each on their own level, ensure that the objectives of Chapter 4 and 5 are achieved. Firstly, *a priori* advisory opinions on (draft) legislation on request of the national governments will – far more than the advisory opinions of Protocol No. 16 – ensure that legislation is passed in the member states that is in conformity with the ECHR because of their preventive and proactive approach and the fact that they have a larger effect than advisory opinions that only address issues raised in one specific case pending before a court or tribunal. This will prevent many structural human rights problems from occurring in Europe in the future

---

<sup>512</sup> Opinion 283 (2013) of PACE on the Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms of 26 April 2013, <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19723&lang=EN>.

and as such bring the level of human rights protection to a higher level. Because of the dialogue with the national governments that this procedure entails the Court's legitimacy and authority will also be enhanced. Moreover this procedure will be more effective than the current opinion procedure before the Venice Commission due to the higher authority and visibility of the ECtHR. This reform proposal is to be found back in 'Draft Protocol No. 18' in Annex III. Secondly, an enlargement of the Court and its Registry, together with the introduction of a system of advices issued by the Registry and the creation of two subdivisions of the Court (the Lower and the Higher Court), will in a very direct and quick way ensure that the current backlog that the ECtHR is facing will diminish structurally to the levels set as aims at the end of Chapter 4. They will furthermore ensure that the ECtHR can work more efficiently and thoroughly on all cases, not in the least because of the expected higher level of specialisation of each judge. In the end this will ensure that human rights protection in Europe is enhanced and because of the diminishing backlog and the introduction of *erga omnes* judgments rendered by the Grand Chamber ensure an even higher authority of the ECtHR. Lastly, making more use of pilot judgments and introducing default judgments will allow the Court to address structural problems in the member states far more efficient and in a way that is less overburdening than its present way of handling such issues. Giving the Court the authority to issue pecuniary sanctions against States that violate Article 46(1) will have a positive impact on the Court's judicial backlog as well, as this will ensure that state parties will comply with the Court's case law faster, thus avoiding future clone cases. Moreover, this harder approach will enhance the level of human rights protection in Europe and will as such increase the legitimacy and authority of the ECtHR amongst European citizens. These last two reform 'groups' can be found back in 'Draft Protocol No. 17' in Annex II.

Certainly the ECtHR can use more than just these reforms, but they might already provide part of the *panacea*. With these reforms cases will hopefully never pend for more than 8 years with the Court as the *Sargsyan* case is currently doing. With these reforms debacles as those surrounding the *Ivanov* and *Hirst (No. 2)* cases will hopefully never occur in the future. With these reforms victims of human rights violations will hopefully find redress in Strasbourg for real and quicker than at present. As such, with these reforms the ECtHR should be able to reduce its judicial backlog to the levels proposed at the end of Chapter 4, while still making it able to increase its legitimacy and authority by fulfilling the aim of delivering individual justice and constitutional justice the way as it was proposed at the end of Chapter 5. As such, the final goal to enhance human rights protection in Europe will hopefully be achieved and a satisfactory answer to the question posed at the beginning of this thesis is given in this thesis.

Please take a look back to the quote at the beginning of this master dissertation: "*For those who, as Ministers, have to think of the cost of our proposal, I say that there will never be a lower insurance rate this side of paradise*"<sup>513</sup>. There is no such thing as a free lunch. This equally counts for the reform proposals of this thesis. Some of them are costly. However, which kind of Europe is it we would like to live in? The world looks at Europe as a continent of freedom, democracy and respect for human rights. Let us be proud of that and do everything we can to keep it that way. It will never be Heaven here, but a strong and potent human rights court can bring us as close to it as possible.

---

<sup>513</sup> SIR DAVID MAXWELL-FYFE in : Preparatory Commission of the Council of Europe, *Collected Edition of the "Travaux Préparatoires"*, Volume I, The Hague, Martinus Nijhoff, 1975, 120.

And now that we have come to the end of this master dissertation, the following quote by the previous judge at the ECtHR for Belgium, FRANÇOISE TULKENS, seems appropriate: “*La réforme de la réforme de la réforme, etc... Il faut cesser de parler de réforme: on en parle depuis quinze ans, cela n’a plus de sens. Aujourd’hui, il faut changer de culture et donc de vocabulaire*”<sup>514</sup>. So let us do so. This thesis started with a reference to ‘The European Human Rights Convention: Time for a Radical Overhaul?’, an article by ANDREW DRZEMCZEWSKI published in 1987. With the reform proposals that have been suggested in this thesis the backlog can finally be substantially, structurally and thus effectively tackled. Consequently the ECtHR will once again be able to proceed at the right pace, building further on its vision of Europe. Now is the time to refocus on the substance of the Convention and to say that, yes, the ECtHR has a future and that this future is a bright one. Let us talk about that from now on.

But however nice it would be to end this thesis with a positive note, that would not be appropriate, as the question if human rights in Europe have a bright future as well is to be left open. In the introduction to this thesis it was mentioned that the focus of this master dissertation would be on the Court and the necessary internal reforms of this Court. However, concluding this thesis it has to be acknowledged that although the Court might be able to reduce the number of pending cases to a satisfactory level with the here proposed reforms, human rights protection in Europe is still facing other challenges. For that thorough reforms are necessary on the national level in each and every member state of the CoE. Likewise the CoM, in its function of supervisor on the execution of the final judgements of the ECtHR, also needs a radical reform, because it is performing ineffectively. Never has it referred a case back to the Court for reasons of interpretational problems or because a State Party is not executing the Court judgement properly. If the amount of repetitive cases pending at the Court and crises surrounding the *Ivanov v. Ukraine* and *Hirst v. UK (No. 2)* cases prove one thing however it is that huge problems *do* exist with regard to the execution of the Court’s judgments. The ECtHR is remedying this by delivering pilot judgments and in this thesis a stronger focus on default judgments is proposed, but in essence it should not be for the Court to perform such tasks at all. NHRIs should *monitor* national implementation of the ECHR and the execution of ECtHR judgments and the CoM – or even better: another institution – should *effectively supervise* the execution of the judgments of the ECtHR. Furthermore, with the recent crisis in eastern Ukraine and the Crimea yet another struggle seems to threaten the Court. A challenge that is way more far reaching than any other. Russia has been adversarial to the Convention and Europe for quite some time now. If given the present crisis Russia would decide to leave the Convention this will set around 143 million people in the cold. It might also be a precedent for other countries. The UK has been critical about the Court for many years as well and some British politicians are calling for a denunciation of the Convention and the ECtHR. Strasbourg should seriously consider how it will avoid any such actions. Hiring a decent PR-manager might be one of them, effectively dealing with the backlog and the introduction of the advisory opinions of Chapter 7.2. might be others, but neither of them will be satisfactory to equally overcome this challenge. Maybe that is the right conclusion to this thesis: the ECtHR has a bright future, but human rights protection in Europe is not saved from calamity. Some more battles will have to be overcome for that to happen.

---

<sup>514</sup> F. TULKENS, “La Cour Européenne des Droits de l’Homme et la Déclaration de Brighton, oublier la réforme et penser l’avenir”, *Cahier de droit Européen* 2012-2013, (305) 342, para. 106.



## 9. Bibliography

### 9.1. Legislation

#### 9.1.1. Treaty law

Universal Declaration of Human Rights of 10 December 1948, *General Assembly Res/217/A/III*.

Statute of the Council of Europe of 5 May 1949, *ETS No. 1*.

The Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, *ETS No. 5*.

American Convention on Human Rights of 22 November 1969, *B-32*.

Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 6 November 1990, *ETS No. 140*.

Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby of 11 May 1994, *ETS No. 155*.

Protocol on the Establishment of an African Court on Human and Peoples' Rights of 9 June 1998, *OAU/LEG/EXP/AFCHPR/PROT (III)*.

Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention of 13 May 2004, *ETS No. 194*.

Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms of 27 May 2009, *ETS No. 204*.

Treaty on the Functioning of the European Union of 25 March 1957, *PB. C. 83*, 30 March 2010.

Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms of 24 June 2013, *ETS No. 213*.

Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms of 2 October 2013, *ETS No. 214*.

#### 9.1.2. Other

Bijzondere wet van 6 januari 1989 op het Grondwettelijk Hof, *BS 7 January 1989*, 315.

Resolution (2002)3 of the Committee of Ministers on the Revised Statute of the European Commission for Democracy through Law of 21 February 2002.

Resolution (2003)5 of the Committee of Ministers on secondment of international or national, regional or local officials to the Council of Europe states of the Council of Europe of 22 October 2003.

Resolution 2004(3) of the Committee of Ministers on judgments revealing an underlying systemic problem of 12 May 2004.

Explanatory Report to Protocol No. 14 to the ECHR, 13 May 2004.

Committee of Ministers, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, 10 May 2006.

Resolution 1856(2012) of the Committee of Ministers, Guaranteeing the authority and effectiveness of the European Convention on Human Rights, 24 January 2012.

Rules of the Supreme Court of the United States, [www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf](http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf), 19 April 2013.

Opinion 283 (2013) of PACE on the Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms of 26 April 2013, <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19723&lang=EN>.

Explanatory Report to Protocol No. 15 to the ECHR, 24 June 2013.

Explanatory Report to Protocol No. 16 to the ECHR, 2 October 2013.

Registry of the European Court of Human Rights, Rules of Court, 1 January 2014.

Registry of the European Court of Human Rights, Practice Direction on the Institution of Proceedings, 1 January 2014, [www.echr.coe.int/Documents/PD\\_institution\\_proceedings\\_ENG.pdf](http://www.echr.coe.int/Documents/PD_institution_proceedings_ENG.pdf).

## **9.2. Case law and (advisory) opinions**

ECJ C-283/81, *CILFIT v. Italy*, 1982.

European Commission for Democracy through Law, Opinion on the Constitutional and Legal Provisions relevant to the prohibition of Political Parties in Turkey, CDL-AD(2009)006, 13 March 2009.

European Commission for Democracy through Law, Opinion on the Draft Law of Luxembourg on Freedom of Expression in the Media, CDL-AD(2002)18, 23 July 2002.

ECTHR, *Advisory Opinion of 12 February 2008*.

ECTHR, *Advisory Opinion of 22 January 2010*.

ECTHR, *Airey v. Ireland*, 1979.

ECTHR, *Bankovic and others v. Belgium and others*, 2001.

ECTHR, *Broniowski v. Poland*, 2004.

ECTHR, *Burdov v. Russia*, 2002.

ECTHR, *Burdov v. Russia (No. 2)*, 2009.

ECTHR, *De Wilde, Ooms and Versyp v. Belgium*, 1972.

ECTHR, *Dogru v. France*, 2008.

ECTHR, *Eweida and others v. The United Kingdom*, 2013.

ECTHR, *Gaglione and others v. Italy*, 2010.

ECTHR, *Hirst v. UK (No. 2)*, 2005.

ECtHR, *Loizidou v. Turkey*, 1995.

ECTHR, *Marckx v. Belgium*, 1979.

ECTHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, 2001.

ECTHR, *Politikin v. Poland*, 2004.

ECTHR, *S. and Marper v. UK*, 2008.

ECTHR, *Salduz v. Turkey*, 2008.

ECTHR, *Sargsyan v. Azerbaijan*, Decision on the admissibility, 14 December 2011.

ECTHR, *Sargsyan v. Azerbaijan*, 40167/06, no judgment yet.

ECTHR, *Segi and Gestoras Pro-Amnestia v. Germany and others*, 2002.

ECTHR, *Schalk and Kopf v. Austria*, 24 June 2010.

ECTHR, *Sidabras and džiautas v. Lithuania*, 2004.

ECTHR, *Sunday Times v. UK*, 1979.

ECTHR, *Surmeli v. Germany*, 2006.

ECTHR, *Swedish Engine Drivers Union*, 1976.

ECTHR, *Tyrer v. UK*, 1978.

ECTHR, *Ümmühan Kaplan v. Turkey*, 2012.

ECTHR, *Vinter and Others v. UK*, 2013.

ECTHR, *Vo v. France*, 2004.

ECTHR, *X and others v. Austria*, 2013.

ECTHR, *Yasa v. Turkey*, 1998.

ECTHR, *Yuriy Nikolayevich Ivanov v. Ukraine*, 2009.

IACtHR, *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*, Advisory Opinion OC-12/91 of 6 December 1991.

IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999.

ICJ, *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, (12 July 1973), [www.icj-cij.org](http://www.icj-cij.org).

### **9.3. Council of Europe documents**

#### **9.3.1. Reports and Declarations**

Brighton Declaration of 20 April 2012, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=).

Council of Europe, 6<sup>th</sup> Annual Report of the Committee of Ministers – 2012, Supervision of the execution of judgments and decisions of the European Court of Human Rights, Strasbourg, Council of Europe, 2013.

Council of Europe, 7<sup>th</sup> Annual Report of the Committee of Ministers – 2013, Supervision of the execution of judgments and decisions of the European Court of Human Rights, Strasbourg, Council of Europe, 2014.

Evaluation Group, Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, 27 September 2001, EG Court(2001)1, <https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr>.

Interlaken Declaration of 19 February 2010, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=).

Izmir Declaration of 27 April 2011, [www.echr.coe.int/Pages/home.aspx?p=court/reform&c=](http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=).

LORD WOOLF, Review of the Working Methods of the European Court of Human Rights, December 2005, [www.echr.coe.int/Documents/2005\\_Lord\\_Woolf\\_working\\_methods\\_ENG.pdf](http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf).

Registry of the ECtHR, Annual Report 2006, Strasbourg, 2007.

Registry of the ECtHR, Annual Report 2009, Strasbourg, 2010.

Registry of the ECtHR, Annual Report 2010, Strasbourg, 2011.

Registry of the ECtHR, Annual Report 2011, Strasbourg, 2012.

Registry of the ECtHR, Annual Report 2012, Strasbourg, 2013.

Registry of the ECtHR, Annual Report 2013, Strasbourg, 2014

Report by Ms. MARIE-LOUISE BEMELMANS-VIDEC to the Committee on Legal Affairs and Human Rights, Guaranteeing the authority and effectiveness of the European Convention on Human Rights, Doc. 12811, 3 January 2012.

Report by the Committee on Legal Affairs and Human Rights of PACE on Draft Protocol No. 15 to the European Convention on Human Rights of 28 March 2013, Doc. 13154, <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19542&lang=en>.

### **9.3.2. CDDH documents**

CDDH, Guaranteeing the long-term effectiveness of the European Court of Human Rights, Addendum to the final report containing CDDH proposals, 21 March 2003, CDDH(2003)006 Addendum final.

CDDH, Opinion on the issues to be covered at the Interlaken Conference, 1 December 2009, CDDH(2009)019 Addendum I.

CDDH, Report of 4<sup>th</sup> Meeting, 17 September 2010, DH-GDR(2010)017.

CDDH, Draft elements for Protocol No. 16, 2012, GT-GDR-B(2012)005.

CDDH, Information on Cases Pending before the ECHR: Situation end 2011, DH-GDR(2012)005, 2012.

CDDH, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I.

CDDH, CDDH Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers, 15 February 2012, CDDH(2012)R74 Addendum III.

CDDH, Report, 1 July 2012, CDDH(2012)R75.

CDDH, Joint preliminary comments on the drafting of Protocols 15 and 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 29 August 2012, DH-GDR(2012)008.

CDDH, Draft CDDH report containing elements to contribute to the evaluation of the effects of Protocol No. 14 to the Convention and the implementation of the Interlaken and Izmir Declarations on the Court's situation, 7 September 2012, GT-GDR-A(2012)R2 Addendum II.

CDDH, Meeting Report, 14 September 2012, GT-GDR-B(2012)R1.

CDDH, Draft Protocol No. 15, 14 September 2012, GT-GDR-B(2012)R1 Addendum.

CDDH, Meeting Report, 15 October 2012, GT-GDR-B(2012)R2.

CDDH, Draft Protocol No. 15, 15 October 2012, GT-GDR-B(2012)R2 Addendum I.

CDDH, Draft Protocol No. 16 to the Convention, 15 October 2012, GT-GDR-B(2012)R2 Addendum III.

CDDH, Observations from the European Group of National Human Rights Institutions on the drafting of Protocol No. 15 and Protocol No. 16 to the European Convention for the protection of Human Rights and Fundamental Freedoms, 23 October 2012, DH-GDR(2012)010.

CDDH, Compilation of written comments on draft Protocol No. 16, 26 October 2012, DH-GDR(2012)013.

CDDH, Compilation of written comments on draft Explanatory Report to Protocol No. 16, 26 October 2012, DH-GDR(2012)015.

CDDH, Report of 2<sup>nd</sup> meeting, 31 October 2012, DH-GDR(2012)R2.

CDDH, Draft Explanatory report to Protocol No. 16, 2 November 2012, DH-GDR(2012)020.

CDDH, Written comments on draft Protocol No. 16, 27 November 2012, CDDH(2012)021.

CDDH, Draft Protocol No. 16 to the Convention, 30 November 2012, CDDH(2012)R76 Addendum V.

CDDH, Written comments on draft Explanatory Report to Protocol No. 16, 8 February 2013, DH-GDR(2013)007.

CDDH, Draft Protocol No. 16 to the Convention and interim measures – Comments received, 15 March 2013, CDDH(2013)010.

CDDH, CDDH report on the advisability and modalities of a “representative application procedure”, 21 March 2013, CDDH(2013)R77 Addendum IV.

CDDH, Report, 8 April 2013, CDDH(2013)R77.

CDDH, Notes on a default judgment procedure: Intervention of Mr Roderick Liddell, Registry of the European Court of Human Rights, at the 1<sup>st</sup> meeting of the GT-GDR-D, 11 April 2013, GT-GDR-D(2013)005.

CDDH, Draft CDDH report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court, 17 May 2013, GT-GDR-D(2013)R2 Addendum I.

CDDH, Draft CDDH report on whether more effective measures are needed in respect of States that fail to implement Court judgments in a timely manner, 19 September 2013, GT-GDR-E(2013)R2 Addendum I.

CDDH, Draft CDDH report on the question of whether or not to amend the Convention to enable the appointment of additional judges to the Court, 19 September 2013, GT-GDR-E(2013)R2 Addendum III.

### **9.3.3. Speeches**

BOILLAT, PH., Closing Remarks on the Conference on the future of the European Court of Human Rights of 7-8 April 2014 in Holmenkollen, 7 p.

BRATZA, N., Speech at the High Level Conference in Brighton, 20 April 2012, [www.echr.coe.int](http://www.echr.coe.int), 3.

SPIELMANN, D., Speech at the 123<sup>rd</sup> session of the CoM, 5 May 2013, [www.echr.coe.int/Documents/Speech\\_20130516\\_Spielmann\\_CM\\_FRA.pdf](http://www.echr.coe.int/Documents/Speech_20130516_Spielmann_CM_FRA.pdf).

### **9.3.4. Other**

Commission on a Bill of Rights, Reform of the European Court of Human Right, our interim advice to government, 28 July 2011, [www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf](http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf).

Committee of Ministers, Securing the long-term effectiveness of the supervisory mechanism of the European Convention on Human Rights, 23 May 2012, CM(2012)PVadd1/Item2E.

Council of Europe, Council of Europe Programme and Budget, [www.coe.int/t/cm/BudgetProgramme\\_en.asp](http://www.coe.int/t/cm/BudgetProgramme_en.asp), (last accessed 15 April 2014).

Council of Europe Doc. MDH(85)1, 1985.

Council of Europe, Human Rights, A continuing challenge for the Council of Europe, Strasbourg, Council of Europe Press, 1995, 143 p.

Council Of Europe, Reforming the European Convention on Human Rights: A work in progress, Straatsburg, Council of Europe Publishing, 2009, 718 p.

Council of Europe, Future developments of the ECtHR in the light of the Wise Persons' Report, Strasbourg, Council of Europe Publishing, 2009, 716 p.

Council of Europe, Reforming the European Convention on Human Rights: A work in progress A compilation of publications and documents relevant to the ongoing reform of the ECHR, Strasbourg, Council of Europe Publishing, 2009, 716.

Council of Europe Directorate of Communication, Council of Europe conference in Izmir on the future of the European Court of Human Rights, Press release 361(2011), 21 April 2011, [https://wcd.coe.int/ViewDoc.jsp?Ref=PR361\(2011\)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE](https://wcd.coe.int/ViewDoc.jsp?Ref=PR361(2011)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE).

Council of Europe, History of the Court's reforms, 29 August 2013, [www.echr.coe.int](http://www.echr.coe.int).

Council of Europe, The supervision of the execution of judgments, [www.coe.int/t/dghl/monitoring/execution/Presentation/Video\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Presentation/Video_en.asp), (last accessed 14 April 2014).

Council of Europe, Venice Commission, [www.venice.coe.int/WebForms/pages/?p=01\\_Presentation](http://www.venice.coe.int/WebForms/pages/?p=01_Presentation) (last accessed 27 April 2014).

Directorate General of Human Rights, Applying and Supervising the ECHR: Future developments of the European Court of Human Rights in the light of the Wise Persons' Report, Strasbourg, Council of Europe, 2007, 106 p.

Directorate General of Human Rights, Applying and supervising the ECHR: Towards stronger implementation of the European Convention on Human Rights at national level. Colloquy organised under the Swedish chairmanship of the CoM of the Council of Europe Stockholm, 9-10 June 2008, 2008, [www.coe.int](http://www.coe.int).

ECTHR, Opinion of the Court on the Wise Persons' report, 2 April 2007, [www.echr.coe.int](http://www.echr.coe.int), 2.

ECTHR, Analysis of statistics 2007, 2008, [www.echr.coe.int/Documents/Stats\\_analysis\\_2007\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2007_ENG.pdf)

ECTHR, The Court's Priority Policy, 2009, [www.echr.coe.int/Documents/Priority\\_policy\\_ENG.pdf](http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf), 2 p.

ECTHR, Memorandum of the President of the European Court of Human Rights, 3 July 2009, [www.coe.int](http://www.coe.int).

ECTHR, Interlaken Follow-up: principle of subsidiarity, 8 July 2010, 17 p.

ECTHR, Analysis of statistics 2010, 2011, [www.echr.coe.int/Documents/Stats\\_analysis\\_2010\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2010_ENG.pdf)

ECTHR, Practical Guide on Admissibility Criteria, 2011, [www.echr.coe.int](http://www.echr.coe.int).

ECTHR, Analysis of statistics 2011, 2012, [www.echr.coe.int/Documents/Stats\\_analysis\\_2011\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2011_ENG.pdf).

ECTHR, Preliminary opinion of the Court in preparation for the Brighton Conference, 20 February 2012, #3841140.

ECTHR, Filtering Section speeds up processing of cases from highest case-count countries, 2013, [www.echr.coe.int/Documents/Filtering\\_Section\\_ENG.pdf](http://www.echr.coe.int/Documents/Filtering_Section_ENG.pdf).

ECTHR, Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights, 6 February 2013, [www.echr.coe.int/Documents/2013\\_Protocol\\_15\\_Court\\_Opinion\\_ENG.pdf](http://www.echr.coe.int/Documents/2013_Protocol_15_Court_Opinion_ENG.pdf).

ECTHR, Position Paper of the European Court of Human Rights on proposals for reform of the European Convention on Human Rights and other measures as set up in the Report of Steering Committee for Human Rights, 12 September 2003, CDDH-GDR (2003)024.

ECTHR, Analysis of statistics 2013, 2014, [www.echr.coe.int/Documents/Stats\\_analysis\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf)

ECTHR, Organisation Charter, 2014, [www.echr.coe.int/Documents/Organisation\\_Chart\\_ENG.pdf](http://www.echr.coe.int/Documents/Organisation_Chart_ENG.pdf).

ECTHR, Overview 1959-2013, February 2014, [www.echr.coe.int/Documents/Overview\\_19592013\\_ENG.pdf](http://www.echr.coe.int/Documents/Overview_19592013_ENG.pdf), 9 p.

ECTHR, Response of the European Court to the Interim Report of the Steering Committee for Human Rights (CDDH), 2 February 2004, CDDH-GDR (2004)001.

ECTHR, Statistics 1/1-30/4/2014, May 2014, [www.echr.coe.int/Documents/Stats\\_pending\\_month\\_2014\\_BIL.pdf](http://www.echr.coe.int/Documents/Stats_pending_month_2014_BIL.pdf).

ECtHR, Reflection paper on the proposal to extend the Court's advisory jurisdiction, 4 April 2011, [www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions\\_en.pdf](http://www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions_en.pdf).

ECTHR, Admissibility Checklist, <http://appform.echr.coe.int/echrappchecklist/default.aspx?lang=eng&cookieCheck=true>, (last accessed 14 April 2014).

ECTHR, Registry, [www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent\\_1346157759256\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_1346157759256_pointer), (last accessed 15 April 2014).

ECTHR, The ECHR in 50 questions, [www.echr.coe.int/Documents/50Questions\\_ENG.pdf](http://www.echr.coe.int/Documents/50Questions_ENG.pdf), 9, (last accessed 15 April 2014).

FRIBERGH, E. (The Court's Registrar), *Email to Mr. Orlov (Head of the Russian Council of Human Rights Centre "Memorial")*, 5 December 2011.

International Committee of the Movements for European Unity, Message to Europeans, 1948, [www.cvce.eu/obj/message\\_to\\_europeans\\_the\\_hague\\_10\\_may\\_1948-en-b14649e7-c8b1-46a9-a9a1-cdad800bcc8.html](http://www.cvce.eu/obj/message_to_europeans_the_hague_10_may_1948-en-b14649e7-c8b1-46a9-a9a1-cdad800bcc8.html), 16 p.

Ministers' Deputies, Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203.

Ministers' Deputies, Consolidated Financial Statements of the Council of Europe for the year ended 31 December 2011, CM (2012) 100, 22 August 2012.

Ministers' Deputies, Brighton Declaration – Follow-up – Steering Committee for Human Rights - Draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Explanatory Report thereto, 10 April 2013, CM(2013)31 and CM(2013)31 add.

Preparatory Commission of the Council of Europe, Collected Edition of the "Travaux Préparatoires", Volume I, The Hague, Martinus Nijhoff, 1975, 326 p.

Registrar of the ECtHR, Note on the pilot-judgment procedure, 2009, [www.echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf).

Registrar of the ECtHR, First pilot judgment in respect of Ukraine concerning non-execution of final domestic court decisions, 15 October 2009, [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2896803-3182815#{"itemid":\["003-2896803-3182815"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2896803-3182815#{).

Registrar of the ECtHR, Sargsyan v. Azerbaijan (Press Release), 5 February 2014.

United Kingdom Chairmanship of the Council of Europe, *Priorities and Objectives*, 28 October 2011, <http://ukcoe.fco.gov.uk/resources/en/22792210/pdf-priorities-261011>.

#### **9.4. Non-Council of Europe related documents**

CJEU, Annual Report 2012, Luxembourg, Publications Office of the European Union, 2013.

CJEU, The Court in figures, [http://curia.europa.eu/jcms/jcms/P\\_80908](http://curia.europa.eu/jcms/jcms/P_80908), (last accessed 15 April 2014).

IACOHR, Annual report of the Inter-American Commission on Human Rights 2010, 7 March 2011, [www.cidh.org/annualrep/2010eng/TOC.htm](http://www.cidh.org/annualrep/2010eng/TOC.htm).

IACtHR, Advisory opinions, [www.corteidh.or.cr/index.php/en/advisory-opinions](http://www.corteidh.or.cr/index.php/en/advisory-opinions) (last accessed 30 April 2014).

ICC, Structure of the Court, [www.icc-cpi.int](http://www.icc-cpi.int) (last accessed 15 April 2014).

ICTY, Current Permanent Judges, [www.icty.org](http://www.icty.org), (last accessed 15 April 2014).

ICTY, Employment and Internships, [www.icty.org/sections/AbouttheICTY/EmploymentandInternships](http://www.icty.org/sections/AbouttheICTY/EmploymentandInternships) (last accessed 15 April 2014).

ICTY, The Cost of Justice, <http://www.icty.org/sid/325>, (last accessed 15 April 2014).

OAS, Program-budget of the Organization 2012, August 2011, [www.oas.org/budget/2012/Approved%20Program%20Budget%202012%20ENG%20%20No%20posts.pdf](http://www.oas.org/budget/2012/Approved%20Program%20Budget%202012%20ENG%20%20No%20posts.pdf).

OAS, Proposed program-budget 2014, 5 August 2013, [www.oas.org/budget/2014/Budget%20Proposal%208-5-13%2011AM.PDF](http://www.oas.org/budget/2014/Budget%20Proposal%208-5-13%2011AM.PDF).

OAS, Staff, [www.oas.org/en/iachr/mandate/staff.asp](http://www.oas.org/en/iachr/mandate/staff.asp), (last accessed 15 April 2014).

US Supreme Court, *2013 Year-End Report on the Federal Judiciary*, 2013, [www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf](http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf).

## 9.5. Doctrine

### 9.5.1. Books

BOND, M., *The Council of Europe: structure, history and issues in European politics*, London, Routledge, 2012, 190 p.

BYCHAWSKA-SINIARSKA, D., "Why (and How) the CoM needs to Be Reformed in Order to Enhance Implementation of ECtHR Judgments", in BENEDEK, W., BENOÎT-ROHMER, F., KARL, W., KETTEMANN, M. C. and NOWAK, M., *European Yearbook on Human Rights* 2013, Antwerp, Intersentia, 2013, 313-321.

CHRISTOFFERSEN, J. and RASK MADSEN, M., *The European Court of Human Rights between Law and Politics*, Oxford, Oxford University Press, 2011, 256 p.

COSTA, J-P., *La Cour Européenne des droits de l'homme: Des juges pour la liberté*, Paris, Dalloz, 2013, 268 p.

FØLLESDAL, A., PETERS, B., ULFSTEIN, G. (eds.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, 441 p.

GERARDS, J., *EVRM algemene beginselen*, Den Haag, Sdu Uitgevers, 2011, 307 p.

GREER, S., *The European Convention on Human Rights : Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, 365 p.

HAECK, Y., *Procederen voor het Europees Hof voor de Rechten van de Mens*, Antwerpen, Intersentia, 2011, 467 p.

HAECK, Y. and BREMS, E., *Human Rights and Civil Liberties in the 21st Century*, Dordrecht, Springer, 2014, 262 p.

HOFFMAN, L., *Human Rights in the twentieth century*, Cambridge, Cambridge University Press, 236 p.

HULS, N., ADAMS, M. and BORNHOFF, J. (eds.), *The Legitimacy of Highest Courts' Rulings*, The Hague, T.M.C. Asser Press, 2009, 500 p.

KARPER, I., *Reformen des Europäischen Gerichts- und Rechtsschutzsystems*, Bremen, Nomos, 2011, 278 p.

KELLER, H. and STONE SWEET, A., *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press, 2013, 892 p.

LEACH, P., *Taking a Case to the European Court of Human Rights*, London, Blackstone Press Limited, 2001, 392 p.

LEACH, P., *Taking a Case to the European Court of Human Rights*, New York, Oxford University Press, 2011, 619 p.

LEMMENS, P. and VANDENHOLE, W., *Protocol No. 14 and the Reform of the European Court of Human Rights*, Mortsel, Intersentia, 2005, 153 p.

MORISON, J., MCEVOY, K. and ANTHONY, G., *Judges, Transition, and Human Rights*, Oxford, Oxford University Press, 2007, 600 p.

PERRY, H.W. JR., *Deciding to decide*, Cambridge (US), Harvard University Press, 1991, 316 p.

ROMERIS, M. (ed.), *Liber amicorum Pranas Kūris*, Vilnius, University Vilnius Press, 2008, 945 p.

VAN ROOSMALEN, M., VERMEULEN, B., VAN HOOF, F. and OOSTING, M. (eds.), *Fundamental Rights and Principles, Liber Amicorum Pieter van Dijk*, Antwerpen, Intersentia, 2013, 584 p.

X., *Liège, Strasbourg, Bruxelles: Parcours des droits de l'homme: Liber Amicorum Michel Melchior*, Limal, Anthemis, 2010, 1038 p.

### **9.5.2. Articles**

BOSSUYT, M., "The Court of Strasbourg acting as an Asylum Court", *EuConst* 2012, 203-245.

BOWRING, B., "The Russian Federation, Protocol No. 14 (and 14bis), and the Battle for the Soul of the ECtHR", *Goettingen Journal of International Law* 2 2010, 589-617.

BREMS, E., "Crisisplan voor Mensenrechtenhof", *Juristenkrant* 2010, afl. 205, 6-7.

O'BOYLE, M., "The Future of the European Court of Human Rights", *GLJ* 2012, 1862-1877.

BURBANO-HERRERA, C., "'SOS European Court of Human Rights': Protocol No. 14bis Urgently Reforms the Institutional Framework while Awaiting the Entry into Force of Protocol No. 14", *Int.Am. & Eur.Hum.Rts. J.* 2010, 115-130.

BURKOV, A., "Motivation for Direct Application of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts", *Baltic Yearbook of International Law* 2012, 229-247.

CAFLISCH, L., "La Cour Européenne des droits de l'homme un chantier permanent", *ZSR* 2012, 159-183.

CALIGIURI, A. and NAPOLETANO, N., "The Application of the ECHR in the Domestic Systems", in F. FRANCONI (ed.), *The Italian Yearbook of International Law* 2010, 125-159.

COSTA, J-P., "Les réformes de la Cour européenne des droits de l'homme – Avant et après Brighton", *Obs. Bxl.* 2012, No. 89, 30-35.

DE LONDRA, F., "Dual functionality and the persistent frailty of the European Court of Human Rights", *E.H.R.L.R.* 2013, 38-46.

DRZEMCZEWSKI, A., "The European Human Rights Convention: Time for a Radical Overhaul?", *B.C. Int'l & Comp. L. Rev.* 1987, 9-15.

DRZEMCZEWSKI, A., "The internal organization of the European Court of Human Rights: the composition of chambers and the Grand Chamber", *E.H.R.L.R.* 2000, 233-248.

DZEHTSIAROU, K. and GREENE, A., "Restructuring the European Court of Human Rights", *P.L.* 2013, 710-719.

DZEHTSIAROU, K. and O'MEARA, N., "Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control", *Legal Studies* 2014, 1-25.

EGLI, P., "Another Step in the Reform of the European Court of Human Rights: The Report of the Group of Wise Persons", *ZaöRV* 2008, 155-174.

GRAGL, P., "(Judicial) love is not a one-way street: the EU preliminary reference procedure as a model for ECtHR advisory opinions under draft Protocol no. 16", *E.L.Rev.* 2013, 229-247.

GREER, S., "What's Wrong with the European Convention on Human Rights", *Hum. Rts. Q.* 2008, 680-702.

GREER, S. and WILDHABER, L., "Revisiting the debate about 'constitutionalising' the European Court of Human Rights", *HRLR* 2012, 655-687.

HAECK, Y., BURBANO HERRERA, C., VANDE LANOTTE, J. and VAN PACTENBEKE, A., "Changing The European Human Rights System Once Again. The Wise Persons Spoke But Did they Speak Wisely?", *Mediterr. J. Hum.Rts.* 2008, 115-144.

HAECK, Y. and VANDE LANOTTE, J., "Desperately Trying to Keep the Titanic Afloat: The Reform Proposals concerning the European Convention on Human Rights after Protocol nr. 14", *Int.Am. & Eur.Hum.Rts. J.* 2008, 87-123.

HAECK, Y. and ZWAAK, L., "De hervorming van het Europees Verdrag en het Europees Hof voor de Rechten van de Mens ingevolge het 14e Protocol: pompen en/of verzuipen?", *T.B.P.* 2006, 3-17.

JORIS, T. and VAN DER JEUGHT, S., "Tien jaar financiële sancties in de Europese inbreukprocedure ex artikel 260 lid 2 VWEU. Tijd voor een stand van zaken", *SEW* 2010, 432-446.

KRENC, F., "Une nouvelle compétence consultative pour la Cour européenne des droits de l'homme: une fausse bonne idée?", *J.T.* 2012, 600-601.

KRENC, F. and VAN DROOGHENBROECK, S., "Le protocole n° 14: "cautère sur une jambe de bois" ou véritable "garantie de l'efficacité à long terme de la Cour européenne des droits de l'homme"?", *JT* 2010, 493-502.

LEACH, P., "Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery?", *HRLJ* 2006, 11-25.

MEYER, S. J., "The Constitutional Potential of the European Court of Human Rights", *NUJS L. Rev.* 2012, 207-217.

MOROWA, A., "The European Court of Human Rights' Rejection of Petitions where the Applicant Has not Suffered a Significant Disadvantage : A Discussion of Desirable and Undesirable Efforts to Safeguard the Operability of the Court", *Journal of transnational legal issues* 2012, 1-19.

SMITH, K.H., "Certiorari and the Supreme Court agenda: an empirical analysis", *Okla. L. Rev.* 2001, 727-769.

TULKENS, F., "La Cour Européenne des Droits de l'Homme et la Déclaration de Brighton, oublier la réforme et penser l'avenir", *Cahier de droit Européen* 2012-2013, 305-343.

VANDE LANOTTE, J. and HAECK, Y., "Het nieuwe Europese Hof te Straatsburg aan de vooravond van de 21e eeuw", *RW* 1999-2000, 1417-1448.

VAN DIJK, P., "Europees Hof voor de Rechten van de Mens en Venetië-Commissie, een praktijk van wederzijdse bevruchting", *NJCM* 2010, 884-896.

VERRIJDT, W., "De gevolgen van het Elfde Protocol bij het E.V.R.M.", *Jura falc.* 2002-2003, 571-651.

NEGRI, S., "Principle of Equality of Arms and the Evolving Law of International Criminal Procedure", *Int'l Crim. L. Rev.* 2005, 513-571.

### **9.5.3. Other**

ANTONIO, B., Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, 2013, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp).

BATES, E., *Guest Post on British ECHR Reform Plans*, 11 November 2011, <http://echrblog.blogspot.be/2011/11/guest-post-on-british-echr-reform-plans.html>.

BREMS, E., *Advanced Course on Human Rights Law*, Universiteit Gent, 2012-2013.

INSTITUTO AFFARI INTERNAZIONALI, *IAI working papers* 12, 23 September 2012, 12 p.

DZEHTSIAROU, K. and GREENE, A., Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp).

Equality and Human Rights Commission, Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, 2013, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp).

DE LONDRAS, F., Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, 2013, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp).

MAHONEY, P., *Statement on case-overload at the European Court of Human Rights*, Vienna, European Law Institute, 2012, 50 p.

The Netherlands Committee of Jurists for Human Rights (NJCM), Contribution on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights, 2013, [www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table\\_all%20contributions.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Online%20table_all%20contributions.asp).

WILDHABER, L., *The place of the European Court of Human Rights in the European Constitutional landscape*, May 2002, [www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf](http://www.confcoconsteu.org/reports/rep-xii/Report%20ECHR-EN.pdf), 9 p.

## 9.6. Other

Amnesty International et al., Joint Statement on the United Kingdom's Priorities and Objectives for its Chairmanship of the Committee of Ministers of the Council of Europe, November 4 2011, [www.amnesty.org/ar/library/asset/IOR61/013/2011/en/534a56df-2c57-4274-b1c5-1fcb0bfadd7/ior610132011en.pdf](http://www.amnesty.org/ar/library/asset/IOR61/013/2011/en/534a56df-2c57-4274-b1c5-1fcb0bfadd7/ior610132011en.pdf).

BBC, *Hardtalk: Dean Spielman*, 14 January 2014, [www.bbc.co.uk/programmes/p01pzkc9](http://www.bbc.co.uk/programmes/p01pzkc9).

BBC, *Theresa May: Tories to consider leaving European Convention on Human Rights*, 9 March 2013, [www.bbc.co.uk/news/uk-politics-21726612](http://www.bbc.co.uk/news/uk-politics-21726612).

BOWCOTT, O., "Backlog at European court of human rights falls below 100,000 cases", *The Guardian* 30 January 2014, [www.theguardian.com/law/2014/jan/30/european-court-human-rights-case-backlog-falls](http://www.theguardian.com/law/2014/jan/30/european-court-human-rights-case-backlog-falls).

Bundesverfassungsgericht, *Erster Senat – Gesamtübersicht*, 2014, [www.bundesverfassungsgericht.de/organisation/gb2013/B-I.html](http://www.bundesverfassungsgericht.de/organisation/gb2013/B-I.html).

BUYSE, A., *Court Statistics over 2013 and Other Strasbourg News*, 6 February 2014, <http://echrblog.blogspot.fr/2014/02/court-statistics-over-2013-and-other.html>.

GRIEVE, D., "European Convention on Human Rights - current challenges", October 24 2011, [www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/AttorneyGeneralEuropeanConventiononHumanRights%E2%80%93currentchallenges.aspx](http://www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/AttorneyGeneralEuropeanConventiononHumanRights%E2%80%93currentchallenges.aspx).

GROVES, J., 'Europe's human rights court is out of control...we must pull out': Call by top British judge after ruling that prisoners should get the vote, Daily Mail, 7 February 2011, [www.dailymail.co.uk/news/article-1354362/Europes-human-rights-court-control-pull-Call-British-judge-ruling-prisoners-vote.html#ixzz1QNV45SLd](http://www.dailymail.co.uk/news/article-1354362/Europes-human-rights-court-control-pull-Call-British-judge-ruling-prisoners-vote.html#ixzz1QNV45SLd).

Institute for War & Peace Reporting, ICC secures budget increase, <http://iwpr.net/report-news/icc-secures-budget-increase>, (last accessed 15 April 2014).

Interview of Judges LEMMENS and BIANKU of 7 February 2014.

RAYNER, J., "ECHR withdrawal 'gift to Putin'", *The Law Society Gazette* 22 March 2012, [www.lawgazette.co.uk/64821.article](http://www.lawgazette.co.uk/64821.article).

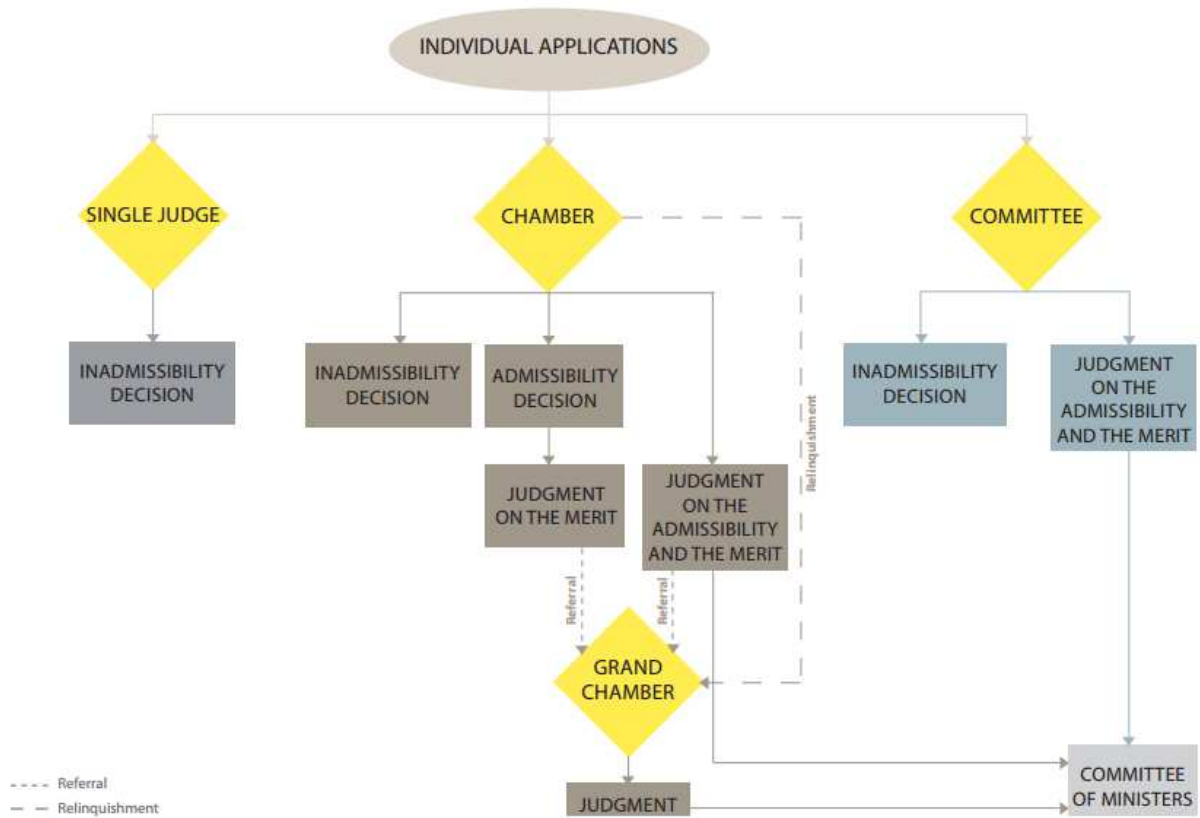
X, *Standard report about the long term training period at the European Court of Human Rights in Strasbourg* 2008/2009, 2009, [www.ejtn.eu/Documents/Exchange%20programme%20documents/Reports%20and%20summaries/AT%20-%202008-2009%20-%20Registry%20-%20EN.pdf](http://www.ejtn.eu/Documents/Exchange%20programme%20documents/Reports%20and%20summaries/AT%20-%202008-2009%20-%20Registry%20-%20EN.pdf).



## 10. Annex

### Annex 1: Simplified case-processing flow chart of the Court

European Court of Human Rights, The ECHR in facts and figures 2012, June 2013, [www.echr.coe.int](http://www.echr.coe.int).



Simplified case-processing flow chart of the Court

Facts & Figures - 2012





COUNCIL OF EUROPE    CONSEIL DE L'EUROPE

Ghent, 15 May 2014

Annex II

**Draft Protocol No. 17 amending the Convention on the Protection of  
Human Rights and Fundamental Freedoms**

---

## **Preamble**

The member States of the Council of Europe and the other High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”), signatory hereto,

Having regard to the provisions of the Convention and, in particular, Article 34 on the right of any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto to submit an application to the European Court of Human Rights (hereinafter referred to as “the Court”) and the need to ensure that this right is not theoretical or illusory but practical and effective,

Noting with satisfaction the success of earlier efforts that have helped to resolve part of the backlog of the Court, but still deeply concerned about the remaining backlog, in particular the backlog in regard to repetitive cases and cases coming from high-case count High Contracting Parties,

Considering the urgent need to amend certain provisions of the Convention in that regard in order to maintain and improve the efficiency of the control system for the long term and enhance the authority and legitimacy of the Court,

Having regard to Opinion No. ... (20...) adopted by the Parliamentary Assembly of the Council of Europe on ...,

Have agreed as follows:

### **Article 1**

At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows:

“Affirming that the right of individual petition to the Court is a cornerstone of the Convention system, pivotal and central to the protection of human rights within the jurisdictions of the High Contracting Parties to the Convention,”.

### **Article 2**

A new paragraph 2 shall be added at the end of Article 19 of the Convention, which shall read as follows:

“2. The Court shall have two subdivisions, the Lower Court and the Higher Court.”

### **Article 3**

Article 20 of the Convention shall be amended to read as follows:

**“Article 20 – Number of judges**

1. The Court shall consist of senior judges and junior judges.
2. The Higher Court shall consist of a number of senior judges equal to that of the High Contracting Parties.
3. The Lower Court shall consist of 16 junior judges.”

#### **Article 4**

Article 22 of the Convention shall be amended to read as follows:

##### **“Article 22 – Election of judges**

1. The senior judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.
2. The allocation of the junior judges amongst the High Contracting Parties shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties. To ensure this balanced representation the High Contracting Parties are allocated to the following Groups:
  - Group A (Andorra, France, Italy, Malta, Monaco, Portugal, San Marino, Spain) with 4 junior judges;
  - Group B (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the former Yugoslavian Republic of Macedonia, Greece, Montenegro, Romania, Serbia, Slovenia, Turkey) with 3 junior judges;
  - Group C (Czech Republic, Hungary, Poland, Slovakia) with 1 junior judge;
  - Group D (Denmark, Finland, Iceland, Ireland, Norway, Sweden, the United Kingdom of Great Britain and Northern Ireland) with 2 junior judges, 1 of whom shall be a common law junior judge;
  - Group E (Austria, Belgium, Germany, Liechtenstein, Luxemburg, the Netherlands, Switzerland) with 2 junior judges;
  - Group F (Armenia, Azerbaijan, Estonia, Latvia, Lithuania, Georgia, Moldova, Russia, Ukraine) with 4 junior judges.
3. The junior judges shall be elected by the Parliamentary Assembly in respect to each Group by a majority of votes cast from a list of three candidates nominated by the respective Group, with the unanimous approval of all High Contracting Parties in that Group, whereby the High Contracting Parties shall respect the need for rotation between the High Contracting Parties within each Group.”

#### **Article 5**

Article 23 of the Convention shall be amended to read as follows:

##### **“Article 23 – Terms of office and dismissal**

1. The senior judges shall be elected for a period of nine years. They may not be re-elected.
2. The junior judges shall be elected for a period of three years. They may not be re-elected.
3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.”

#### **Article 6**

Paragraph 2 of Article 24 of the Convention shall be amended to read as follows:

“2. When sitting in a single-judge formation, the Lower Court shall be assisted by rapporteurs who shall function under the authority of the President of the Lower Court. They shall form part of the Court’s Registry.”

#### **Article 7**

Article 25 of the Convention shall be amended to read as follows:

##### **“Article 25 – Plenary Court**

1. The plenary Court, consisting of both junior and senior judges, shall
  - (a) elect the Presidents and one or two Vice-Presidents of the Higher Court, who shall equally be the President and Vice-Presidents of the Court as well, from amongst the senior judges for a period of three years; they may be re-elected;
  - (b) elect the Presidents and one or two Vice-Presidents of the Lower Court, for a period of three years; they may be re-elected;
  - (c) adopt the rules of the Court;
  - (d) elect the Registrar and one or more Deputy Registrars.
2. The plenary meeting of the Higher Court shall
  - (a) set up Chambers, constituted for a fixed period of time;
  - (b) elect the Presidents of the Chambers of the Court; they may be re-elected;
  - (c) make any request under Article 26, paragraph 2.
3. The plenary meeting of the Lower Court shall set up committees, constituted for a fixed period of time.”

#### **Article 8**

Article 26 of the Convention shall be amended to read as follows:

##### **“Article 26 – Lower Court, Higher Court and judicial formations**

1. To consider cases brought before it,

- (a) the Lower Court shall sit in a single-judge formation and in committees of three judges, two of whom shall be junior judges and one a detached senior judge;
- (b) the Higher Court shall sit in Chambers of seven senior judges and in a Grand Chamber of seventeen senior judges.

2. At the request of the plenary meeting of the Higher Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.

3. Junior judges shall not examine any application against the High Contracting Party in respect of which that junior judge has been elected.

4. There shall sit as an *ex-officio* member of the Chamber and the Grand Chamber the senior judge elected in respect of the High Contracting Party concerned. If there is none or if that senior judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of senior judge.

5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other senior judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no senior judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the senior judge who sat in respect of the High Contracting Party concerned.”

#### **Article 9**

Paragraph 2 of Article 27 of the Convention shall be deleted.

#### **Article 10**

1. Paragraph 2 of Article 28 of the Convention shall be deleted.

2. Paragraph 3 of Article 28 of the Convention shall become paragraph 2 and shall be amended to read as follows:

“2. If the senior judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that senior judge to take the place of the detached senior judge of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.b.”

#### **Article 11**

Paragraph 1 of Article 29 of the Convention shall be amended to read as follow:

“1. If no decision is taken under Article 27 or 28, no judgment rendered under Article 28, or the Chamber assumes jurisdiction to review a judgment of decision in accordance with Article 43, a

Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.”

## **Article 12**

Article 30 of the Convention shall be amended to read as follows:

### **“Article 30 – Relinquishment of jurisdiction**

1. Where a judicial formation of the Higher Court is of the opinion that a case pending before it falls within the jurisdiction of a judicial formation of the Lower Court, it may at any time before it has rendered its judgment, relinquish jurisdiction in favour of that judicial formation of the Lower Court.

2. Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, or where the resolution of a question before the Chamber pertains possible systemic deficiencies affecting many individuals in the national jurisdiction of the High Contracting Party, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber.”

## **Article 13**

Article 31(a) of the Convention shall be amended to read as follows:

“(a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30, when it has assumed jurisdiction to review a decision or judgment under Article 43(1), or when the case has been referred to it under Article 43(2);”.

## **Article 14**

Article 43 of the Convention shall be amended to read as follows:

### **“Article 43 – Review and referral**

1. Within a period of three months from the date of the decision or judgment of a judicial formation of the Lower Court, a judicial formation of the Higher Court may, in exceptional cases, assume jurisdiction to review the decision or judgment following a decision by the President of the Higher Court if the case raises admissibility or substantive issues which would warrant consideration by a judicial formation of the Higher Court.

2. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request mentioned in paragraph 2 if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.

3. If the panel accepts the request mentioned in paragraph 2, the Grand Chamber shall decide the case by means of a judgment.”

#### **Article 15**

Article 44 of the Convention shall be amended to read as follows:

#### **“Article 44 – Final decisions and judgments**

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final
  - (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or
  - (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
  - (c) when the panel of the Grand Chamber rejects the request to refer under Article 43(2).
3. The decisions and judgments of the judicial formations of the Lower Court shall be final, unless application has been made of Article 43(1).
4. The final judgment shall be published.”

#### **Article 16**

Article 46 of the Convention shall be amended to read as follows:

#### **“Article 46 – Binding force and execution of judgments**

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties; the High Contracting Parties equally undertake to abide by the final judgment of the Grand Chamber adopted by a majority vote of two thirds in any case to which they are not parties where it is explicitly provided in the judgment that it shall have binding effect towards every High Contracting Party.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. 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 referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to fulfil its obligation under paragraph 1, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee,

refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5. If the Committee of Ministers is unable to adopt a decision after the deadline that was set in the judgment by the Court for the High Contracting Party to fulfil its obligation under paragraph 1, or after 18 months from the date of that final judgment if no such deadline was set, representatives entitled to sit on the committee representing one third of the High Contracting Parties may request the Parliamentary Assembly to refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1; the Parliamentary Assembly may subsequently refer this question to the Court by an absolute majority vote.

6. If the Court finds a violation of paragraph 1, it may impose a lump sum or penalty payment on the High Contracting Party and it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.”

### **Final and transitional provisions**

#### **Article 17**

1. This Protocol shall be open for signature by the High Contracting Parties to the Convention, which may express their consent to be bound by:

- (a) signature without reservation as to ratification, acceptance or approval; or
- (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

#### **Article 18**

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 17.

#### **Article 19**

All provisions of this Protocol shall apply from its date of entry into force, in accordance with the provisions of Article 18.

#### **Article 20**

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and the other High Contracting Parties to the Convention of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;

- (c) the date of entry into force of this Protocol in accordance with Article 18; and
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this ... day of... ..., in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the other High Contracting Parties to the Convention.





Ghent, 15 May 2014

Annex III

**Draft Protocol No. 18 amending the Convention on the Protection of  
Human Rights and Fundamental Freedoms**

---

## **Preamble**

The member States of the Council of Europe and the other High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”), signatory hereto,

Considering that extension of the Court’s competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity,

Having regard to Opinion No. ... (20...) adopted by the Parliamentary Assembly of the Council of Europe on ...,

Have agreed as follows:

### **Article 1**

A new paragraph 4 shall be added at the end of Article 47 of the Convention, which shall read as follows:

“4. The Court may furthermore, at the request of a High Contracting Party’s legislative or executive government branches, give advisory opinions regarding the compatibility of (draft) legislation with the Convention and the Protocols thereto.”

### **Article 2**

Article 48 of the Convention shall be amended to read as follows:

#### **“Article 48 – Advisory jurisdiction of the Court**

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47 and shall refuse any request it deems irrelevant or potentially dangerous for the Court’s reputation.”

### **Article 3**

Article 49 of the Convention shall be amended to read as follows:

#### **“Binding force of and reasons for advisory opinions**

1. Advisory opinions given pursuant to Article 47(1) shall be binding; advisory opinions given pursuant to Article 47(4) shall not be binding.
2. Reasons shall be given for advisory opinions of the Court.
3. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
4. Advisory opinions of the Court shall be communicated to the Committee of Ministers.”

## **Final and transitional provisions**

### **Article 4**

1. This Protocol shall be open for signature by the High Contracting Parties to the Convention, which may express their consent to be bound by:

- (a) signature without reservation as to ratification, acceptance or approval; or
- (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

### **Article 5**

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 4.

### **Article 6**

All provisions of this Protocol shall apply from its date of entry into force, in accordance with the provisions of Article 5.

### **Article 7**

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and the other High Contracting Parties to the Convention of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) the date of entry into force of this Protocol in accordance with Article 5; and
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this ... day of... ..., in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the other High Contracting Parties to the Convention.





Ghent, 15 May 2014

Annex IV

**Draft Protocol No. 19 amending Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms**

---

## **Preamble**

The member States of the Council of Europe and the other High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”), signatory hereto,

Considering the need to enhance the effectiveness of the advisory opinion procedure of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “Protocol No. 16”),

Having regard to Opinion No. ... (20...) adopted by the Parliamentary Assembly of the Council of Europe on ...,

Have agreed as follows:

### **Article 1**

Article 3 of Protocol No. 16 shall be amended to read as follows:

#### **“Article 3**

The Council of Europe Commissioner for Human Rights, the High Contracting Party to which the requesting court or tribunal pertains and the parties to the domestic proceedings shall have the right to submit written comments and take part in any hearing. The President of the Court may, in the interest of the proper administration of justice, invite any other High Contracting Party or person also to submit written comments or take part in any hearing.”

### **Article 2**

A new paragraph 2 shall be added at the end of Article 5 of Protocol No. 16, which shall read as follows:

“2. The requesting national court shall, in accordance with domestic law, address the positions from the advisory opinion in its decision.”

## **Final and transitional provisions**

### **Article 3**

1. This Protocol shall be open for signature by the High Contracting Parties to the Convention, which may express their consent to be bound by:

- (a) signature without reservation as to ratification, acceptance or approval; or
- (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

#### **Article 4**

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties that have expressed their consent to be bound by Protocol No. 16 have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 3.

#### **Article 5**

All provisions of this Protocol shall apply from its date of entry into force in accordance with the provisions of Article 4, but they shall not apply to any pending request for an advisory opinion prior to the date of entry into force of this Protocol.

#### **Article 6**

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and the other High Contracting Parties to the Convention of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) the date of entry into force of this Protocol in accordance with Article 4; and
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this ... day of... ..., in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the other High Contracting Parties to the Convention.



## 11. Nederlandstalige samenvatting

Het Europees Verdrag voor de Rechten van de Mens (EVRM) is 54 jaar oud dit jaar. In al die tijd heeft het bewezen een erg succesvol mechanisme te zijn voor de bescherming van de mensenrechten in Europa. In feite kan het zelfs het meest succesvolle verdrag van z'n soort in de wereld genoemd worden. Ongeveer 800 miljoen mensen in 47 lidstaten staan onder haar bescherming. Dit succes is natuurlijk enkel mogelijk gemaakt door het werk dat verricht werd door het Europees Hof voor de Rechten van de Mens (EHRM). Dit Hof heeft echter te kampen met grote moeilijkheden. Al sinds *medio* de jaren '80 van de vorige eeuw wordt er gewaarschuwd voor de groeiende juridische achterstand van dit Hof. Sindsdien is de stroom van zaken die voor het Hof aanhangig worden gemaakt echter enkel exponentieel toegenomen. Het EHRM krijgt nu jaarlijks een goede 65 000 zaken ter behandeling binnen en het is duidelijk dat het Hof met z'n 47 rechters en 640 griffie medewerkers niet over de nodige mankracht beschikt om al die zaken binnen een redelijke termijn te behandelen. Daarnaast maakt die instroom duidelijk dat er nog heel wat mensenrechtenschendingen plaatsvinden in Europa. Beide problemen moeten dringend worden aangepakt wil het EHRM zich in de toekomst laten blijven gelden als de ultieme autoriteit op het vlak van mensenrechten in Europa. Het doel van deze thesis is daarom om voorstellen te formuleren naar het Hof toe die een antwoord bieden op de volgende vraag: hoe kan de juridische achterstand van het EHRM verminderd worden en als dusdanig de legitimiteit en autoriteit van het EHRM verhoogd met als uiteindelijk doel de versterking van de mensenrechtenbescherming in Europa?

In deze thesis is vastgesteld dat het EHRM sinds een goede twee jaar uit de diepste crisis van haar bestaan aan het klimmen is. De juridische achterstand is aan het afnemen en de recente hervormingen die Protocol Nr. 14 bracht hebben dus duidelijk hun vruchten afgeworpen. De zichtbare verbetering is echter slechts gedeeltelijk van aard. Ze vindt enkel plaats voor de Alleenzettelende Rechters. De Comités en Kamers van het Hof kampen nog steeds met een grote juridische achterstand (die sinds 2010 nog met 43,2% is toegenomen). De doorlooptijd van de aanhangige zaken voor deze juridische formaties loopt zelfs op tot 4 à 5 jaar. Het grootste probleem stelt zich enerzijds m.b.t. de repetitieve zaken (zaken die voortspruiten uit systemische of structurele problemen op nationaal niveau), die nu ongeveer 50% van het aantal aanhangige zaken uitmaken, en anderzijds m.b.t. de grote hoeveelheid aan zaken die komen uit landen met een hoog aantal aanhangige zaken. Op het einde van april 2014 golden Oekraïne, Italië, Rusland, Turkije en Roemenië (in die volgorde) voor 68,5% van het aantal aanhangige zaken, terwijl deze 5 van de 47 lidstaten slechts 44,96% van de bevolking van de Raad van Europa vertegenwoordigen.

Het probleem zit hem voornamelijk in het feit dat dit Hof onderbemand is en dringend een groter budget nodig heeft voor de uitdagingen waarmee ze geconfronteerd wordt. Het budget van het EHRM is deel van het budget van de Raad van Europa hetwelk jaarlijks wordt vastgesteld volgens het principe van reële nul-groei en is klein in vergelijking met dat van andere internationale gerechtshoven. Zoals hierboven net gesteld beschikt het Hof met 47 rechters en 640 griffieleden over een veel te kleine personeelspoel, ook in een vergelijkend opzicht met andere internationale rechtshoven.

Op het einde van hoofdstuk 4 werden doelen vastgesteld voor de toekomst van dit Hof. M.b.t. de doorlooptijd van zaken werden de volgende streefcijfers vooropgesteld:

- Een maximum van 2,5 jaar voor zaken aanhangig voor de Grote Kamer;
- Een maximum van 6 maanden voor zaken aanhangig voor de Alleenzettelende Rechter, voor zaken die behoren tot Categorie I van de *priority policy* van het Hof en voor repetitieve zaken (vanaf de datum van een gerelateerd piloot arrest en daarna vanaf de datum van aanhangigmaking bij het Hof);
- Een maximum van 2 jaar voor alle andere zaken.

Gebaseerd op deze streefcijfers en het huidig aantal inkomende zaken werd daarna beslist dat de volgende cijfers zouden gebruikt worden om in de toekomst vast te stellen of het Hof nog te maken heeft met een juridische achterstand: 22 500 aanhangige zaken voor de Alleenzettelende Rechter en tussen de 25 000 en 30 000 aanhangige zaken voor de Comit es en Kamers.

In hoofdstuk 5 werd daarna vastgesteld dat het verdere doel van dit Hof moet zijn om te streven naar een pragmatische aanpak van *individual justice*, terwijl het Hof tegelijkertijd de mogelijkheid moet behouden om als quasi-constitutioneel hof van Europa te functioneren. Het recht voor iedere burger om een zaak aanhangig te maken bij dit Hof is een hoeksteen van de Conventie, dit wegnemen door het overnemen van het Amerikaanse *certiorari*-systeem zou een brug te ver zijn die overigens tienduizenden, voornamelijk Oost-Europese, burgers in de kou zou zetten.

In hoofdstuk 6 werden de recent goedgekeurde Protocollen nrs. 15 en 16 onder de loep genomen. Er werd geoordeeld dat Protocol nr. 15, ondanks de paar goeie hervormingsvoorstellen, niet tot de nodige structurele hervorming zal leiden. Het inkorten van de tijd om een zaak aanhangig van 6 naar 4 maanden (Artikel 35(1)) is waarschijnlijk de meest effici ntste maatregel van dit Protocol om de juridische achterstand weg te werken, maar het is echter evenzeer een arbitraire en slecht voorbereide amendering van het EVRM. In het algemeen pakt Protocol nr. 15 ook de structurele problemen van het EHRM niet aan (de behandeling van repetitieve zaken, het slecht functioneren van de Comit es en de Kamers en de aanpak van structurele problemen in de landen met het meeste aantal aanhangige zaken). Protocol nr. 16 voorziet in de invoering van een adviesprocedure bij het EHRM voor de hoogste hoven en tribunalen van de lidstaten van de Raad van Europa en heeft als voornaamste doel om de dialoog tussen de nationale jurisdicties en het EHRM aan te wakkeren om zo tot een versterking van de Conventie en haar implementatie in de lidstaten te komen. Het is een interessante vernieuwing, maar door het feit dat de adviezen niet-bindend zullen zijn en dat de capaciteit van de Grote Kamer erg beperkt is (10   30 arresten per jaar), valt te verwachten dat deze adviesprocedure het Hof en haar Grote Kamer echter serieus zal overbelasten. Anderzijds is het ook weinig waarschijnlijk dat deze procedure op de lange termijn ervoor zal zorgen dat de werklast van het Hof zal afnemen.

Aangezien Protocollen nrs. 15 en 16 niet de nodige structurele hervormingen met zich meebrengen werden in hoofdstuk 7 nieuwe voorstellen gelanceerd voor een toekomstige hervorming om de doelstellingen van hoofdstuk 4 en 5 te bereiken en als dusdanig een antwoord te bieden op de onderzoeksvraag die werd gesteld aan het begin van de thesis. De hervormingsvoorstellen focusten elk op een ander aspect van het Conventiesysteem. Een eerste voorstel focust op de nationale implementatie van het EVRM in de lidstaten. Het betreft de invoering van een *a priori* adviesprocedure op (voorgenomen) wetgeving op verzoek van de

overheden van de lidstaten van het EVRM. Enerzijds zal dit alternatief voor Protocol nr. 16 efficiënter zijn dan de adviesprocedure die met Protocol nr. 16 wordt ingevoerd aangezien het op een veel grotere schaal kan voorkomen dat mensenrechtenschendingen zich in de toekomst voordoen dan dat adviezen in individuele zaken die aanhangig zijn voor een nationale rechtbank dit mogelijk maken. Anderzijds is het een goed alternatief voor de huidige adviesprocedure voor de Commissie van Venetië omdat de autoriteit van dergelijke adviezen versterkt zal worden wanneer ze door het EHRM worden gegeven. Een tweede groep van voorstellen focust op de interne werking van het Hof. Een uitbreiding van het Hof in mankracht (meer rechters en meer griffie personeel) wordt vooropgesteld, gecombineerd met een interne opdeling van het Hof in een Lager Hof en een Hoger Hof. Dit voorstel zal er op een erg directe en snelle wijze voor zorgen dat de juridische achterstand van het EHRM wordt teruggebracht naar een aanvaardbaar niveau, terwijl de mogelijkheid van specialisatie en een sterke hiërarchie en samenwerking tussen beide divisies van het EHRM ervoor zal zorgen dat de kwaliteit van de rechtspraak van het Hof gewaarborgd blijft. De legitimiteit van het Hof zal ook enkel versterkt worden door de invoering van een ontradend systeem van gemotiveerde adviezen voor manifest onontvankelijke zaken en de invoering van een *erga omnes* effect voor bepaalde arresten van de Grote Kamer. Een derde en laatste groep van voorstellen focust op de problemen die zich stellen bij de uitvoering van de arresten van het EHRM. Hier wordt voorgesteld om meer gebruik te maken van piloot arresten en te starten met het gebruik van *default* arresten om structurele problemen in bepaalde lidstaten van het EVRM aan te pakken op een wijze die efficiënter is en het Hof minder zal belasten dan haar huidige aanpak van dergelijke gevallen. Daarnaast wordt ook de invoering van financiële sancties vooropgesteld om zo staten aan te pakken die de arresten van het EHRM niet naleven. Deze laatste groep voorstellen zou ervoor moeten zorgen dat in de toekomst minder kloon-zaken aanhangig gemaakt worden bij het Hof en op die wijze de legitimiteit en autoriteit van het Hof versterkt wordt.

Het EHRM kan waarschijnlijk nog meer hervormingen gebruiken dan enkel deze voorstellen, maar hetgeen in deze thesis is voorgesteld zou alvast een groot deel van de oplossing moeten zijn. Een erg belangrijke opmerking bij de voorstellen die hier zijn geformuleerd is dat hun succes sterk afhankelijk is van een budgetverhoging van het Hof (en dus ook van de Raad van Europa), vandaar ook de quote aan het begin van de thesis. Als de lidstaten van het EVRM het echter goed menen met de mensenrechten en de toekomst van Europa, dan mogen de meerkosten van deze hervormingskosten geen onoverkomelijk probleem vormen.

Met de hier gesuggereerde hervormingsvoorstellen zou de juridische achterstand van het EHRM moeten kunnen teruggebracht worden tot de niveaus die aan het einde van hoofdstuk 4 zijn voorgesteld en zou het Hof op bevredigende wijze de doelen van hoofdstuk 5 moeten kunnen verwezenlijken. Zodoende is met deze thesis een antwoord geboden op de vraag hoe de juridische achterstand van het EHRM te verminderen en als dusdanig de legitimiteit en autoriteit van het EHRM te verhogen met als uiteindelijk doel de versterking van de mensenrechtenbescherming in Europa.