Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price?

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E.H.R.L.R. 544 *This article critically examines the various measures recently adopted by the Committee of Ministers of the Council of Europe and aimed at guaranteeing the continued effectiveness of the European Court of Human Rights in the context of its steadily expanding workload. The author argues that, while reforms were needed, some of the measures adopted are open to criticism for addressing the wrong problems and/or undermining the fundamental right of individual petition.*

The ever-increasing number of individual complaints which are being lodged with the European Court of Human Rights poses serious risks for the effectiveness of the Convention's control system, and during its 114th Session, recently held in Strasbourg on May 12-13, 2004, the Committee of Ministers of the Council of Europe adopted a comprehensive package of measures--an amending Protocol to the European Convention on Human Rights and its Explanatory Report, a Declaration, three Recommendations and a Resolution--aimed at preserving it for the future. This is the result of a reforming process that has been under discussion in the Council of Europe for several years. The adopted measures centre mainly on three areas: preventing violations at national level and improving domestic remedies, making the filtering and processing of applications as efficient as possible and, finally, improving and speeding up the execution of the Court's decisions.

A system in crisis

The European Court of Human Rights has to cope with an exponential increase in the number of individual applications. This is not only the consequence of the enlargement of the Council of Europe-changes in Central and Eastern Europe since 1989 having led to a doubling of the number of contracting parties to the Convention. It seems that in older Member States also, individuals increasingly turn to Strasbourg, as a result, most probably, of the publicity given to important cases, coupled with better knowledge of the Convention machinery and a growing tendency to turn to the judiciary in general.

The increase in the volume of individual applications seems, at present, to have attained critical levels: more than 30,000 applications were lodged in 2000 and 2001, ***E.H.R.L.R. 545*** almost 35,000 in 2002, and nearly 40,000 in 2003.[1] Not only is the Court unable to process such an immense number of applications within a reasonable time, but it might face a real risk of drowning under the sheer volume of cases brought before it.[2]

Not all of these cases, obviously, raise fundamental and/or new human rights issues under the Convention. It is well known that the Court declares inadmissible over 90 per cent of the applications which are lodged with it.[3] And amongst the other cases,

terminated by a judgment on the merits, a vast majority (over 60 per cent) concerns "repetitive" cases,[4] *i.e.* applications deriving from a structural or systemic situation in the respondent state, which generates large numbers of, by definition, well-founded cases, raising the same issue as earlier judgments.[5] It therefore follows that any reform aimed at preserving the effectiveness of the Court should concentrate on finding an effective way of dealing with manifestly inadmissible cases, on the one hand, and repetitive cases, on the other.

The principal stages in the preparatory work on the reform[6]

The question of the increasing workload of the European Court of Human Rights and the risks it may involve for the effectiveness of the Convention system was already on the agenda of the Ministerial Conference on Human Rights held in Rome in November 2000, on the occasion of the 50th anniversary of the Convention. In one of the Resolutions adopted at the close of the Rome proceedings, the Conference expressed its concern for the difficulties encountered by the Court in dealing with the everincreasing volume of applications and called upon the Committee of Ministers to "initiate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation through the Liaison Committee with the European Court of Human Rights and the Steering Committee for Human Rights".[7]

In response to the concern voiced at Rome, the Committee of Ministers' Deputies set up, by decision of February 7, 2001, an Evaluation Group to examine possible means of guaranteeing the effectiveness of the European Court of Human Rights. The group, composed of the Chairman of the Ministers' Deputies' Liaison Committee with the ***E.H.R.L.R. 546*** European Court of Human Rights, the President of the Court and the Deputy Secretary General of the Council of Europe, transmitted its Report in September 2001.[8] Concurrently, the Steering Committee for Human Rights (CDDH) set up a Reflection Group "on the reinforcement of the Human Rights Protection Mechanism". Its Activity Report was sent to the Evaluation Group in June 2001,[9] so that the latter could take it into account in its work.

At its 109th Session, held on November 8, 2001, the Committee of Ministers adopted a "Declaration on the protection of Human Rights in Europe. Guaranteeing the longterm effectiveness of the European Court of Human Rights", in which it welcomed the Evaluation Group's report and instructed the CDDH to carry on the reflection process. The CDDH submitted an Interim Report in October 2002,[10] and a Final Report containing a set of proposals in April 2003.[11] In June 2003, it was requested by the Ministers' Deputies to draft the various instruments--amending Protocol to the European Convention on Human Rights, Recommendations, Resolution and Declaration --necessary to implement the proposals contained in that final report. It adopted an Interim Activity Report, informing of the state of progress of this work in November 2003,[12] and a Final Activity Report in April 2004.[13]

In the meantime, the proposals of the CDDH had been examined by the Court on two occasions. On September 12, 2003, the Court unanimously adopted a Position Paper on the measures set out in the Final Report of April 2003,[14] and on February 2, 2004, it responded to the Interim Activity Report of November 2003.[15] The Parliamentary Assembly was consulted as well. It adopted an opinion on the draft amending Protocol to the Convention on April 28, 2004.[16]

Strengthening the implementation of the European Convention at national level

The prime responsibility for securing rights and freedoms guaranteed by the Convention is cast by Art.1 not on the Court, but on the High Contracting States themselves, the Court's role being only subsidiary. So, one may wonder whether the overburdening of the Convention system should not be attributed, in part at least, to the fact that not enough is done at national level. If the Strasbourg system is suffering under a spiralling workload, is this not because there is something wrong with the capacity of national authorities to offer adequate protection of the Convention rights or, at the very least, with the faith of individuals in the capacity of national courts to offer an effective remedy for their human rights complaints? In order to try to reduce individuals' need to turn to the Court, the Committee of Ministers of the Council of Europe has thus adopted a set of three Recommendations aimed at strengthening the implementation of the Convention obligations by the Member States.

E.H.R.L.R. 547 Two of these Recommendations aim at preventing violations from occurring in the first place, by urging Member States to offer adequate university education and professional training about Convention rights, especially to professionals dealing with law enforcement (judges, prosecutors, lawyers) and detention (police officers, prison staff, immigration services, etc.),[17] and by recommending them to ensure that there are appropriate and effective mechanisms for verifying the compatibility with the Convention of both draft laws and existing legislation, as well as administrative practice.[18]

The third Recommendation, on the other hand, aims at improving the effectiveness and accessibility of domestic remedies where there are allegations that a right enshrined in the Convention has been violated,[19] considering that the existence of effective domestic remedies could, in the long or even medium term, lead to a reduction in the workload of the Court, "both quantitatively, since more individuals can obtain redress before a national authority, and qualitatively, since a case which has been well examined by a national authority is subsequently much easier for the Court to deal with".[20]

Though these three Recommendations are obviously welcome, their value remains largely symbolic, since Committee of Ministers' recommendations are not binding on Member States. According to Art.15.2 of the Statute of the Council of Europe, the Committee of Ministers can only "request the governments of members to inform it of the action taken by them with regard to such recommendations". In the instant case, the Committee of Ministers has expressly asked the Ministers' Deputies to undertake a review on a regular and transparent basis of the implementation of the three adopted Recommendations.[21]

Reinforcing the case-processing capacity of the Strasbourg Court

The various measures aimed at ensuring a more effective operation of the European Court of Human Rights have been incorporated in an amending Protocol to the European Convention.

Protocol 14, as well as its Explanatory Report, were formally adopted on May 12, 2004. The Protocol was opened for signature the next day and, so far, it has been signed by 20 states.[22] According to its Art.19, it shall enter into force on the first day of the ***E.H.R.L.R. 548*** month following the expiration of a period of three months[23] after the date on which all parties to the Convention have expressed their consent to be bound by it. In its separate Declaration, the Committee of Ministers has urged all Member States to sign and ratify Protocol 14 as speedily as possible to secure its entry into force within two years after its opening for signature, *i.e.* by May 13, 2006 at the latest.[24]

There are three main changes made by Protocol 14 to the control system of the Convention[25]: (a) the introduction of single-judge formations, empowered to make final decisions on admissibility of applications in clear-cut cases, (b) the implementation of a new procedure for "manifestly well-founded" cases, and (c) the insertion of a new admissibility requirement for individual applications.

The single-judge formation

Article 6 of Protocol 14 amends the text of the new Art.26 (formerly Art.27) ECHR by adding the single-judge category to the various judicial formations of the Court (committees of three judges, Chambers of seven judges and Grand Chamber of seventeen judges).

According to the new Art.27 (inserted in the Convention by Art.7 of the Protocol), single judges will be granted the power to declare individual applications inadmissible or to strike them out of the Court's list of cases, whenever "such a decision can be taken without further examination", *i.e.* where such a decision can, at present, be taken ***E.H.R.L.R. 549*** unanimously by a committee of three judges.[26] The single judge will have discretion to refer the application to a committee or a Chamber, but if it takes a decision of inadmissibility or of striking out, that decision shall be final (new Art.27(2) and (3) ECHR).

In accordance with the principles of judicial independence and impartiality, new Art.26(3) ECHR excludes the possibility that the judge elected on behalf of a state could ever be empowered to examine the admissibility of an application against that same state, when sitting as a single judge.

Single judges will be assisted in the course of their making decisions on the admissibility of applications by a new class of Registry personnel, the so-called "rapporteurs", mentioned in new Art.24 (formerly Art.25) ECHR, as amended by Art.4 of the Protocol. The decision itself, however, will remain the sole responsibility of the judge.[27]

According to the Explanatory Report, the introduction of the single-judge formation is expected to lead to "a significant increase in the Court's filtering capacity", since there will be only one judge instead of three involved in the decision-making, on the one hand, and the rapporteur work will be carried out by non-judicial personnel instead of the judges themselves, on the other hand.[28] It has been argued, however, that it would also represent a retrenchment in the guarantees offered to individual applicants, since final decisions on applications alleging human rights' violations will no longer have necessarily to be collegial.[29] Yet this loss of collegiality is more apparent than real: under the current system, indeed, committee cases are dealt with in batches of 50 or

so at a time, and even if they must formally have been approved by three judges, the decisions taken are in fact based on the rapporteur's note, with which the other two judges on the committee hardly ever disagree.[30]

An accelerated procedure for repetitive cases: extending the committees' powers

Besides the filtering out of the overwhelming majority of applications which are inadmissible, the second major challenge which the Court is currently facing is--as ****E.H.R.L.R. 550*** mentioned before--that of handling the numerous repetitive but manifestly well-founded cases, deriving from the same structural defect at national level.

Protocol 14 addresses that second challenge by extending the competence of the committees of three judges, empowering them not only to declare applications inadmissible--as they can now--but also to take joint decisions on both admissibility and merits "if the underlying question in the case, 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" (new Art.28(1)(b) ECHR, amended by Art.8 of the Protocol). The Explanatory Report specifies that "well-established case-law" normally means "case-law which has been consistently applied by a Chamber", but that exceptionally, it could be conceivable that a single judgment on a question of principle may constitute "well-established case-law" as well, "particularly when the Grand Chamber has rendered it". It also stresses that it is above all the repetitive cases that are targeted by the new competence of the committees.[31]

Parties will have an opportunity to give their view about the advisability of following the new accelerated procedure (they may, in particular, contest the "wellestablished" character of the case-law involved or try to demonstrate that the case at issue differs from the applications which have resulted in such well-established caselaw), but they will not have a right of veto. And exactly as for an inadmissibility decision at present, this new procedure will require unanimity of the three judges. If they fail to reach unanimity on all the aspects of the case (the admissibility of the application, its merits and the just satisfaction), the ordinary Chamber procedure will be applied.

Since the extended powers of the committees will be limited to questions that have already been the subject of well-established case-law, it was not found necessary to provide for the possibility to request, following a committee judgment, a referral to the Grand Chamber. Judgments, as well as decisions, of the committees shall thus be final (new Art.28(2) ECHR). For the same reason, mandatory participation of the judge elected on behalf of the state named in the application did not appear necessary in all the cases where a committee makes a joint decision on admissibility and the merits. In some cases, however, the presence of the "national judge" may prove useful, and the possibility has thus been given to the committees to invite the judge elected in respect of the High Contracting Party concerned to replace one of their members (new Art.28(3) ECHR, as amended by Art.8 of the Protocol).[32]

The proposal to empower committees of three judges to rule on the admissibility and merits of cases which raise issues about which the case-law of the Court is clear has been ****E.H.R.L.R. 551*** largely welcomed by the various bodies consulted by the CDDH.[33] The implementation of this new procedure has been anticipated by the drafters to represent a significant increase in the decision-making potential of the Court, since many cases will be decided "by three judges instead of the seven currently required when judgments or decisions are given by a Chamber".[34] On the other hand, it maintains the principles of judicial and collegiate decision-making, as well as the essence of the right of individual petition.

An additional admissibility criterion for individual applications

Article 12 of Protocol 14 adds a new admissibility criterion to the criteria already laid down in Art.35 ECHR. According to the wording of new Art.35(3)(b), individual applications will be declared inadmissible if "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 main element of the new admissibility requirement is thus whether the applicant has suffered a "significant disadvantage": the criterion is aimed at rejecting cases considered as carrying only minor consequences for the applicant, pursuant to the principle whereby judges should not deal with such cases, but should be allowed to concentrate on the more important ones (*de minimis non curat praetor*). Two safeguard clauses are provided, however: it will not be possible for the Court to reject an application on account of its trivial nature if respect for human rights requires an examination on the merits and/or if the case has not received due judicial examination at national level.

A two-fold transitional rule has been set out in Art.20(2) of the Protocol regarding the new admissibility criterion: it shall not apply to applications declared admissible before the entry into force of the Protocol, and, besides, single-judge formations and committees will be prevented from applying it during a period of two years following that entry into force, its application being reserved for that period to the Chambers and Grand Chamber of the Court.

According to the Explanatory Report, the purpose of the new admissibility criterion 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".[35] The idea of giving the Court wider possibilities to reject applications by raising the admissibility threshold through the introduction of additional admissibility criteria has been discussed from the very beginning of the reform process. Several forms of words were successively put forward. Initially, the proposal made by the Evaluation Group set up by the Committee of Ministers' Deputies was to empower the ***E.H.R.L.R. 552*** Court to decline to examine in detail applications which raise "no substantial issue" under the Convention[36] but the CDDH concluded that "this would give too wide a discretion to the Court, enabling it to pick and choose the cases it would wish to deal with".[37] It proposed to circumscribe the Court's discretion by reference to what it considered to be more objective criteria, and suggested a new formulation according to which an application could be declared inadmissible "if the applicant had not suffered a significant disadvantage and if the case raises neither a serious question affecting the interpretation or application of the Convention or the Protocols thereto, nor a serious issue of general importance".[38] Regarding the wording of that first safeguard clause, the CDDH later[39] expressed a preference for using a formula taken from Art.37(1) ECHR,[40] rather than the one initially proposed, drawn from Art.43(2) ECHR.[41] In the latest stages of the process, a second safeguard clause was finally added, in order to avoid the situation in which an application would be rejected as inadmissible on the new ground set out, although the applicant had never had a proper remedy in the national legal system.

NGOs across Europe have lobbied forcefully against the adding of a new admissibility criterion in Art.35 ECHR,[42] and their concerns were shared by several CDDH members,[43] by some judges of the Court,[44] and by the Parliamentary Assembly.[45]

E.H.R.L.R. 553 The new admissibility criterion has been opposed on both principled and practical reasons. As a matter of principle, it was advocated that it would impinge on the very essence of the Convention mechanism, its distinct and unique achievement, namely the right of individual petition. And indeed, it entails *de facto* a restriction of the right of individuals to seek redress before the Court: any individual wishing to apply to the Court will still remain free to do so and have the guarantee that his or her application will be examined by a judicial formation of the Court on its admissibility; however, on the basis of a new and "rather vague, even potentially arbitrary" condition,[46] that application is likely to be rejected without a judicial determination of the merits of the case, even if well-founded.

On more practical grounds, the expediency of the criterion has been seriously questioned. It was stressed that the measure does not seem to aim at the right target since it focuses on cases that presently meet the admissibility requirements, which represent a very small proportion of the Court's caseload: the priority for the Court is not to have more cases declared inadmissible; the challenge is, on the contrary, to filter out, in a more efficient manner, the overwhelming majority of cases that are *already* inadmissible under the current criteria.[47]

The Committee of Ministers seems to have been willing to answer that objection by stating, in the Explanatory Report to the Protocol:

"The new criterion may lead to certain cases being declared inadmissible which might have resulted in a judgment without it. Its main effect, however, is likely to be that it will in the longer term enable more rapid disposal of unmeritorious cases. Once the Court's Chambers have developed clear-cut jurisprudential criteria of an objective character capable of straightforward application, the new criterion will be easier for the Court to apply than some other admissibility criteria, including in cases which would at all events have to be declared inadmissible on another ground."[48]

It is most doubtful, though, whether the new criterion will ever, even in the longer term, permit a more expeditious disposal of applications inadmissible under other criteria as well. Applying the new admissibility criterion will indeed necessarily require an assessment of whether:

• there was no significant disadvantage suffered by the applicant,

• respect for human rights does not require pursuing examination of the application beyond the admissibility stage, and,

• the case did receive a due judicial examination at national level.

"Unless the examination was so perfunctory as to make the right of individual petition illusory",[49] this treble control will inevitably require an in-depth study of the case file **E.H.R.L.R. 554* and probably make decisions on admissibility more complex and time consuming, rather than more efficient.[50]

Improving the execution of the Court's judgments

The issue of a rapid and adequate execution of the Court's judgments is closely linked to that of the inflow of new applications, especially with regard to repetitive cases: most of these repetitive applications would not have been lodged with the Court if appropriate general measures had been taken, or taken more promptly, by the state concerned following a finding of a violation.

Various measures have thus been adopted to improve and accelerate the execution of the Court's judgments. The Court has first been invited, by a Resolution of the Committee of Ministers[51] to identify in its judgments what it considers to be an underlying systemic problem and the source of this problem,[52] so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.[53] Such judgments containing indications of the existence of a systemic problem should also be given maximum publicity. They should be notified not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights, and should be highlighted in an appropriate manner in the database of the Court.

The Committee of Ministers, on the other hand, has been empowered by Protocol 14 to ask the Court[54] for interpretation of a final judgment in the course of the execution process,[55] as well as to institute proceedings before the Court's Grand Chamber where a state persistently refuses to comply with a judgment, in order to obtain a finding by **E.H.R.L.R. 555* the Court that the state has infringed its obligation under Art.46(1) ECHR[56] (Art.16 of the Protocol adding new paras (3) to (5) to Art.46). In both cases, the decision requires a qualified majority vote of two-thirds of the representatives entitled to sit on the Committee, so the new procedures are expected to be used only on very rare occasions and should not result in an increase of the workload of the Court.[57]

Conclusions

Having to cope with an excessive caseload, the Convention's control system is obviously in crisis, and reforms are needed. The question, however, is whether the measures adopted by the Committee of Ministers address the right problems.

Several of these measures seek to alleviate the workload of the elected judges. This is, in particular, the case with the amendment of Art.28 ECHR, which empowers three-judge committees--instead of the currently required seven-judge Chambers--to rule, in a simplified procedure, on admissibility and the merits in cases in which the underlying question has already been the subject of well-established case-law. It is also the case with the introduction of the single-judge formation, that will be competent to take inadmissibility decisions in clearly-cut cases--a judicial power exercised hitherto by the three-judge committees. These measures, however, will not significantly ease the Registry's workload. On the contrary, the work of studying the file and of drafting decisions or judgments will still have to be carried out, and additional rapporteur work will have to be done in the context of single-judge formations. Since it seems that it is registry time, rather than judicial time, that is currently lacking for the processing of cases,[58] one might wonder whether the measures considered are aimed at the right target. Even if this does not require an amendment to the Convention, it is rather obvious anyway--and the Committee of Ministers has acknowledged it[59] --that no increase in the effectiveness of the Convention system will be achieved without additional budgetary resources aimed at strengthening the registry of the Court.

**E.H.R.L.R. 556* More serious concern is triggered by the introduction of a new admissibility requirement. The efficiency of the measure has been questioned, since the present system is already very selective (with more than 90 per cent of the applications declared inadmissible). Considering the huge number of applications lodged with the Court (almost 40,000 in 2003), it could be objected that even a small percentage of admissibility still represents an important absolute number of admissible cases and that an additional tool for dispensing with certain of these cases is thus welcome. The new criterion, however, seems so complex that it is likely to make examination of cases at the admissibility stage a rather difficult and time-consuming operation.

Besides being probably of very little expediency, the addition of this new admissibility criterion is also most objectionable as a matter of principle. The reform process of the European Court of Human Rights has largely been dominated by a debate about the priorities the Court should give itself, and the choice it should make between a system of individual justice and one of (quasi-)constitutional justice. So far, the Convention system has been able to fulfil two key roles: to provide an avenue of redress for every individual with human rights complaints and to function as a (quasi-) constitutional instrument of European public order, elucidating, safeguarding and developing the legal standards of human rights protection laid down in the Convention.[60] In view of its ever-increasing caseload, some have questioned the possibility of the Court continuing to play both roles, and have wondered whether the first should not be sacrificed or curtailed in order to allow the Court to continue to fulfil the second. In other words, was it not time for the Court to become less accessible for everyone but at least able to deal without undue delay with the major problems that are of fundamental importance in the country concerned and for the application and interpretation of the Convention in general? That latter view[61] represents a considerable erosion of the protection of human rights by the European Court. It was adopted, however, by the Evaluation Group set up by the Committee of Ministers' Deputies which proposed that the Court should be empowered to decline to examine in detail applications that raise no "substantial issue" under the Convention, so as to ensure that judges were left with sufficient time to devote to "constitutional judgments", *i.e.* "fully reasoned and authoritative judgments in cases which raise substantial or new and complex issues of human rights law".[62] The criterion finally adopted in Protocol 14 might seem more restrictive, but it still impinges on the right of individual petition, the cornerstone of the Convention's system, by reducing the individual's prospects of obtaining judicial determination of the merits of his or her case, even if it is well-founded.

Other possible innovations, on the other hand, may have been too quickly rejected. This might, in particular, be the case with the idea--put forward by certain experts on the Reflection Group set up by the CDDH[63] --of making it compulsory for applicants to be represented by a lawyer at all stages of the Strasbourg proceedings (which, today, ***E.H.R.L.R. 557*** is not obligatory until notice of the application has been given to the respondent contracting party[64]). Even if there is no way--and it would not be desirable either--to "turn off the tap",[65] *i.e.* to reduce the input of the Court by preventing people from lodging applications with it, measures are obviously needed upstream from the Court to try to dissuade people from making misconceived applications. Initial legal advice provided to potential applicants could be most useful in that respect. It might result not only in fewer cases being brought to the Court but also in better-prepared cases, which would be simpler and quicker to process. The idea of making such legal assistance compulsory was, however, rejected at an early stage of the reform process, since it could "exclude for financial reasons a number of meritorious applications and constitute an unwarranted impediment to access to the Court".[66] Actually, compulsory legal representation of applicants from the very first stages of the procedure would not be a social or financial obstacle to access to the Court if adequate legal aid were to be made available at national level. But it seems that the Council of Europe was not ready to impose such an obligation--which has obviously a significant financial effect--on the Member States. The result is regrettable. An efficient human rights control system has its price, and if the contracting parties to the Convention are not ready to pay for it, the costs might well be supported by the individuals instead, whose right of petition to the Court has finally been much more curtailed by the new admissibility criterion than it would have been by compulsory legal representation.

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Footnotes

1 Figures taken from the "2003 Survey" (*www.echr.coe.int/Eng/EDocs/2003SURVEYCOURT.pdf*), p.34.

2 How the caseload of the Court will evolve in the future is obviously impossible to forecast with accuracy but, most probably, it will continue

to rise sharply, especially with the greater awareness of the Convention in the contracting states that have ratified it more recently. A very often quoted figure, in this respect, is that of the virtual number of potential applicants which, in 2004, is about 800 million people.

3 In 2002 and 2003, over 95 per cent of the decisions taken by the Court were inadmissibility or strike-out decisions (see the "2003 Survey", p.34).

4 See the "2003 Survey", p.25, as well as the "2002 Survey" (*www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf*), p.23.

5 The most frequently cited example of this phenomenon is the excessive length of civil proceedings in Italy, a situation which has given rise to literally thousands of applications and hundreds of judgments finding a violation of Art.6.

6 Most of the preparatory documents can be consulted on the website of the Council of Europe (*www.coe.int/T/E/Human_rights/ECHRReform.asp*).

7 See para.18(ii) of Resolution I, "Institutional and functional arrangements for the protection of human rights at national and European level" (CM (2000) 172).

8 Doc.EG Court (2001) 1.

9 Doc.CDDH-GDR (2001) 010.

10 Doc.CM (2002) 146.

11 Doc.CM (2003) 55.

12 Doc.CM (2003) 165.

13 Doc.CM (2004) 65.

14 Doc.CDDH-GDR (2003) 024.

15 Doc.CDDH-GDR (2004) 001.

16 Opinion No.251 (2004).

17 Recommendation 4 (2004) on the ECHR in university education and professional training adopted by the Committee of Ministers on May 12, 2004. Providing adequate education on the Convention may actually prevent not only a number of violations resulting from insufficient knowledge of the Convention, but also the lodging of applications which manifestly do not meet the admissibility requirements (see Appendix to Recommendation 4 (2004), para.3).

18 Recommendation 5 (2004) on the verification of the compatibility of draft laws, existing laws and administrative practice with

the standards laid down in the ECHR adopted by the Committee of Ministers on May 12, 2004.

19 Recommendation 6 (2004) on the improvement of domestic remedies adopted by the Committee of Ministers on May 12, 2004.

20 See Proposal A.1 (argument a) of the Final Report of the CDDH (CM (2003) 55).

21 See Declaration, "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels" adopted by the Committee of Ministers on May 12, 2004.

22 Armenia, Croatia, Denmark, Estonia, France, Georgia, Greece, Iceland, Ireland, Italy, Latvia, Luxembourg, Netherlands, Norway, Portugal, Romania, Slovenia, Sweden, Switzerland and the United Kingdom.

23 Since implementation of the reform is considered to be urgent, a period of three months has been preferred to one year, which had been the period chosen for amending Protocol 11. The Explanatory Report recalls that for Protocol 11, the period of one year was necessary in order to allow for the setting up of the new Court, and in particular for the election of the judges (para.104).

24 See Declaration, n.22 above.

25 Other measures in Protocol 14 include: (a) changing the judges' term of office from the present six-year renewable term to a single, nine-year term, in order to strengthen both the appearance and the reality of their independence: see Art.2 of the Protocol, amending Art.23 ECHR, and Art.21 of the Protocol for the transitional provisions; (b) introducing some flexibility as regards the size of the Court's Chambers (they could, in the future, be reduced for a fixed period from seven to five judges, by unanimous decision of the Committee of Ministers at the request of the plenary Court), as well as a new system of appointment of ad hoc judges (while under the current system, state parties are allowed to choose an ad hoc judge after the beginning of the proceedings, the new rule provides for a judge's

replacement by a person chosen by the President of the Court from a reserve list submitted in advance by each contracting party): see Arts 5 and 6 of the Protocol, amending the current Arts 26 and 27 ECHR that shall become Arts 25 and 26; (c) establishing the principle of the taking of a joint decision on admissibility and merits for individual applications (although the Court may always decide to take the decision on admissibility separately): see Art.9 of the Protocol, amending Art.29 ECHR; (d) providing the Commissioner for Human Rights with the right to intervene as third party in all cases before a Chamber or the Grand Chamber: see Art.13 of the Protocol, adding a new para.3 to Art.36 ECHR; (e) implementing a more flexible friendly settlement procedure (with a possibility for the Court to place itself at the parties' disposal for this purpose at *any stage in the proceedings* and a new power conferred on the Committee of Ministers to supervise the execution of *decisions* endorsing the terms of friendly settlements): see Art.15 of the Protocol amending Art.39 ECHR; (f) providing the possibility for the EU to accede to the Convention: see Art.17 of the Protocol amending Art.59 ECHR.

26 Under the new system as well, three-judge committees will still be empowered, according to Art.28 ECHR, to declare an individual application inadmissible or to strike it out of the list of cases "where such a decision can be taken without further examination". It will be for the Court to decide when this shared competence will be exercised by a single judge or a committee, but since the reform is aimed at increasing its filtering capacity, one might consider that, as a matter of principle, clearly inadmissible cases should in the future be disposed of by a single judge rather than by a committee.

27 Explanatory Report, para.67.

28 *ibid.* para.62.

29 It is on that basis that the measure was opposed by 74 NGOs and bodies in a document submitted to the

Committee of Ministers: see para.7 of the "Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights", signed in March 2003. The Joint Response can be consulted on Amnesty International's website at *http://web.amnesty.org/library/index/engior610082003*. In a later comment on the Interim Activity Report of the CDDH, Amnesty International once more expressed the same position of principle (see para.44 of Amnesty International's Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights (February 2004), *http://web.amnesty.org/library/index/engior610052004*).

30 Some committees do not even hold meetings and take their decisions merely on the basis of a written procedure (see para.24 of the Final Report of the Working Party on Working Methods of the European Court of Human Rights, produced by judges of the Court and members of the Registry, dated January 2002).

31 Explanatory Report, para.68.

32 This decision to substitute one of the three judges of the committee by the judge elected in respect of the contracting party which is the subject of the application may be taken, according to new Art.28(3) ECHR, "having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.b". Queries have been raised about this wording which seems to give a prominent place to the state party (see, in particular, Amnesty International's Comments on the Interim Activity Report of the CDDH, n.30 above, paras 22-24), and the Parliamentary Assembly did recommend that the words "including whether that Party has contested the application of the procedure under paragraph 1.b" be deleted (para.14 of its opinion No.251 (2004)).

33 The Court and the 74 NGO signatories to the "Joint Response to Proposals to Ensure the Future Effectiveness of the European

Court of Human Rights", n.30 above, did endorse it. The Parliamentary Assembly and Amnesty International in its later comments on the Interim Activity Report of the CDDH as well, though with some reservations regarding the wording proposed to trigger the substitution, in the three-judges committee, of the "national" judge (see n.33 above).

34 Explanatory Report, para.70.

35 *ibid.* para.77.

36 Doc.EG Court (2001)1, paras 92-93.

37 See its Final Report of April 2003, Doc.CM (2003) 55, para.14.

38 See proposal B.4 of the same document.

39 See its Interim Activity Report, Doc.CM (2003) 165, para.40.

40 Art.37(1) ECHR allows the Court to strike an application out of its list of cases whenever it is no longer justified to continue the examination of the application. The second sentence of the article, however, provides that the Court shall continue the examination of the application "if respect for human rights as defined in the Convention and the Protocols thereto so requires".

41 Art.43 ECHR authorises the parties to a case to request that it be referred to the Grand Chamber within a period of three months from the date of the judgment of the Chamber. Yet, the request for referring to the Grand Chamber is first submitted to a panel of five judges and shall be accepted, according to Art.43(2), only "if the cases raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance".

42 See, especially, the "Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights", n.30 above, paras 8-10 and Amnesty International's Comments on the Interim Activity Report of the CDDH, n.30 above, paras 33-37.

43 See n.2 of the Final Report of the CDDH (CM (2003) 55).

44 While the judges broadly agreed with most of the proposals made in the

CDDH report, the Court was unable to reach a common position on the CDDH's proposal to introduce into the Convention a new admissibility criterion. The point of view of the judges in favour of this measure is summarised in paras 36-37 of the Position Paper of the Court (Doc.CDDH-GDR (2003) 024), whilst that of the judges opposed to it is expressed in paras 34-35 of the same document (see also the common position adopted by judges Tulkens, Fischbach, Casadevall and Thomassen, "Pour le droit de recours individuel" in *La réforme de la Cour européenne des droits de l'homme* (Bruylant-Nemesis, Brussels, 2003), pp.171-175). In its later response to the CDDH Interim Activity Report (Doc.CDDH-GDR (2004) 001), the Court, having taken votes on the issue of the new admissibility criterion, was able to express a majority view: the majority of the Court supported the idea of enhancing the flexibility of admissibility conditions, but suggested an alternative--and even broader--new admissibility criterion, according to which the Court would declare an individual application inadmissible "where it considers that … the respect of human rights as defined in the Convention or the Protocols thereto does not require the examination of the application" (para.21).

45 Opinion No.251 (2004), para.11.

46 Point of view expressed by the opponents of the new admissibility criterion amongst the judges (see n.45 above), Position Paper of the Court, para.34; see also Amnesty International's Comments on the Interim Activity Report of the CDDH, n.30 above, para.36.

47 See "Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights", n.30 above, para.8 and common position adopted by judges Tulkens, Fischbach, Casadevall and Thomassen, n.45 above, para.4.

48 Explanatory Report, para.79.

49 Point of view expressed by the opponents of the new admissibility criterion amongst

the judges (see n.45 above), Position Paper of the Court, para.35.

50 See also Amnesty International's Comments on the Interim Activity Report of the CDDH, n.30 above, paras 35 and 37.

51 Resolution 3 (2004) on judgments revealing an underlying systemic problem adopted by the Committee of Ministers on May 12, 2004.

52 But not, by contrast, to indicate the corrective measures it should recommend, since under the principle of subsidiarity, it is for the Member States, subject to the supervision of the Committee of Ministers, to choose the means of executing the Court's judgments.

53 In its Position Paper (para.43), the Court suggested that, further to a "pilot judgment" in which a specific structural problem had been found, the respondent state should have the obligation to introduce an effective remedy aimed at providing redress at national level, even for cases already brought before the Court (but not yet declared admissible). This would allow the Court, which would in the meantime have "frozen" the proceedings in respect of all individual applications concerning the same situation, subsequently to decline to examine them for failure to exhaust domestic remedies. The CDHH, however, took the view that it was "legally difficult" to provide for a general legal obligation to create retroactive domestic remedies and the idea was rejected (see Interim Activity Report, CM (2003) 165, paras 20-21).

54 According to the Explanatory Report (para.97), it would normally "be for the formation of the Court which delivered the original judgment to rule on the question of interpretation", but "the Court is free to decide on the manner and form in which it wishes to reply to the request".

55 No time-limit has been set for the referral "since a question of interpretation may arise at any time during the Committee of Ministers' examination of the execution of the judgment" (*ibid.*).

56 During the reform process, it was stressed that the

Committee of Ministers needed a wider range of means of pressure to ensure the execution of judgments. At present, the sole sanction available to deal with wilfully recalcitrant states is to suspend or expel them from the Council of Europe according to Art.8 of the Council of Europe's Statute. These are extreme measures, and might be counterproductive in most instances. As emphasised in the Explanatory Report, states concerned by such measures have need of the disciplines of Council of Europe membership, far more than others, and not of being outside it (para.100).

57 Explanatory Report, paras 96 and 100.

58 This has been expressly acknowledged by the Evaluation Group set up by the Committee of Ministers' Deputies, whose report emphasises that "delays in processing applications derive not so much from a shortage of time on the part of the judges as from difficulties encountered by the Registry in preparing files for judicial consideration" (Doc.EG Court (2001) 1, para.69; see also paras 86 and 87). The same idea has been expressed by some of the experts in the Reflection Group set up by the CDDH, who stressed that most of the work related to admissibility decisions is carried out by the registry, and that reducing the number of judges from three to one would therefore not solve the problem of the Court's backlog (Doc.CDDH-GDR (2001) 010, Appendix 1, para.20).

59 Upon proposal of the CDDH, the Committee of Ministers has expressly agreed to strengthen the registry of the Court (see the Final Activity Report of the CDDH, Doc.CM (2004) 65, para.21), and in its Declaration, n.22 above, it has asked the Ministers' Deputies to "assess the resources necessary for the rapid and efficient implementation of the Protocol" and "to take measures accordingly".

60 See the wording of the European Court in *Ireland v United Kingdom* (1978) 2 E.H.R.R. 25 at [154].

61 Which has been expressed in particular by the President of

the European Court of Human Rights (see L. Wildhaber, "Un avenir constitutionnel pour la Cour européenne des droits de l'homme", *Revue universelle des droits de l'homme,* 2002, pp.1-6).

62 Doc.EG Court (2001)1, para.98.

63 Doc.CDDH-GDR (2001) 010, Appendix 1, para.19.

64 R.36(2) of the Rules of Court.

65 Amnesty International's Comments on the Interim Activity Report of the CDDH, n.30 above, para.43.

66 Report of the Evaluation Group set up by the Committee of Ministers' Deputies, document EG Court (2001)1, para.5. See also J. Wadham and T. Said who defended the view that "allowing applicants to communicate with the Court in the early stages of proceedings … without the need of a lawyer is an extremely important element in ensuring effective access to justice and any curtailment of this would considerably limit and devalue the right of individual petition" ("What Price the Right of Individual Petition: Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights" [2002] E.H.R.L.R. 172).

