

THE REFORM OF THE EU COURTS (III)

The Brilliant Alternative Approach of
the European Court of Human Rights

Franklin DEHOUSSE

(with the collaboration of Benedetta Marsicola)



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ABOUT THE AUTHORS

Franklin Dehousse is professor (on sabbatical in abeyance) at the University of Liège, and judge at the European General Court. Benedetta Marsicola is Lawyer at Trevisan & Cuonzo Avvocati (LLM).

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In memory of Fernand Herman, former Member of the European Parliament, Henri Simonet, former Member of the European Commission, and Karel Van Miert, former Member of the European Commission. Three friends, who offered me encouragement (and sometimes work) at the beginning of my career in EU affairs. Three men of European conviction, who would not have liked this story at all

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EXECUTIVE SUMMARY

- In 2011, the European Court of Justice (ECJ) proposed a strong increase in the number judges at the European General Court (EGC), to deal with the latter's substantial backlog. At the time, the EGC began to implement a more modest and progressive strategy, based on limited, targeted and reversible increase of personnel (as recommended by the author in 2011). Four years later, at the end of 2015, after a very long and complex debate, the EU institutions decided to double the number of judges in the EGC. During the same period of time, the judicial backlog had been more or less liquidated. According to various press sources, some sitting judges were beginning to look for work (not to speak of the armada of new ones due to arrive in 2016). The EGC's management strategy had evidently delivered, notwithstanding the addition of merely 9 additional legal secretaries and without an additional judge. Moreover there was still an important margin within which results could continue to be improved.
- In a comparative approach, this report examines the reforms implemented by the European Court of Human Rights (ECtHR) from 2000 to 2016. During this period, the ECtHR had to address a far greater backlog than that faced by the EGC. The strategy for reform it followed was completely different from that followed by the EU, being far more global, economical, and flexible. This paper aims to describe and analyse the ways in which the ECtHR's backlog was strongly reduced and to draw some lessons for the management of the EU courts.
- After 1989, due to multiple factors, the ECtHR underwent enormous and simultaneous changes. The Council of Europe was enlarged to include a number of new states some of which were confronted with serious challenges in the field of human rights. The scope of the protection of human rights was simultaneously enlarged. Taken together it was a kind of perfect legal storm. From 2000 to 2012, the number of applications before the ECtHR rose from 10,000 to 65,000. During the same period, the number of pending applications went from 16,000 to 162,000.
- The ECtHR launched an in depth reflection process. Internal papers were drafted. External experts were consulted. External contributions were encouraged. International conferences were organized. Multiple technical analyses emerged. This allowed a global and long term analysis to be adopted. This also stimulated various costs/benefits analyses.
- The reform process was also extremely open. Internal and external reports were published. Official documents were made public on the internet. All analyses were debated in conferences where dozens of experts were present.
- The ECtHR implemented, managerial reforms before structural ones. This minimized costs and amplified flexibility. Managerial measures could also be adapted, corrected or withdrawn in the light of experience.

- Increases in the number of personnel came about progressively, not automatically, and were not irreversible. This allowed for limited and targeted increases of personnel, which could be withdrawn or re-effected after the targeted problem had been addressed. This also allowed the stable part of the personnel to increase.
- In a nutshell, the reform of the ECtHR was everything that the EGC's was not. Indeed, the two reforms are more or less of a totally different character. So far as process is concerned, in the ECJ's case there was no in depth preparation, no consultation of external experts or interested parties, no costs/benefits analysis, no impact assessment, and more or less no public debate. This could surprise observers. First, the Council of Europe, a traditional intergovernmental organization, appeared to manage change in a far more democratic and transparent manner than the EU, with its transnational character and safeguards meant to involve the Member States' citizens. Second, there had been a quite serious and open preparatory debate during the earlier reform of the EU Court of Justice's statute in the framework of the Nice Treaty. The new reform thus reflects a deterioration of the top management of the European Court of Justice, and generally of the other EU institutions.
- The opposition between the two reforms is also complete in so far as the substance is concerned. The result of the doubling of the General Court is to create a massive increase in the number of judges and of the staff attached to their cabinets. This increase is neither progressive nor reversible, and allows for no assessment by way of trial and error. Moreover, it is limited to the top tier of the institution, which is both more costly and more unstable. The difficulty of managing the biggest international court in the world has not been examined. Finally, the efficiency of the changes is to be evaluated after the money has been spent, and not beforehand.
- The doubling of the number of judges of the EGC has now become the new symbol of a generally obese EU institutional system. The Treaty of Nice had produced an obese Commission. The Treaty of Lisbon had produced an obese Parliament (and even Central Bank and Court of Auditors). Now the EU also has an obese Court of Justice. The primacy of representation over efficiency has led to a system where the top tier of each institution is manifestly excessive as compared to the tasks it is required to discharge (sometimes even to the detriment of the other tiers). This not only costs a lot of money but makes these institutions more difficult to manage. It is high time that the leaders in charge of EU affairs rediscover the immortal words of Mies van der Rohe. In EU politics, as in architecture or management, "less is more".

INTRODUCTION

In 2011, the European Court of Justice (ECJ) proposed a strong increase of the judges of the European General Court, to deal with a substantial backlog. At the time, the author indicated that it would be preferable to implement a careful and progressive strategy, with internal reforms and small targeted increases of personnel¹. A little bit later, the General Court began to implement this strategy. Four years later, at the end of 2015, after a very long and complex debate, the EU institutions decided to double the number of judges in the European General Court (EGC). According to various press sources, the judicial backlog had more or less disappeared, and some sitting judges were beginning to look for work (not to speak of the armada of new ones due to arrive in 2016). The recommended progressive strategy to deal with the backlog had evidently delivered, with the addition of only 9 additional legal secretaries and not a single additional judge. Moreover there was still an important margin left in which to improve results².

By contrast it is interesting to examine the reform implemented by the European Court of Human Rights (ECtHR) since the end of the 1990s. During this period, the ECtHR had to deal with a massive backlog. The strategy for reform it followed was completely different than that followed by the EU, being far more global, economical, and flexible. This paper aims to describe and analyse the way in which the backlog of the ECtHR evolved and by which means and methods by which its situation has improved³.

The context is, of course, completely different. After 1989, the ECtHR went through a considerable enlargement (more important than the EU's in many aspects). Between 1989 and 1996, the number of State Parties to the European Convention on Human Rights (ECHR) went from 22 to 40, reaching the current number of 47 in 2007. This modified the role of the Court in many ways. A huge reorganization of the Court was more or less simultaneously launched by Protocol n° 11. The new State Parties did not always have a strong human rights culture. The number of new applications rose considerably. The number of languages increased. The backlog grew and became extremely worrying. All of these elements combined to clog the system. Paradoxically, at least at first sight, Protocol n° 11 to the Convention has been

¹ See F. Dehousse (with the collaboration of M. Rouland), "The reform of the EU Courts – The need of a management approach", Egmont / Tepsa, 2011 [The reform of EU Courts I].

² See F. Dehousse (with the collaboration of B. Marsicola), "The reform of the EU Courts – Abandoning the management approach by doubling the General Court, Egmont / Tepsa, 2016 [The reform of EU Courts II].

³ The Court of Justice of the European Union (CJEU) is the judicial institution of the European Union. It comprehends both the Court of Justice (ECJ) and the General Court (EGC), after the suppression of the Civil Service Tribunal. The European Court of Human Rights (ECtHR) is the court established by the Council of Europe to control the implementation by the State Parties of the European Convention of Human Rights (ECHR).

adopted to suppress the Commission of Human Rights, precisely at the moment when the need of filters had become far clearer.

The judicial mission of the EU Courts and the ECtHR are also not the same. Human rights cover an extremely broad scope of activities. The national legal and factual context, sometimes very complex, must be understood. On the other side, the EU has developed an extremely heavy corpus of secondary legislation. The geographical space covered by the ECHR is broader and the national systems included therein more heterogeneous. However, in many aspects, the systems are similar. Furthermore, both judicial systems are of international nature, which makes their reform quite more complicated.

With the adoption of a series of measures and various changes in working methods, the ECtHR has managed to solve many of its problems, halving the number of pending applications in just few years. Despite the great differences between them this experience can offer very interesting lessons for the European Union's courts. As we shall see, the strategy adopted by the ECtHR was completely different, in fact the complete opposite of the CJEU's. In a nutshell, all parties involved were consulted at length, the process was completely transparent, a very great variety of measures were contemplated, and finally the increase of judges was the only one excluded. The present report constitutes a synthesis. It does NOT aim to explain the general functioning of the ECtHR, or constitute a comprehensive analysis of its reforms. More modestly, it tries to examine the great trends, the measures taken and the methodology used to take the decisions. It also tries to draw some conclusions for future changes in the EU courts system. This approach, very different, and in many aspects opposite than the European Court of Justice's, can also offer many valuable lessons in judicial management for the reform of the national judicial systems.

The report will first provide a quick reminder about the ECtHR (§ 1). It will detail the growth of the backlog and its causes (§ 2). It will describe the different international conferences that were essential for the reform process (§ 4). Then it will analyse all the adopted measures (§ 4) and their results (§ 5). Finally, it will evoke other possible measures which have already been debated but not implemented yet (§ 6).

1. THE ECHR TODAY: A REMINDER⁴

1.1. The organisation of the Court

The reader will find here a very brief reminder of the functioning of the Court, according to rules currently in force.

The Court has **jurisdiction** over all matters concerning the interpretation and application of the Convention and the Protocols. The applications can be brought before the Court by a State Party against another State Party or by physical persons, NGOs or groups of individuals claiming to be a victim of a violation of the Convention by a State Party.

To be **admissible**, an application must meet a number of criteria. Applicants can file an application before the ECtHR only after having exhausted the domestic remedies available, and within a period of six months from the date on which the final decision was taken. In addition, applications shall not be anonymous and shall not regard the same as a matter upon which the Court has already adjudicated, they shall be compatible with the provisions of the Convention, shall not be manifestly ill-founded and the applicant has to have suffered from a significant disadvantage, with some exceptions.

The Court is composed by 47 **judges**, one per State Party, elected by the Parliamentary Assembly of the Council of Europe by a majority of votes cast from a list of three candidates nominated by the State Party. As a result of an amendment introduced by Protocol n° 14, judges are elected for a single period of nine years and may not be re-elected. They can sit in different formations: alone as a single judge, in a Committee of three judges, a Chamber of seven judges (that may be reduced to five) and in a Grand Chamber of seventeen judges. The Court has two official languages: English and French.

The **Plenary Court** elects its President and one or two Vice-Presidents for a renewable period of three years; establishes Chambers and elects their Presidents; adopts the **Rules of the Court**; elects the Registrar and one or more Deputy Registrars.

The **President** directs the work and administration of the Court. S/he represents the Court and is responsible for its relations with the authorities of the Council of Europe; s/he presides at plenary meetings of the Court, meetings of the Grand Chamber and meetings of the panel of five judges. S/he is assisted in his tasks by a **Bureau** composed of the President of the Court, the Vice-Presidents of the Court and the

⁴ There are many excellent comments on the ECHR: see for example B. Rainey, E. Wicks, and C. Ovey, *The European Convention on Human Rights*, Oxford Univ. Press, 6th ed., 2014; F. Sudre, *Droit européen et international des droits de l'homme*, 12th ed., P.U.F., 2015.

Section Presidents. The President may submit to the Bureau any administrative or extra-judicial matter which falls within his or her competence.

The **Registrar** assists the Court in the performance of its functions and is responsible for the organisation and activities of the Registry under the authority of the President of the Court; s/he also holds the archives and is in charge of external communication. S/he is elected by the Plenary Court for five renewable years and is assisted by one or more Deputy Registrars. S/he can be dismissed by the Plenary Court upon initiative of one of the judges. The Registrar draws up General Instructions for the operation of the Registry, which are approved by the President of the Court.

The **Registry** provides legal and administrative support to the Court in the exercise of its judicial functions; its functions and organisation are laid down in the Rules of Court. It is composed of lawyers, administrative and technical staff and translators. There are in 2016 some 640 staff members of the Registry, 270 lawyers and 370 other support staff.⁵ Registry staff members are staff members of the Council of Europe and are subject to the Council of Europe's Staff Regulations. They are appointed by the Registrar, under the authority of the President of the Court; unlike other international jurisdictions, judges do not have personal chambers.

The Registry is organised in five sections, in their turn divided into 31 case-processing divisions, according to the lawyers' knowledge of languages and of the different legal systems, each assisted by an administrative team. The lawyers' task is to prepare files and analytical notes for the judges; they also correspond with the parties on procedural matters. The registry also includes the Filtering Section, a Jurisconsult in charge of the Grand Chamber Registry, research and Case-Law Information, and a Common Services Directorate.⁶

According to Article 50 of the Convention, the Council of Europe bears the expenditure of the Court. At present, the Court does not have a separate **budget**, but partakes in the general budget of the Council of Europe. It is therefore subject to the approval of the Committee of Ministers of the Council of Europe in the course of their examination of the overall Council of Europe budget. The Council of Europe is financed by the contributions of its 47 State Parties, which are fixed according to scales taking into account population size and gross national product.

The Court's budget for 2016 amounts to 71,165,500 euros.⁷ This covers Judges' remuneration, staff salaries and operational expenditure (translation, interpretation, information technology, official journeys, publications, representational expenditure, legal aid, fact-finding missions, etc). It does not include expenditure on the building and infrastructure. The Registry has a Budget and Finance Office, which

⁵ Information available on the Website of the Court, : http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_1346157759256_pointer.

⁶ Ibidem.

⁷ Ibidem.

deals with the day-to-day management of the Court's budget, under the authority of the Registrar.⁸

1.2. Protocols to the Convention

The Convention is a living instrument. Since 1950 it has undergone amendment through the adoption of protocols, some of which are of an essential nature. Basically, there have been two phases in the ECHR's history.

Protocol n° 11 to the Convention, entered into force on 1 November 1998, is essential in defining these the two phases. It replaced the original two-tier structure that comprised the Commission on Human Rights and the part-time Court by a single, full-time Court, which has automatic jurisdiction. The Protocol put an end to the Commission's filtering function, and enabled individual applicants to bring their cases directly before the Court. It also put an end to the judicial powers of the Committee of Ministers, which decided on applications that were admissible and were not referred to the Court. The Committee of Ministers is now competent to ensure that State Parties execute the Court's judgments issued against them⁹.

Under Protocol n° 11, the Court sits in Chambers of seven judges. Manifestly ill-founded cases may be declared inadmissible by a unanimous vote of a committee of three judges. If the Court declares the application admissible, it will pursue the examination of the case, and also place itself at the disposal of the parties with a view to securing a friendly settlement of the matter.

Protocol n° 11 introduced the system according to which, within three months from the date of the judgment of the Chamber, any party to the case might, in exceptional cases, request that the case be referred to the Grand Chamber. When the request is accepted, the resulting judgment of the Grand Chamber is final. Otherwise, judgments of Chambers become final when the parties declare that they will not request that the case be referred to the Grand Chamber, or have made no request for reference three months after the date of the judgment, or, if such a request is made, when the panel of the Grand Chamber rejects the request to refer.¹⁰

Since the entry into force of Protocol n° 11, **Protocol n° 14** has had the greatest impact on the functioning of the Court. Signed in 2004, it only entered fully into force in June 2010, after long awaited ratification by the Russian Federation. In the period pending its entry into force, 18 State Parties agreed nonetheless to give binding force

⁸ Ibidem.

⁹ For a good synthetic description of the system's evolution, see E. Fribergh and R. Liddell, From protocol n° 11 to 2025 – A Court in constant change, in *El Tribunal Europeo de Derechos Humanos*, 2015, Tirant le Blanch, 493-507.

¹⁰ For an historical and insider overview of the adoption of the Protocol see M. Rund, The Court: Historical framework, in *Proceedings, Conference on the long-term future of the European Court of Human Rights*, Oslo, 7-8 April 2014, available at: <http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Proceedings-Oslo-2014.pdf>, p. 23 ss.

to its most relevant provisions of the Protocol, by ratifying Protocol n° 14*bis*. This instrument allowed for the provisional application of single judge formations and the new competence for Committees of three judges to rule on the merits of repetitive applications.¹¹

The main changes introduced by Protocol n° 14 are: the creation of Single Judge formations competent to declare inadmissible or strike out individual applications while extending the competence of Committees of three judges to cover repetitive cases; the introduction of a new admissibility criterion consisting of the proof of having suffered from a significant disadvantage as a consequence of the alleged violation of the Convention; the affirmation of the practice of ruling simultaneously on admissibility and merits as the norm (even though this was already the Court's practice due to a liberal interpretation of the Convention); the possibility for the Committee of Ministers to request the Court to give an authentic interpretation of judgments; extended access to the instrument of friendly settlements; the possibility for the Committee of Ministers to request the Court to file infringement proceedings for non-compliance with Court judgments; the extension of the term of the judges' mandate to nine years, non-renewable; an amendment implying the possibility of the accession of the EU to the Convention.

In 2013, the Committee of Ministers adopted **Protocol n° 15** to the Convention, which will enter into force as soon as all the State Parties to the Convention have signed and ratified it. To date, Protocol n° 15 has been ratified by 26 States and Protocol n° 16 by 6.

The main innovations brought by Protocol n° 15 are the references to the principle of subsidiarity and the doctrine of the margin of appreciation in the Preamble of the Convention, and the introduction of stricter rules for the admissibility of applications. In particular, the time limit within which an application must be made to the Court is shortened from six to four months and the significant disadvantage admissibility criterion is amended to remove the safeguard preventing rejection of an application that has not been duly considered by a domestic tribunal. In addition, the Protocol amends the Convention by removing the right of the parties to a case to object to a Chamber relinquishing jurisdiction over it in favour of the Grand Chamber and by modifying the age requirements of candidates to the post of judges.

Finally, in 2013, **Protocol n° 16** was adopted by the Committee of Ministers. This new protocol will allow the highest courts and tribunals of State Parties to request the Court to deliver **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. The possible implications of these two last protocols, net yet entered into force, on the Court's caseload have yet to be evaluated.

¹¹ See A. Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights*, Oxford, 2007.

2. THE BACKLOG: STATISTICS AND CAUSES

2.1. Statistics

The collection and analysis of data is a complex exercise due to the fact that the Court has undergone changes in both its case handling and its working methods through the years. Also, special circumstances can alter the figures quite considerably, for example high numbers of applications with respect to systemic issues. Cases pending at pre-trial stage (that have not yet been filtered for allocation to a judicial formation or struck out), are not considered in the account of the pending cases and of the backlog. Additionally, cases which are not allocated to a judicial formation do not constitute a burden for the judges, but only for the Registry. These considerations explain why it is easier and perhaps more correct to evaluate the workload data from the perspective of the number of cases allocated rather than the number of those lodged. Moreover, since the beginning of this century, use began to be made of the joint ruling on admissibility and merits, which increased steadily until the entry into force of Protocol n° 14, which made it the general rule.¹² Since 2001, the Court has published an Annual Report, and, since 2006, a document entitled “Analysis of the Court Statistics”, which are both available on the Court’s website. In general, most unfortunately, the statistical apparatus remains nonetheless partly limited. All elements cannot be compared, especially in a long term perspective, and this makes a complete analysis singularly difficult.

However, it can be observed that the number of **applications lodged** per year has increased quite steadily at least since 1998,¹³ when the new system of the reformed Court was set up as a result of the entry into force of Protocol n° 11 to the Convention. Since 2010, the number of applications has become stabilised.¹⁴

As explained above, more precise information is available on the number of **applications allocated to a judicial formation** per year which will be handled by a judgment or a decision (see chart “Number of applications allocated to a judicial formation”). These applications have been increasing gradually. These applications allocated to a judicial formation became more stable starting from 2011, in tandem with a levelling off in the number of applications lodged. Starting from 2014 applications allocated

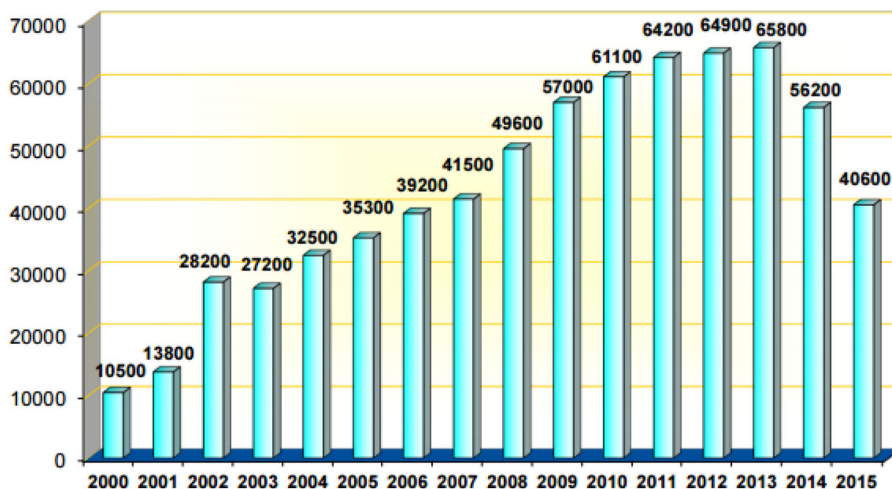
¹² This information has been collected also thanks to an informal discussion with a member of the Case management and of the Case management and Working Methods Division of the Court Registry.

¹³ The annual reports tables presented above show that the number of lodged applications was 18.200 in 1998; 22.600 in 1999; 30.200 in 2000; 31.300 in 2001, 34.600 in 2002; 38.900 in 2003 and 44.000 in 2004. We have not found precise data concerning the subsequent years but the Interlaken Process and the Court Reports (European Court of Human Rights, 28 August 2013 and 12 October 2015) affirm that the increase was about 10 to 15% every year; only in 2015 did the number decrease by around 35%, possibly because of the application of the new Rule 47.

¹⁴ Interlaken Process and the Court, European Court of Human Rights, 28 August 2013.

to a judicial formation started for the first time to decrease in number, and the trend increased in 2015.

Chart 1. Applications allocated to a judicial formation per year



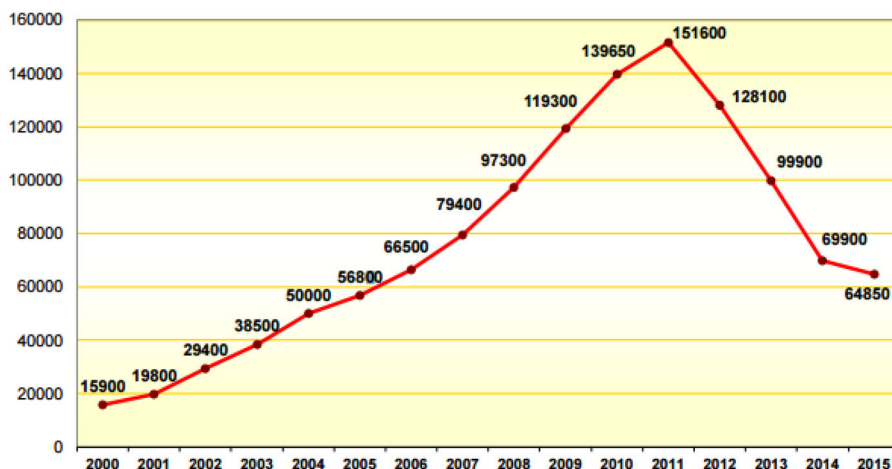
Source: ECHR Analysis of the statistics 2015

Applications that are **not allocated to a judicial formation** are **disposed of administratively**. From 2005 to 2011, they have been between 11500 and almost 14000. They increased a lot between 2013 and 2015 (by 84% in 2014 and 29% in 2015). Many of these were disposed of by application of the new Rule of Court 47, which introduced stricter requirements for the applications (see *infra*).¹⁵

From 2000 the number of **applications pending** before a judicial formation (i.e. allocated but not yet decided) increased steadily, with a substantial rise from 2007 to 2011, thereafter falling substantially (see chart “Application pending before a judicial formation”). At the end of 2014, there were fewer than 70.000 such cases, 30% less as compared with the previous year. In 2015 the level of reduction shrank considerably to 7% as compared with 2014, due to the fact that the backlog of single judge cases had been virtually disposed of.

¹⁵ Press conference, President Dean Spielmann, Strasbourg 29 January 2015, available at: http://www.echr.coe.int/Documents/Speech_20150129_Press_Conference_2015_FRA.pdf; Analysis of Statistics 2014, Council of Europe, January 2015 and Analysis of Statistics 2015, January 2016.

Chart 2. Applications pending before a judicial formation



Source: ECtHR Analysis of the statistics 2015

It is interesting to observe the evolution of the figures in the **latest years**, namely after June 2010, when Protocol n° 14 entered into force. The number of applications allocated to a judicial formation has increased only slightly (between +1 and +5%) in the last four years. It dropped by 28% from 2014 to 2015. The relative stabilisation and even decrease in the number of applications allocated to a judicial formation in the last years might indicate a growing realisation on the population subject to the Convention system that the Court is not a “final court of appeal” before which individuals can ventilate their disappointment at national decisions.¹⁶ The entry into force of the new rule 47 in 2014 has also had a substantial impact (see infra).

It is remarkable is that, from 2010 to 2012, the percentage ratio of applications decided judicially (by judgment or by decision) almost doubled year on year, reaching an outstanding increase of 68% in 2012 as compared to the previous year. It is also interesting to note that in 2011 there was a decrease of 42% in the number of judgments delivered. According to the Analysis of the Statistics of that year,¹⁷ this was mainly due to the fact that fewer applications representing repetitive cases) were processed. This demonstrates the impact that a priority policy is capable of having in the handling of the caseload (see infra).

2012 was an exemplary year for the Court’s statistical output: the number of 87,879 cases disposed of judicially (by decision or by judgement) exceeded those allocated

¹⁶ See N. Hervieu, *Embellie strasbourgeoise sur le front européen des droits de l’homme* in Lettre «Actualités Droits-Libertés» du CREDOF, 30 January 2013, available at: <http://revdh.org/2013/01/30/cedh-embellie-strasbourgeoise-front-europeen-droits-homme/>.

¹⁷ Analysis of Statistics 2011, European Court of Human Rights, January 2011, available at http://www.echr.coe.int/Documents/Stats_analysis_2011_ENG.pdf.

by approximately 22,700. As a result, for the first time since 1998, the stock of allocated applications pending decreased by 16% (from 151,600 to 128,100) after it had reached an all time record of more than 160,200 in the course of 2011. The number of applications disposed of administratively in 2012 was 18,700, 39% more than the previous year. Administrative disposal of applications has increased annually since 2009.

As the Court's president pointed out during his speech of the opening of the judicial year 2013,¹⁸ the achievements of 2012 were mainly due to recourse to practical solutions aimed at modernising and rationalising working methods. In particular, the single judge procedure was used to the full and the pilot judgement procedure had been used more intensively than ever.

In 2013, for the first time, the number of pending applications was lower than 100,000 (the figure at 31 March 2014 was 96,050¹⁹). The number of applications disposed of judicially amounted to 93,396, whereby the Court achieved a reduction of the stock of pending applications by 22%. Although the ratio of applications considered as "backlog" within the number of the cases pending is unknown, it is a remarkable fact that the Court was able to dispose of almost one quarter of its stock in one year. This is especially true when compared to the 2011 estimate of the Steering Committee for Human Rights that it would take almost 20 years for the Court to dispose of all the applications then pending before its Chambers and Committees and just under two and-a-half years to dispose of those pending before single judges.²⁰

The positive trend in the decrease of pending applications led to a number of 69,900 in 2014. So it had been more than halved in three years. It reached 64,850 by the end of 2015.²¹ In 2015, the backlog of single judge formation cases has been disposed of. At the end, there were only 3.250 such cases pending.²² Repetitive cases are the next

¹⁸ Available in the 2013 annual report: http://www.echr.coe.int/Documents/Annual_report_2013_prov_ENG.pdf.

¹⁹ European Court of Human Rights, Statistics 1/1-31/3/2014, available at http://www.echr.coe.int/Documents/Stats_month_2014_ENG.pdf.

²⁰ CDDH Interim Activity Report, Steering Committee for Human Rights (CDDH), CDDH(2011)R72 Addendum I, Strasbourg 1 April 2011, Council of Europe, available at: http://www.coe.int/t/dghl/standardsetting/cddh/Interim_Activity_Reports/CDDH_2011_R72Add%20I%20-%20CDDH%20Interim%20Activity%20Report%20_ECHR%20amendment%20measures.pdf.

CDDH is the acronym from the Steering Committee's French name. The Council of Europe instituted a **Steering Committee for Human Rights** (CDDH), composed of representatives of the forty-seven Member states of the Council of Europe. It defines policy and co-operation with regard to human rights and fundamental freedoms. The CDDH assumes in particular tasks which aim to develop and promote human rights, as well as to improve procedures for their protection at both national and European levels, constantly bearing in mind the evolution of the case-law of the European Court of Human Rights. The CDDH holds plenary meetings as well as meetings in the framework of more specialised and smaller sub-committees, which it supervises and whose work it directs. It is assisted by a Bureau (CDDH-BU) and by a Secretariat.

²¹ ECHR Analysis of Statistics 2015, January 2016, available at: http://www.echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf.

²² See Speech of President Raimondi, Press conference, 28 January 2016, available at: http://www.echr.coe.int/Documents/Speech_20160129_Raimondi_JY_ENG.pdf.

challenge ahead. In 2016, the Court was confronted with 30,500 such cases.²³ Five State Parties alone account for 67% of the total pending applications. These are, in order of volume of applications, Ukraine, Turkey, the Russian Federation, Italy and Hungary.²⁴

2.2. The causes of the backlog's growth

The European Convention on Human Rights²⁵ was ratified on 4 November 1950 and entered into force on 3 September 1953. The Convention system had a very slow beginning, as many States took their time to ratify the Treaty. At the beginning, a two-tier structure was in place, encompassing the Commission on Human Rights, a non-judicial organ with a filtering function, and the Court, sitting a few days per month. Initially very few applications were filled, it is odd nowadays to recall that in 1958 there were only 96 of them.

The Commission considered virtually all of the applications inadmissible, mostly on the ground of “manifest inadmissibility” and was somewhat perceived as the defender of national interests. It is therefore no surprise that the Court, which was to be established after eight States had recognised its jurisdiction, delivered its first judgment (*Lawless v. Ireland*, application n° 332/57) in 1960 (admissibility) and 1961 (merits). Barely a handful of judgments had been delivered by the end of the nineteen-sixties. It has to be kept in mind that only in 1989/1990 did all the – at the time 25 – State Parties accept to be respondents²⁵ in cases initiated through individual applications. This was originally subject to the condition that the State made a special declaration. This condition was only abolished in 1997 with the entry into force of Protocol n° 11.

The trend began to change in the 1970s, when the Commission started to modify its approach by sending more applications to the Court, which led to an increase in the number of judgments. In 1997, the last year before the entry into force of Protocol n° 11, which abolished the Commission and established a single, permanent Court (see *infra*), the Commission received 14,160 applications of which it sent 700 to the Court, which in turn delivered 106 judgments.²⁶

Before the entry into force of Protocol n° 11, the ECHR system became particularly overloaded, for various reasons.

²³ Ibidem.

²⁴ ECHR Analysis of Statistics 2015, January 2016, available at: http://www.echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf.

²⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, the text of the Convention is available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

²⁶ The reference for this historical overview is: C. Tomuschat, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, in *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, R. Wolfrum and U. Deutsch eds., 2009.

First, the accession of many Central and Eastern European states made a big difference. The number of potential applicants spiked up. Additionally, new-born democratic governments, which still had a long way to go in terms of respect of the rights covered by the Convention, were about to be arraigned as respondents before the Court. To date, since the entry into force of the Convention in Montenegro, presently the last of the 47 State Parties to the Council of Europe, the Convention covers more or less 800 million people.²⁷ Second, the novelties introduced by Protocol n° 11 confronted the Court with new tasks, in particular filtering, decisions on admissibility and conducting friendly settlements. Third, for various reasons, including the extension of the right of individual petition, recourse to the ECtHR became increasingly frequent in the original Contracting States.²⁸

Notwithstanding this challenge, the reformed Court showed it was capable of good productivity, for example in 2001 it handed down 889 judgments, which was already an improved performance. However, it was incapable of outperforming the number of incoming applications, which, as explained above, were increasing at a pace of 10-15% year on year up until 2013²⁹. For example, in 2006, the Court had two and a half years of backlog to tackle.³⁰ In 2007 it took an average of 30 months before the first examination of an application was conducted (it was around 37 months in 2011³¹).

2.2.1. The 2004 Explanatory Report

The Explanatory Report to Protocol n° 14 to the Convention, of 2004,³² acknowledged that it had been generally recognised that the Court's excessive caseload (during 2003, some 39 000 new applications had been lodged and, at the end of that year, approximately 65 000 applications were pending before it) faced two particular challenges. The first was that of *inadmissibility*, since it was necessary to process the very numerous individual applications that were terminated without a ruling on the

²⁷ These numbers let judge P. Mahoney, in 2013, to make the pessimistic statement that it would be inconceivable that the Court, although undoubtedly having the substantive jurisdiction, should have the material capacity to look fully into the merits of all unresolved human rights violations within a convention community of 47 states and 800 million people, in P. Mahoney, *The European Court of Human Rights and its Ever-growing Caseload: Preserving the Mission of the Court While Ensuring the Viability of the Individual Petition System*, in *The European Court Of Human Rights And Its Discontents, Turning Criticism into Strength*, S. Flogaitis, T. Zwart and J. Fraser eds., Elgar, 2013, p. 22.

²⁸ Ibidem.

²⁹ *Interlaken Process and the Court, 2013 Report*, European Court of Human Rights, 28 August 2013, available at http://www.echr.coe.int/Documents/2013_Interlaken_Process_ENG.pdf.

³⁰ C. Tomuschat, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, in *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, cit.; p. 12

³¹ L. Wildhaber, *Criticism and case-overload: Comments on the future of the European Court of Human Rights*, in *The European Court Of Human Rights And Its Discontents, Turning Criticism into Strength*, S. Flogaitis, T. Zwart and J. Fraser eds., Elgar, 2013, p. 14.

³² *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>

merits, principally because they were declared inadmissible (more than 90% of all applications). The second was that of *repetitive applications*, i.e. individual applications deriving from a similar problem of a structural character in a given Member State. (repetitive cases are handled a so-called “pilot judgment”, see *infra*). Repetitive applications represent approximately 50% of the Court’s caseload in 2014.³³

Structural problems arose from an increased awareness of the ECHR’s potential in the new State Parties. They also found their origin in the poor implementation of Convention obligations and /or the faulty execution of the Court judgments. This was aggravated by the Committee of Ministers’ weak capacity to fully comply with its task of supervising the execution of Court judgments.³⁴

The 2004 report forecast showed that the Court’s caseload would continue to rise sharply if no action was taken. Moreover, the estimates of the increase were quite conservative. Indeed, the cumulative effects of greater awareness of the Convention, in particular in the new State Parties, the entry into force of Protocol No. 11, the ratification of other additional protocols by States which were not party to them, the Court’s evolving and extensive interpretation of rights guaranteed by the Convention and the prospect of the European Union’s accession to the Convention, suggested that the annual number of applications to the Court could far exceed the figure for 2003.³⁵

Such an increase in the caseload would have an impact both on the Registry and on the work of the Judges and would lead to a rapid accumulation of pending cases before three-judges Committees and Chambers. In fact, as was the case with Committees, the output of Chambers was far from being sufficient to keep pace with the influx of cases brought before them. Moreover the considerable amount of time spent on filtering work could have a negative effect on the capacity of judges and the registry to process Chamber cases.³⁶

2.2.2. *The 2005 Lord Woolf’s report*

In 2005, Lord Woolf observed, in his report for the Council of Europe on the working methods of the Court,³⁷ that the Court had 82,100 applications pending on 1st

³³ Rapport d’Information, fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d’administration générale (1) sur la Cour européenne des droits de l’Homme, par MM. Jean-Pierre MICHEL et Patrice GÉLARD, Sénateurs, n°275, enregistré à la Présidence du Sénat français le 25 juillet 2012

³⁴ D. Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights*, cit., p. 5-6.

³⁵ Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms,, cit.

³⁶ Ibidem.

³⁷ At that time Lord Harry Woolf was Master of the Rolls of England and Wales. He operated a review of the Working Methods of the Court, upon the invitation of the Secretary General of the Council of Europe and the President of the European Court of Human Rights: *Review of the Working Methods of the Court*, Report by the Right Honorable The Lord Woolf, December 2005.

October 2005. This was projected to grow at around 20% per year, leading to more than a quarter of a million cases by 2010. Of the 82,100 pending cases, it was estimated that the “core backlog”, that is to say cases that had exceeded the one-year time limit allowed for each stage of processing an application, comprised of 27,200 cases (see Chart 4, ‘Pending applications’).³⁸ For Lord Woolf, the backlog was not fully representative of the general caseload of the Court (whereby 95% of applications filed were eventually declared inadmissible). The Court’s drive to increase efficiency and to maximise its disposal rate had led to a focus on processing the more straightforward work. He pointed out that, faced with targets, the Court lawyers might be tempted to take on Committee cases, rather than the more complex Chamber cases. It was estimated that up to 40% of the cases in the backlog were Chamber, rather than Committee cases. Many of the outstanding Chamber cases raised serious human rights questions.

During the same period, some Internal and External Audit reports had made an estimation of personnel need. It was estimated that 620 extra staff would be needed to cope with the backlog, and there had been much discussion around the creation of a ‘backlog secretariat’.³⁹

2.2.3. *The 2012 Interlaken report*

In 2012, the Court produced the report entitled “Interlaken Process and the Court”. Interestingly, it made things more complex by explaining⁴⁰ that the term “**backlog**” had been defined differently over the years. In particular, the objectives set out in the Brighton Declaration (see below) provided a basis for a new definition of the term. The new definition (“Brighton backlog”) comprises applications that have not been dealt with for the first time within a year of filing.

In fact, since repetitive applications are responsible of around 50% of the backlog of the Court, and an unsurprisingly similar figure of 50% of the applications are addressed against 5 or 6 State Parties, it could be inferred that its causes are not mainly internal to the Court, but rather lie on States which do not prevent violations and not take measures to put an end to them.⁴¹ Although it is evident that any discussion or action on the future of the Court should tackle this (very sensitive) issue, the optimal implementation of the Convention will not happen in the short or medium run. In any case, the Court is compelled to find the most effective internal solutions to deal with its workload.⁴² For the report, there had been an inherent mismatch

³⁸ Review of the Working Methods of the Court, Report by the Right Honorable The Lord Woolf, cit.

³⁹ Ibidem

⁴⁰ Available at http://www.echr.coe.int/Documents/2012_Interlaken_Process_ENG.pdf

⁴¹ See J-P. Costa, Les reformes de la Cour européenne des droits de l’homme – Abrighton, in L’Observateur de Bruxelles, 2012, n. 89, p. 30-31.

⁴² P. Mahoney, The European Court of Human Rights and its Ever-growing Caseload: Preserving the Mission of the Court While Ensuring the Viability of the Individual Petition System, cit., p. 21.

between the work of adjudication to be carried out and the capacity of the Court to handle it.⁴³

Aside from inadmissible and the repetitive applications, another big problem remains to be tackled by the Court. This consists of applications which are “meritorious” (that is to say not manifestly inadmissible) but not considered as a priority. While the single judge procedure aims at the disposal of inadmissible cases, and the priority policy aims at focusing on the most priority cases, there is a real risk that this last category of applications will not be handled within a reasonable period of time. In 2013, meritorious non-priority applications were estimated to amount to 20,000 out of the 54,000 non-priority pending cases.⁴⁴ At the beginning of 2016, as President Raimondi has explained, along with priority cases, this type of application will amount to 19,600 applications. This could be an important challenge for the Court in the future.⁴⁵

Another challenge is the generally weak understanding of the limits of the ECtHR’s role. If 90% of applications are declared inadmissible, this means that there is a clear gap between the expectations of those who apply to the Court and what it is intended to do.⁴⁶ It has been argued that ultimately the victims of the success of the Court are not the Court itself, but the applicants who have filed meritorious applications and have to wait long time for their cases to be ruled.⁴⁷ This is partly due to the fact that applications to the Court are free of charge and that there is no need to be assisted by a lawyer. Applicants have thus literally nothing to lose in filing a case.

One of the main problems remains knowledge and education throughout Europe regarding the Convention system. Better information and dissemination on the conditions of admissibility of a case and of the case-law of the Court is crucial in restraining an increase in the volume of (unmeritorious) applications. This has to be done by addressing both the general public, those following a legal education and legal professionals.⁴⁸

In that context, one of the main obstacles to the dissemination of the “acquis de Strasbourg” is the fact that judgments and decisions are only delivered in English and French, languages that cannot be presumed to be known – and the legal jargon

⁴³ Ibidem.

⁴⁴ See P. Mahoney, *The European Court of Human Rights and its Ever-growing Caseload: Preserving the Mission of the Court While Ensuring the Viability of the Individual Petition System*, cit. p.24-25; see also L. Wildhaber, *Criticism and case-overload: Comments on the future of the European Court of Human Rights* cit. p. 15-16.

⁴⁵ Press conference, President Guido Raimondi, 28 January 2016, available at: http://www.echr.coe.int/Documents/Speech_20160128_Raimondi_JY_PC_ENG.pdf.

⁴⁶ J. Fraser, *Conclusion: The European Convention on Human Rights as a common European endeavor*, in *Conclusion: The European Convention on Human Rights as a common European endeavor*, in *The European Court Of Human Rights And Its Discontents, Turning Criticism into Strength*, S. Flogaitis, T. Zwart and J. Fraser eds., Elgar, 2013, p. 196.

⁴⁷ See J-P. Costa, *Les reformes de la Cour européenne des droits de l’homme*, cit., p. 30-31.

⁴⁸ J. Fraser, *Conclusion: The European Convention on Human Rights as a common European endeavor*, in *Conclusion: The European Convention on Human Rights as a common European endeavor*, cit., p. 207-209.

understood – by the citizens and legal practitioners in the 47 States.⁴⁹ The Court has lately been quite active in this regard, by drafting and translating a series of information documents, namely a “Practical Guide on Admissibility Criteria” into all the languages,⁵⁰ and publishing a series of case-law “factsheets”, guidelines and summaries on a series of issues.⁵¹ The Court has launched a Russian version of its ‘Hudoc’ research engine (to be added to the French, English and Turkish ones), plans to make it available in Bulgarian and Spanish in 2016 and is engaged in a project that aims at translating key case-law into a series of target languages, financially supported by a number of actors, namely the Human Rights Trust Fund (HRTF).⁵² The HRTF is due to come to an end in 2016, therefore the Court called State Parties to promote the translation of decisions, in line with the Brussels’s declaration call for accessibility.⁵³

The old saying that ‘justice delayed is justice denied’ is equally applicable to the Court, which cannot afford not to respect its own standards.⁵⁴ The lack of efficiency and excessive length in dealing with applications might also lead to possible human rights victims being discouraged from applying, which would leave violations unpunished⁵⁵ and jeopardise the reputation and therefore the authority, of the Court’s judgments. The Court is thus obliged to solutions enabling it to deal with its task of guardian of the Convention in an efficient and high quality manner.

Another issue which should not be neglected, as it plays a fairly big role in the workload of the Court, is that of **interim measures**. Rule 39 of the Rules of Court⁵⁶ provides that the Court may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties an interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings. The competence to indicate an interim measure lies on

⁴⁹ C. Tomuschat, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, in *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, cit.

⁵⁰ Available on the website of the Court: http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n1347458601286_pointer.

⁵¹ Available on the website of the Court: http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n1347891100085_pointer.

⁵² See Case-law information, training and outreach, in *Annual Report 2014*, ECHR, January 2015.

⁵³ See Case-law information, training and outreach, in *Annual Report 2015*, ECHR January 2016.

⁵⁴ See Case-law information, training and outreach, in *Annual Report 2014*, ECHR, January 2015.

⁵⁵ See the Speech given by Mr Dean Spielmann, President of the European Court of Human Rights, on the occasion of the opening of the judicial year, 25 January 2013, cit.

⁵⁶ Rule 39 (available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)

1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.

2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.

3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.

4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.

Chambers or on Presidents of Section. Since the last amendment of Rule 39, in 2013, it also lies on Vice-Presidents of Sections appointed as duty judges by the President of the Court.

Interim measures are urgent measures which apply in case of imminent risk of irreparable harm. They are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question. They mostly relate to the rights covered by articles 2 and 3 of the Convention in the framework of expulsions or extraditions, although their use is no longer limited to these two articles.⁵⁷ The Court's practice is to examine each request on an individual and priority basis through a written procedure. Refusals to grant interim measures cannot be appealed and such measures can be discontinued at any time. An interim measure is usually ordered for the duration of the main proceedings or a shorter period.

Although they are only provided for in the Rules of Court and not in the Convention, the Grand Chamber has clarified that States are under an obligation to comply with them.⁵⁸

Chart 3.

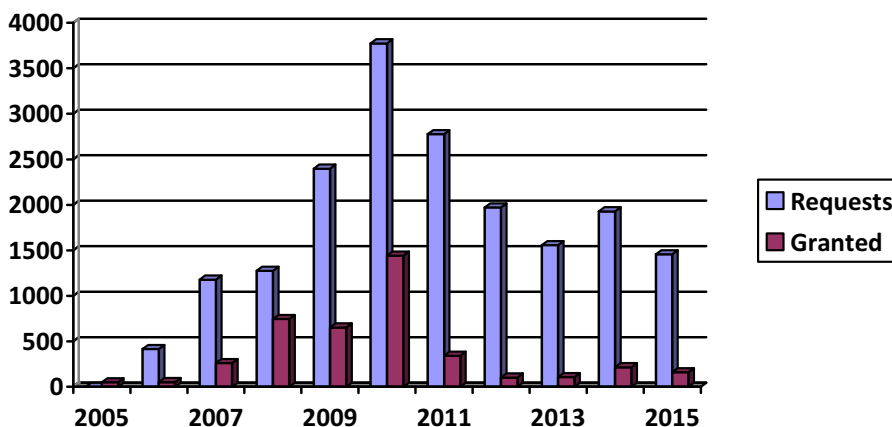


Table elaborated with the data published in the Court's Annual Reports and Analysis of Statistics.

The table above represents the trend in the filing and granting of request for interim measures by the Court in the latest years. There was a steady increase with a peak in 2010 and then a decrease until 2013. The increase in 2014 is due to the requests

⁵⁷ For an overview of the case-law until 2010, C. Harby, *The Changing Nature of Interim Measures before the European Court of Human Rights E.H.R.L.R.*, 2010, 1, p. 73-84.

⁵⁸ For more information, see Factsheet – Interim measures, European Court of Human Rights, January 2013, available at: http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf.

linked to the situation in Ukraine, which has the largest number of such applications.⁵⁹

Recently, requests for interim measures have been filed by migrants of various nationalities refusing to be returned to Hungary. Although so far the number of requests related to the migrant crisis has not been very substantial, the Court has developed an action plan to be able to react in case of a large influx of requests of this type.⁶⁰

As clearly stated in the Court's Annual Report of the 'peak year' 2010, requests for interim measures represent an additional burden for the Court and its Registry.⁶¹ In 2011, as President Bratza stated in the Annual Report, having been nearly submerged by interim measures just over a year before, the Court changed its procedures at the judicial and administrative level, revised its practice direction, and, through its President, made a public statement on the situation. These measures have produced effects quickly, returning this aspect of proceedings to a more normal rhythm.⁶² Some State Parties have requested (sometimes for political reasons) to introduce a statement of reasons for the decisions concerning the interim measures. Though the Court is not enthusiastic (for valid reasons, since this is an interlocutory measure), it has indicated during the 2015 Brussels conference that it would study this topic.⁶³

To recapitulate, there are a lot of explanations for the ECtHR's backlog. In fact, the whole ECHR system changed fundamentally after 1989. There are now more State Parties, with a greater variety of human rights issues. The regime of individual applications has been strengthened. The implementation of rights and the enforcement of judgments in the Council of Europe framework remain weak. Many applications are inadmissible, often a consequence of a weak knowledge of the limits of the ECHR. Many cases are repetitive. A lot of interim measures are sought.

⁵⁹ Analysis of the Statistics 2016, ECHR January 2016.

⁶⁰ See Speech of President Raimondi, Press conference, 28 January 2016, available at: http://www.echr.coe.int/Documents/Speech_20160129_Raimondi_JY_ENG.pdf.

⁶¹ European Court of Human Rights, Annual Report 2010, available at http://www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf, p. 15.

⁶² European Court of Human Rights, Annual Report 2011, available at http://www.echr.coe.int/Documents/Annual_report_2012_ENG.pdf, p. 33.

⁶³ Annual Report 2015.

3. INTERNATIONAL DEBATES OVER THE REFORM

A fascinating aspect of the reform process in the Council of Europe has been its open and strongly debated nature. It was also a widely consensual one. There lies a fundamental difference with the EU Courts' reform in the European Union, which was generally closed, opaque, very weakly debated, and often conflictual.

The need for an in-depth first reflection as to how to ensure effectiveness in spite of an increasing number of applications has been the object of discussion since the beginning of this century. Possible options were already discussed at an embryonic level at the European Ministerial Conference on Human Rights, held in Rome on the occasion of the 50th Anniversary of the Convention, in 2000.⁶⁴ By a decision of the Committee of Ministers of February 2001, an evaluation group in charge of analysing possible means to improve the Court's efficiency was established.⁶⁵ The Group released a first report in September 2001, tackling the issue of case overload that it was feared put at serious risk the efficacy of the Convention system and proposing a range of measures.⁶⁶ In 2003, the Court reacted to a Report⁶⁷ of the Human Rights Steering Committee⁶⁸ by a memorandum adopted unanimously by the plenary session on 12 September 2003, in which it warned that any reform would have to introduce flexibility in the procedural framework and have a prospective approach, in order to be at the same time firm and capable of adapting to unexpected changes, including outstanding fluctuations of the caseload.⁶⁹

3.1. The first reports (2005 and 2006)

The Secretary General of the Council of Europe and the President of Court appointed the abovementioned Lord Harry Woolf, to carry out a **Review of the Working Methods of the Court**. The purpose was to suggest administrative steps that could be taken, without amending the Convention, to allow the Court to cope with its current and projected caseload, pending more fundamental reform. The review was published in December 2005.⁷⁰

⁶⁴ Proceedings available at http://www.coe.int/t/dghl/standardsetting/cddh/Proceedings/Rome_en.pdf.

⁶⁵ Composed of President Wildhaber, Deputy Secretary General Kruger and Lord Woolf as Chairman

Report available at http://www.coe.int/t/dghl/standardsetting/cddh/Proceedings/Rome_en.pdf.

⁶⁷ Available at: http://www.coe.int/t/dghl/standardsetting/cddh/Interim_Activity_Reports/2003_PR_fr.pdf.

⁶⁸ The CDDH, already mentioned, has been working on the reform of the Convention system since 1999, before the Rome Conference of 2000. It gave its contribution in the reform package that included Protocol 14, was involved in the follow-up to the Report of the Group of Wise Persons and in the preparation and follow up of the reform process started at Interlaken. More information available in the dedicated section of the website of the Council of Europe http://www.coe.int/t/dghl/standardsetting/cddh/default_en.asp.

⁶⁹ Quoted by F. Tulkens, *la Cour européenne des droits de l'homme et la déclaration de Brighton. Oublier la réforme et penser à l'avenir*, in *Cahiers de droit européen*, 2012, n° 2, p. 210.

⁷⁰ Working Methods of the Court, Report by the Right Honorable The Lord Woolf, December 2005, available at http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf.

The review recommended that the Court should redefine what constitutes an application by accepting properly completed comprehensive application forms. It suggested establishing satellite offices of the Registry in key states that produce high numbers of inadmissible applications. These offices would provide applicants with information as to the Court's admissibility criteria, and the availability, locally, of ombudsmen and other alternative methods of resolving disputes. In general, methods of alternative resolution should be encouraged, and a "friendly settlement unit" created within the Court's Registry. The report advocated a greater use of the Pilot Judgment procedure (see *infra*), as it allows repetitive cases to be dealt with summarily. The review also suggested that the Court establish a just satisfaction unit to give guidance as to rates of compensation. Where possible, issues of compensation could be remitted to domestic courts for resolution. In addition, Lord Woolf recommended appointment of a second Deputy Registrar, responsible for management of the Court's lawyers and staff, and the creation of a Central Training Unit for lawyers.

In 2006, a report from a "**Group of Wise Men**" was presented to the Committee of Ministers.⁷¹ The Group of Wise Men had been appointed in parallel with the adoption of Protocol 14 (before Lord Woolf's appointment to review working methods) by the governments, in order to elaborate a long term strategy for the Convention system. It addressed, *inter alia*, the "explosion" in the number of individual applications to the Court. It affirmed that it was essential to recommend effective measures to remedy this situation on a permanent basis, to make it possible to ensure the long-term effectiveness of the Convention's control mechanism without limiting the right of individual application, thus allowing the Court to concentrate on its function as the custodian of human rights.

The proposals included greater flexibility of the procedure for reforming the judicial machinery, the establishment of a new judicial filtering mechanism, enhanced cooperation with national courts through the possibility of delivering advisory opinions, the improvement of domestic remedies for redressing violations of the Convention, relieving the Court from the task of awarding just satisfaction and encouraging use of procedural tools to enhance efficiency such as the pilot procedure.

It is not, however, until 2010 that a series of high level conference meetings were held in order to tackle the various issues linked to the reform of the Court.

⁷¹ Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203 15 November 2006, available at CM(2006)203 15 November 2006.

3.2. Interlaken

The conference on the Future of the European Court of Human Rights was held at Interlaken on 18-19 February 2010. The Interlaken Declaration⁷² was issued at a time when criticism started to be voiced, even against the very existence of the Court.⁷³ The Declaration contains an action plan ‘as an instrument to provide political guidance for the process towards long-term effectiveness of the Convention system’.

The Preamble reaffirmed the attachment to the right of individual petition, called for a strengthening of the principle of subsidiarity and for a uniform and rigorous application of the criteria concerning admissibility and the Court’s jurisdiction. It invited the Court to make maximum use of the procedural tools and resources at its disposal. It stressed the need for the reduction of clearly inadmissible applications, for effective filtering, and for finding solutions for dealing with repetitive applications. In addition, it pointed out the need to simplify the procedure for amending Convention provisions of an organizational nature, entertaining the idea of a Statute of the Court.

The Conference stressed the need for a thorough analysis of the Court’s practice relating to applications it declared inadmissible and recommended setting up a mechanism within the existing bench in order to ensure effective filtering. It suggested that the Committee of Ministers examine setting up of a filtering mechanism within the Court, going beyond the single judge procedure.

It called upon States Parties to facilitate the adoption of friendly settlements and unilateral declarations and to cooperate with the Committee of Ministers in order to adopt and implement general measures capable of remedying effectively the structural problems at the origin of repetitive cases. As far as the pilot judgment procedure is concerned (see *infra*), the Conference stressed the need for the Court to develop clear and predictable standards for such procedure as regards the selection of applications, the procedure to be followed and the treatment of adjourned cases, and to evaluate the application of these kinds of procedures. In addition, it called upon the Committee of Ministers to consider whether repetitive cases could be handled by judges responsible for filtering. Furthermore, the action plan set specific deadlines. These included an invitation to the Committee of Ministers to follow up and implement, by June 2011 and in cooperation with the appropriate bodies, those measures which did not require an amendment of the Convention.

⁷² High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19, February 2010, available at http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf

⁷³ See F. Tulkens, *la Cour européenne des droits de l’homme et la déclaration de Brighton. Oublier la réforme et penser à l’avenir*, cit., p. 318;

3.3. Izmir

The second high level conference was held during the Turkish Chairmanship of the Committee of Ministers at Izmir on 26-27 April 2011. It welcomed the measures taken by the Court including the adoption of a priority policy and the new rule on the pilot procedure. At the same time, it expressed concern at the continued rise in the Court's workload and cast doubt over the effectiveness of Protocol 14 in that context.

The Declaration included a follow-up plan. As well as repeating many of the points raised at Interlaken, new proposals were tabled. Future chairmanships were invited to follow up this Declaration jointly with that of Interlaken. States were invited to give priority to the resolution of repetitive cases by way of friendly settlements or unilateral declarations where appropriate.

The Conference considered that the Court, when referring to its "well-established case-law" in the framework of repetitive cases, should take account of legislative and factual circumstances and developments in the respondent States.

The Court was further invited to apply fully, consistently and foreseeably all admissibility criteria and the rules regarding the scope of its jurisdiction, *rationes temporis, loci, personae* and *materiae* and to give full effect to the new admissibility criterion of "significant disadvantage". It was also pointed out that the case law should reaffirm that the ECtHR was not a fourth-instance court, thereby avoiding the re-examination of issues of fact and law decided by national courts.

The Conference welcomed the production of information material and further encouraged States Parties to second national judges and, where appropriate, other high-level independent lawyers, to the Court Registry.

3.4. Brighton

2011 saw the beginning of the UK's six-month chairmanship. In the preceding years, members of its coalition government had expressed concerns over the role of the ECtHR, notably regarding some politically controversial judgments. The UK had argued that rather than focusing on such "domestic" issues the Court system should concentrate on serious human-rights abuses and on ensuring that these judgments are effectively enforced, stressing on the subsidiary role of the ECtHR system and proposing stricter admissibility criteria.⁷⁴ The Declaration resulting from the Brighton Conference of 19 and 20 April 2012 is however less radical.⁷⁵ After pointing out that the principles of subsidiarity and of the margin of appreciation should be given

⁷⁴ Reforming the European Court of Human Rights, cit.

⁷⁵ High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 19-20 April 2012, available at http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

prominence and be consistently applied, the Conference concluded that they should only be given a reference in the Preamble of the Convention.

The Conference paid a lot of attention to the provisions of Article 35 of the Convention encouraging the Court to have regard to the need to take a strict and consistent approach towards the admissibility of applications, clarifying its case law to this effect as necessary. It welcomed the Court's suggestion that the time limit under Article 35(1) of the Convention within which an application must be made to the Court should be shortened to four months. It concluded that the provision of the Convention applying the criterion of significant disadvantage, Article 35(3)(b), should be severed from the requirement that no case should be rejected on the ground of the lack of significant disadvantage where it had not been duly considered by a domestic tribunal. The conference also suggested that an application should be regarded as manifestly ill-founded within the meaning of Article 35(3)(a), *inter alia*, when the Court considers that the application raises a complaint that has already been duly considered by a domestic court which has applied the rights guaranteed by the Convention in light of the Court's well-established case law, including the margin of appreciation, unless the Court finds that the application raises a serious question affecting the interpretation or the application of the Convention. Most of these suggestions were included in Protocol n° 15 to the Convention.

In addition, it invited the Court to develop its case law on the exhaustion of domestic remedies so as to require an applicant, where a domestic remedy was available, to argue before the national court or tribunal the alleged violation of the Convention rights or an equivalent provision of domestic law, thereby allowing national courts an opportunity to apply the Convention in light of the Court's case law.

Concerning the processing of applications, the Conference welcomed the advances already made by the Court. It noted with appreciation the Court's assessment that it could dispose of pending clearly inadmissible applications by 2015. It acknowledged 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.

The Declaration invited the Committee of Ministers, building on the pilot judgment procedure, to consider the advisability and modalities of a procedure by which the Court could register and determine a small number of representative applications from a group of applications alleging the same violation against the same respondent State Party, such determination being applicable to the whole group.

In addition, it noted that, in order to enable the Court to decide the applications pending before its Chambers in a reasonable time, it might be necessary in the future to appoint additional judges to the Court. This was the first time that this possibility was mentioned in any official conclusions. It needs to be emphasized that it has not been extensively studied during the next years.

The Conference further suggested measures to facilitate the filing of applications, by means of on-line tools and improved forms to be filled in by the applicants. Finally, it invited the Court to take into consideration the application of a broader interpretation of the concept of well-established case law within the meaning of Article 28(1) of the Convention, the provision defining the jurisdiction of the three-judge Committees, in order to enlarge its scope without prejudice to the appropriate examination of the individual circumstances of the case.

The Declaration pointed out the Court's aspiration of being able to decide whether to communicate a case within one year, and thereafter to make all communicated cases the subject of a decision or judgment within two years of communication. However, it acknowledged that, for these measures to be effective and for their objectives to be attained, the Court required adequate resources.

3.5. Oslo

On 5-7 April 2014, the "MultiRights Annual Conference" took place at Oslo under the auspices of the Council of Europe, with the participation of ECtHR judges, academia, management of the Court and experts.⁷⁶ Its theme was the long-term future of the Court.

In his speech,⁷⁷ President Spielmann pointed out that 2012 and 2013 were excellent years for the productivity of the Court. In particular, the backlog of manifestly inadmissible cases for some formerly high count countries, such as Turkey, Romania and Poland, had been disposed of. The progress in productivity had allowed the volume of the pending cases to be as "low" as 96,000, but for this trend to continue it was necessary that serious steps were taken to execute judgments, notably in states such as Italy and Ukraine.

One of the main issues to tackle, observed the President, was that of repetitive cases. Efforts should be made both at Court and Member State level. For its part, the Court improved the efficiency of its filtering section, which would deal with repetitive cases (and not only those allocated to a single judge) with the help of new ICT solutions. The link between repetitive applications and non/bad execution of judgments should not be neglected⁷⁸. Dialogue with national courts should also be promoted, especially in light of the subsidiary role of the Court in the enforcement of the Convention, as emphasised by the new Protocol n° 16. He finally stressed that the Court has a mainly constitutional role, but is also called to make justice to daily violations of human rights, for which it is respected all over the world. No official declara-

⁷⁶ Information on the website: <http://www.jus.uio.no/pluricourts/english/news-and-events/events/2014/coe-conference-en/conference-programme.html>.

⁷⁷ http://www.echr.coe.int/Documents/Speech_20140407_Spielmannn_FRA.pdf.

⁷⁸ President Spielmann did not spare his criticism of the wishes of some governments to take participate in the CCDH reflections on the procedure for the adoption of rules of court.

tion was issued at the end of this conference, which did not have an intergovernmental character; however, the proceedings have been published.⁷⁹

3.6. Brussels

A high level Conference on the future of the Court took place on 26 and 27 March 2015 in Brussels under the auspices of the Belgian Chairmanship of the Council of Europe. The theme of the Conference was “The implementation of the European Convention of Human Rights, our shared responsibility.”

In its Contribution paper to the Conference,⁸⁰ the Court pointed out that very positive developments had lead its docket to decline, and that the issue of the effective implementation of the Convention has gained primary importance. This had to be addressed both under the angle of the prevention of violations and the execution of judgments. For the first angle, the Court underlined its continuous efforts to improve information about the ECHR system. For the execution angle, the Court pointed out that, although they decreased in number, repetitive cases still amounted to around half of the docket. The Court mentioned the possibility of indicating in the judgments’ reasoning the type of measures required for their implementation. It also envisaged the possibility of expressly mentioning, when appropriate, that no specific measure other than payment is foreseen. A further interesting measure proposed by the Court was that of giving applicants the possibility to reopen domestic proceedings after the Court had established that the original ones infringed the Convention. Finally, the Court advocated the idea of having, in each country, a designated authority with general responsibility for ensuring that measures for the execution of judgements have been taken.

The “Brussels Declaration” of 27 March 2015⁸¹ stated that the backlog of clearly inadmissible cases was expected to be cleared by the end of the year. It reaffirmed the importance for States to respect the right to individual application, including regarding interim measures, the need to promote knowledge and compliance with the Convention and the execution of judgements. The conference considered that

⁷⁹ Conference on the long-term future of the European Court of Human Rights – Proceedings, Pluri Courts – Council of Europe 2014, available at: <http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Proceedings-Oslo-2014.pdf>.

⁸⁰ Contribution of the Court to the Brussels Conference, ECHR, 26 January 2015, available at: http://www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf; see also, on the same topic: CDDH contribution to the High-level Conference on “The implementation of the Convention, our shared responsibility”, organised by the Belgian Chairmanship of the Committee of Ministers (Brussels, 26-27 March 2015), Steering Committee for Human Rights, Council of Europe, 21 November 2014, available at: [http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH\(2014\)R82-Add-II-en.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH(2014)R82-Add-II-en.pdf). On the execution of the ECHR, see also the excellent chronicles of E. Lambert, in *Revue trimestrielle des Droits de l’Homme*.

⁸¹ High-level Conference on the “Implementation of the European Convention on Human Rights, our shared responsibility” Brussels Declaration 27 March 2015, available at: http://justice.belgium.be/fr/binaries/Declaration_EN_tcm421-265137.pdf.

emphasis should be placed on solving the problems of repetitive applications and in particular those well founded, as well on dealing with cases of serious violations of human rights.

The Action Plan section of the Declaration contains evokes different measures. It welcomed the Court's (not so enthusiastic in fact) intention to provide brief reasons for decisions on inadmissibility taken by a single judge, indicating provisional measures and by panels of five judges adjudicating on the refusal of requests for referral to the Grand Chamber. In addition, it supported further exploration of case-management practices, in particular with regard to prioritization and the pilot-judgment procedure. A new element was the call for greater transparency towards the parties on the state of the proceedings. A series of recommendations are then addressed to the State Parties for a better implementation of the Convention system at national level, through information and training and, in particular, the execution of judgments. In particular, the Conference called upon the parties to put in place domestic remedies to address violations of the Convention and to deploy sufficient resources to the execution of judgments, especially those raising structural problems. Some recommendations were addressed to the Committee of Ministers on the supervision of the execution of judgements.

To conclude, all the analysis, brainstorming, proposals and implementing actions that the Court and its stakeholders have taken in the last decades have led now to focus more issues outside the Court's own responsibility, that is to say the implementation of Convention at national level. However, the court strives to make its contribution, as it should, for example by adapting the content of its judgments, to improve the operation of the Convention system.

A first follow up to the Brussels Conference was the "Interlaken Process and the Court" document of October 2015.⁸² The Court should start to include a succinct statement of the reasons in single judge decision from 2016, also thanks to the reduction of the backlog of this type of application. In addition, a Network of Superior Courts is currently in a test phase, with the aim to facilitate the exchange of information concerning case-law and the application of the Convention in general. Moreover, the Court has developed a tool to keep the Committee of Ministers informed of the state of pending cases.

⁸² Interlaken Process and the Court (2015 report), ECHR, 12 October 2016

4. MEASURES TO TACKLE THE BACKLOG

It is possible now to enumerate the numerous reforms undertaken by the ECtHR that had an impact in the handling of its backlog. They will be presented here with a summary evaluation.

4.1. New Judicial Formations and competences

4.1.1. *The measure*

Protocol n° 14 introduced **Single Judge Formations**, with jurisdiction to declare inadmissible, or to strike out, individual applications. As provided for by the new Article 27 of the Convention, when they decide not to issue a final decision on admissibility, Single Judges shall forward the application to a Chamber or Committee. Single Judges are appointed for twelve months by the President of the Court and are assisted by non-judicial Registry rapporteurs. These are part of the Registry and function under the authority of the President⁸³. Section Registrars and Deputy Section Registrars shall act ex officio as non-judicial rapporteurs.

The Single Judges are appointed by the President of the Court, who also decides on their number, after having consulted the Bureau. The President draws up a list of States in respect of which each single judge shall examine applications throughout its appointment in this capacity. The Single Judges continue to carry out their duties within the Sections of which they are members⁸⁴.

Furthermore, Protocol n° 14, by amending Article 28 of the Convention, empowered the **Three Judge Committees** to also rule on the merits of an application where the underlying question in the case is already the subject of well-established case-law of the Court. They decide by unanimous vote and according to a simplified procedure; the decisions are final. The competence of the committees has therefore been extended to cover repetitive cases. Three Judge Committees can rule simultaneously on admissibility and merits, which has become the norm in the Court's practice, however they remain free to choose on a case by case basis.

Finally, Article 26, paragraph 2, was amended to provide that, at the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce from seven to five the number of judges of the Chambers. This has not been done so far, since it could provoke new problems, for example the diffi-

⁸³ See Rules, Art. 18A.

⁸⁴ See Court Rules, Art. 27A.

culty in constituting geographically balanced chambers, the need to avoid three-to-two decisions, and possibly the appointment of supplementary judges.⁸⁵

4.1.2. Results

The creation of Single Judge Formations is one of the essential positive changes brought to the organization of the ECtHR. Single Judges have allowed a very high number of unmeritorious applications to be disposed of. In 2010, out of 38,576 judicial decisions of inadmissibility or striking out, 22,260 were delivered by single judge formations, which became operative in the second half of that year. In 2011 Single Judges delivered 46, 930 decisions, a figure double that of 2010, but this time during an entire year, thus showing a certain steadiness in the level of productivity.

In 2012, the number of single judge decisions was 81,764, an increase of 74% compared to the previous year, mainly due to the application of new working methods and to the fact that a higher number of judges were appointed as single judges.⁸⁶ In 2013, a similar number of decisions, 80,583, were delivered by single judge formations.⁸⁷ In 2014, single judges declared inadmissible or struck out of the list approximately 78,700 applications, leaving the relatively ‘tiny’ amount of 8,200. Finally, as the Court had anticipated, during 2015 the backlog of single judges cases was absorbed, the current number of pending cases at the beginning being 3,250. Thus, the Court is now able to dispose of this type of application quite quickly. This allows it to divert the resources devoted to solving the single judge applications crisis to other types of needs, such as repetitive, priority cases or non-priority/non inadmissible cases.⁸⁸

The single judge mechanism retained the judicial character of the decision on admissibility, while lowering the number of judges involved. This process has been defined as part of the “judicial downsizing” effect of the Protocol 14 reforms. 36 judges are alternately appointed as single judges, assisted by 80 Registry lawyers.⁸⁹

It has been observed that Protocol 14 has basically transferred to the Single Judge formations the former competences of the three judge Committees.⁹⁰ Some commentators have drawn a comparison with some institutions active at first

⁸⁵ European law Institute (ELI) Statement on case-overload at the European Court of Human Rights, July 6th 2012, available at http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-1-2012_Statement_on_Case_Overload_at_the_European_Court_of_Human_Rights.pdf.

⁸⁶ Analysis of statistics 2013, cit.

⁸⁷ European Court of Human Rights, Analysis of statistics 2012, January 2013, available at http://www.echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf.

⁸⁸ See Speech of President Raimondi, Press conference, 28 January 2016, available at: http://www.echr.coe.int/Documents/Speech_20160129_Raimondi_JY_ENG.pdf.

⁸⁹ Reform of the Court: Filtering of cases successful in reducing backlog, Press release issued by Registrar of the Court, ECHR 312 (2013) 24.10.2013.

⁹⁰ L. Caflish, La nouvelle répartition des compétences au sein de al Cour: le juge unique et les comités, in *The European Court of Human Rights after Protocol 14, Preliminary Assessment and Perspectives*, Samantha Besson (ed.), Schulhess, 2011, pp. 47 et suiv.

instance in domestic legal systems, such as the French “juge de paix”.⁹¹ An early, rather pessimistic comment pointed out that the establishment of the new formations could lead to a “denationalisation” of the national judge.⁹² Others pointed out that the Court should beware of the risk that the personal responsibility of judges could be offset by the non-judicial rapporteurs.⁹³ For some observers, the single judges only seldom depart from the reports of the Registry officials. The veracity of such comments remains difficult to assess.

By reducing the volume of the backlog as of 2016, the introduction of Single Judge formations can be said to have been a verifiable success in terms of efficiency. In carrying out this task, the Court will also be able to provide a statement of reasoning. It nevertheless remains the case that, although the backlog has widely decreased thanks to the productivity of the single judges, this does not automatically mean that a higher number of violations of human rights have faced justice.⁹⁴ This situation could still call for a deeper reform of the system, in particular as far as the filtering mechanism is concerned.

The **three-judge Committees** have not so far delivered a very high number of judgments. This trend may change in the future. In 2010, the number of judgments delivered by this new formation was 116 out of 1, 499 judgments in respect of 2, 607 applications, many of which had been joined. In the last few years, the number of judgments delivered by the three-judge committees has not changed greatly, ranging from between 209 and 269 in 2011-2014.⁹⁵

Before the entry into force of Protocol n° 14, this formation was chiefly responsible for filtering, which is now allocated to the single judge formation. One of the main issues brought by the new formulation of article 28 of the Convention is that may risk hindering the respect of the natural judge principle by the ECtHR. The exact meaning of the expression “well established case law of the Court”, over which this formation has been accorded competence, remains uncertain. Although it may seem clear that the definition aims at repetitive cases, its scope as far as other types of applications are concerned appears to be unclear. The small number of judgments delivered by this formation may lead one to conclude that the expression has so far been interpreted quite strictly⁹⁶.

⁹¹ C. Tomuschat, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, in *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, cit., p. 13-14.

⁹² F. Tulkens, *La Cour européenne des droits de l’homme et la déclaration de Brighton. Oublier la réforme et penser à l’avenir*, cit., p. 312.

⁹³ C. Tomuschat, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, cit.

⁹⁴ See, among others, E. Fribergh, *First Experiences with Protocol No 14 and Further Need for Reform*, cit., M. O’Boyle, *The Future of the European Court of Human Rights*, in *German Law Journal*, Vol. 12, n. 10, 2011, p. 1862-.

⁹⁵ *Annual Analysis of Statistics*.

⁹⁶ See J-P. Costa, *Les réformes de la Cour européenne des droits de l’homme*, op.cit., p. 32.

However, one has to keep in mind that the three-judge Committees tend to join cases more often than the Chambers, especially when dealing with repetitive applications. In 2013 for example, the 219 Committee judgments accounted for 75% of the number of cases decided by judgement. Thus although there are often not many judgments, they have the effect of closing a lot of cases. On the one hand the lower number of Committee judgments may be seen as a guarantee for the applicants of meritorious applications, who have more chances to have their case tackled by a Chamber. On the other hand, it can be detrimental to the speed of justice and to the productivity of the ECtHR.

The possibility for the three-judge Committees to rule jointly on admissibility and merits on questions covered by well-established case law has been said to be, if used to the maximum of its potential, the most useful innovation wrought by Protocol n° 14 to solve the problem of the overload of repetitive cases. A more intense use of this formation is expected to be the most useful solution to deal with this problem.⁹⁷

In fact, in recent years the Court has developed what it calls the WECL (well established case-law procedure), supported by new IT tools. It uses methods that have proven to be effective in filtering applications. This procedure is also meant to relieve pressure on the Chambers so they can concentrate further on other priority cases.⁹⁸ In 2015, the Court affirmed that it had the means and tools, in particular the IT tools, to deal with repetitive cases, and that it would eliminate this part of the docket within the next two years.⁹⁹

4.2. Filtering Section

4.2.1. *The measure*

This is another essential positive change to the functioning of the ECtHR. At the beginning of 2011 a new **Filtering Section** was appointed at the Court to carry out a thorough and immediate sifting of all cases, to ensure that all applications are placed on the appropriate procedural track and allocated to the appropriate judicial formation, in accordance with the Court's priority policy. The Filtering Division of the old ECtHR has become a Filtering Section. The Filtering Section was initially established to centralise the handling of the incoming cases from five of the highest case-count countries.¹⁰⁰ It is made up of the judges appointed as Single Judge and the Registry rapporteurs who have been appointed by the President of the Court to assist them.

⁹⁷ See F. Tulkens, *la Cour européenne des droits de l'homme et la déclaration de Brighton. Oublier la réforme et penser à l'avenir*, cit., p. 312.

⁹⁸ See Response of the Court to the "CDDH report containing conclusions and possible proposals on ways to resolve the large number of applications arising from systemic issues identified by the Court", ECHR, 20 October 2015, available at: http://www.echr.coe.int/Documents/2014-ECHR_response_CDDH_report.pdf.

⁹⁹ The Interlaken process and the Court (2015 report), ECtHR, 2015.

¹⁰⁰ Reform of the Court: Filtering of cases successful in reducing backlog, Press release issued by Registrar of the Court, ECHR 312 (2013) 24.10.2013.

This makes for a close operational link between the filtering procedure and the issuing of Single Judge decisions on admissibility.

In 2014, President Spielmann indicated that the Filtering Section will also deal with repetitive applications, according to a “one in-one out” policy.¹⁰¹ In 2014, in fact, the number of applications pending at Single Judge level decreased by 69%; therefore the objective of eradicating the backlog of such applications by the end of the year 2015 seems to be progressing well.

4.2.2. *The results*

The Filtering Section handled mainly cases from Russia, Turkey, Romania, Ukraine and Poland).¹⁰² After six months, it was already clear that the creation of the Filtering Section had led to the development and sharing of best practices which have helped to speed up the administrative and judicial processing of incoming applications. By the end of June 2011, the Filtering Section had recorded 21,859 new applications. During the same period, 11,369 applications against five States were dealt with by a Single Judge, an increase of 42% compared to 2010.¹⁰³

A question that may arise concerning the operation of filtering section concerns the power given to each single judge member. They can analyse, filter and discard an application in complete autonomy.

4.3. The new admissibility criterion

4.3.1. *The measure*

Protocol n° 14 to the Convention introduced a new admissibility criterion. It basically requires proof of having suffered from a **significant disadvantage** as a consequence of the alleged violation of the Convention. In other words, the Convention adopted the “*de minimis non curat praetor*” principle. The objective was to enable a faster disposal of unmeritorious cases allowing the Court to concentrate on its core mission.¹⁰⁴

¹⁰¹ Conférence de presse Président Dean Spielmann, 30 January 2014, Cour européenne des droits de l’homme, available at: http://www.echr.coe.int/Documents/Speech_20140130_Spielmann_JY_PC_FRA.pdf.

¹⁰² Filtering Section speeds up processing of cases from highest case-count countries, European Court of Human Rights, available at http://www.echr.coe.int/Documents/Filtering_Section_ENG.pdf (the date of publication is not indicated but inferable from the wording of the document).

¹⁰³ Ibidem.

¹⁰⁴ Research Report, The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on, European Court of Human Rights, 2012, available at: http://www.echr.coe.int/Documents/Research_report_admissibility_criterion_ENG.pdf. In case *Dudek v. Germany* (apps no. 12977/09 et al, decision of 23/11/10), the Court itself stated that “The High Contracting Parties clearly wished that the Court devote more time to cases which warrant consideration on the merits, whether seen from the perspective of the legal interest of the individual applicant or considered from the broader perspective of the law of the Convention and the European public order to which it contributes”.

According to new Article 35, paragraph 3, letter b) of the Convention, the Court shall declare individual applications inadmissible if it considers that the applicant has not suffered a significant disadvantage. Nonetheless, the text provides for two so-called safeguards, the first being: ‘unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits’; and the second: ‘provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.’¹⁰⁵

The Court may raise the new admissibility criterion of its own motion or in response to an objection raised by the responding government. So far, there are examples of the Court having appraised the new criterion before, after, or jointly with other admissibility requirements.

4.3.2. Results

The new text of Article 35, paragraph 3, letter b) of the Convention being quite general, it is the responsibility of the Court to specify how it will apply these elements. During the first year from the entry into force of the new Protocol, only 10 separate admissibility decisions applying this criterion were issued. Until the end 2015, the provision in question had been applied in approximately 40 decisions,¹⁰⁶ a number largely insufficient to have had a substantial impact over the total caseload of the Court¹⁰⁷.

The Interlaken Declaration invited the Court to give full effect to the new admissibility criterion and to consider other possibilities for applying the *de minimis* principle.¹⁰⁸ The Izmir Declaration reiterated the invitation for the Court to give full effect to the criterion ‘in accordance’ to the *de minimis* principle.¹⁰⁹ The Brighton Declaration went further, by stressing the importance of applying ‘strictly and consistently the admissibility criteria, in order to reinforce confidence in the rigour of the Convention system and to ensure that unnecessary pressure is not placed on its workload.’ In addition, the Conference called for the removal of the second safeguard clause – related to the due consideration of the complaint by a domestic

¹⁰⁵ Article 20 of Protocol 14 provided that, for the first two years from its entry into force (until 31 May 2012), the new admissibility criterion would only be applied by Chambers and Grand Chambers

¹⁰⁶ The Hudoc research engine only hits around 40 results of inadmissibility decisions applying solely his criterion, the latest of which dating back to August 2011. Later, other decisions were delivered for manifestly ill-founded cases where the new criterion had also been contemplated.

¹⁰⁷ Some have observed that it is paradoxical that judges have to spend time in deciding whether an application complies with a criterion that defines applications not worthy of spending the judges’ time. S. Greer, *The New Admissibility Criterion, in The European Court of Human Rights after Protocol 14, Preliminary Assessment and Perspectives*, Samantha Besson (ed.), Schulhess, 2011, p. 45. However, it is difficult to imagine an alternative to deal with applications.

¹⁰⁸ High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, cit., point 9 (c).

¹⁰⁹ High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration, cit., point F(2-b)

tribunal – inviting the Committee of Ministers to adopt a related amending instrument.¹¹⁰ It is at least questionable whether the Declarations have actually been followed in this regard.

It has been pointed out that during the first years after the entry into force of the new criterion, its implementation required more, rather than less, time and consideration from the Court, which delivered extensively motivated judgments with a view to developing legal principles for its application.¹¹¹ Once Protocol n° 15 will have entered into force, however, it will introduce the modifications advocated by the Brighton Conference, thus widen the scope of applicability of the significant disadvantage criterion by eliminating one of its ‘safeguards’. The Explanatory Report to the Protocol points out that the amendment is intended to give greater effect to the principle that the Court should not be concerned by trivial matters.¹¹²

In a report of 2012 on the effects of Protocol n° 14 and on the implementation of the Interlaken and Izmir Declarations, the CDDH reported an observation by the President of the Court stating that the great majority of cases which might fall to be dealt with under the new provision would be declared inadmissible more rapidly and more easily under other criteria.¹¹³ As an observer stated, one might conclude that both the fears and hopes that had accompanied the entry into force of the new criterion have failed to materialize. It has not made the Court inaccessible and it has not significantly helped reducing the case overload. Its deterrent effect towards dubious applications is also questionable. Its implementation by single judges would probably make a difference, although, on the other hand, it would make the application of the legal principles less visible, as single judge decisions are usually not published.¹¹⁴ One can only speculate as to why this is so in circumstances where the costs of electronic publication are extremely limited.

Other commentators have pointed out that that the very nature of the criterion is quite discretionary and that the related case law is quite unsubstantial. On that view it is no surprise that it has been used to adjudge a minimum percentage of the total applications.¹¹⁵

¹¹⁰ High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, cit., point 15.

¹¹¹ A. Buyse, *Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35 § 3 (b) ECHR*, in B. McGonigle Leyh, Y. Haecq, C. Burbano Herrera, and D. Contreras Garduno (eds.), *Liber Amicorum for Leo Zwaak*, Intersentia 2013, forthcoming, p. 12.

¹¹² Explanatory Report to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, available at <http://www.conventions.coe.int/Treaty/EN/Reports/Html/213.htm>.

¹¹³ 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, available at [http://www.coe.int/t/dghl/standardsetting/cdh/CDDH-DOCUMENTS/CDDH\(2012\)R76_Addendum%20II_EN.pdf](http://www.coe.int/t/dghl/standardsetting/cdh/CDDH-DOCUMENTS/CDDH(2012)R76_Addendum%20II_EN.pdf).

¹¹⁴ A. Buyse, *Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35 § 3 (b) ECHR*, cit., p. 12. The author here affirms having had confirmation from the Registry that, at the beginning of March 2013, 127 decisions had been taken on the basis of article 35, paragraph, 3, letter b) of the Convention, 68 of which solely based on the criterion.

¹¹⁵ S. Greer, *The New Admissibility Criterion*, cit.

The strict wording of the provision as emerged from Protocol n° 14 has been alleged to be the main cause of the failure of the criterion.¹¹⁶ This situation may change once all the State Parties ratify Protocol n° 15.

The European Law Institute, too, has noticed the exiguous number of applications decided through this criterion. Consequently, even if recourse to it increases in the future, one has to be prudent about expecting an enormous impact on the caseload.¹¹⁷ The very need for the existence of the clause had been put into question.¹¹⁸

With or without the amendment of Protocol n° 15, it seems that it is a matter for the Court, rather than a direct consequence of the text of the Convention, whether the new criterion is to be applied extensively, thereby enabling it to contribute to the disposal of the backlog. While on the one hand the Court can use it as a tool to speed up the disposal of the backlog of unmeritorious applications, on the other hand, its rather discretionary nature has the potential of jeopardizing legal certainty for applicants. To conclude, the results remain thus mixed until now. The benefits for the backlog's reduction appear limited, and there is a potential contradiction between this rule and the wide access to human rights justice.

4.4. The Pilot Judgment Procedure

4.4.1. The measure

The Pilot Procedure was introduced to tackle repetitive applications regarding a structural problem in the implementation of the Convention in the State Parties. It was not until the end of the 1990s, when the number of State Parties and related applications started to increase that the Court started to notice such trends. In particular, the length of proceedings in the Italian judicial system and the non-execution of judgments by many of the states created out of the former Soviet Union were the cause of the filing of a high number of applications.¹¹⁹

The first judgment which presented a structure that, although was not directly called in this way, would become typical of the Pilot Judgment was *Broniowski v. Poland*, delivered in June 2004 (shortly after adoption of Protocol n° 14). The case concerned a compensation scheme for Polish citizens displaced after World War II from regions east of the River Bug, and involved almost 180 applicants.¹²⁰

¹¹⁶ See J-P. Costa, *Les réformes de la Cour européenne des droits de l'homme*, op.cit., p. 32.

¹¹⁷ European Law Institute (ELI) Statement on case-overload at the European Court of Human Rights, cit., p. 19.

¹¹⁸ European Law Institute (ELI) Statement on case-overload at the European Court of Human Rights, cit., p. 44.

¹¹⁹ See L. Wilhaber, *Pilot Judgments in Cases of Structural or Systemic Problems*, in *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, R. Wolfrum and U. Deutsch eds., 2009., p.69-70

¹²⁰ *Broniowski v. Poland*, [GC], n° 31443/96, ECHR 2004-V-(22.6.04).

Elements that tend to be present in each Pilot Judgment Procedure are:

- The finding by the Grand Chamber of a structural problem, involving a group of individuals, concerning the respect of the rights guaranteed by the Convention
- The conclusion that such deficiencies in national law and practice could be the basis of a high number of connected applications
- The recognition and indication of concrete general measures to solve these problems
- A decision (which is in fact not found in all cases) to adjourn consideration of other pending applications deriving from the same cause
- The use of the operative part of the judgment to reinforce the obligation to take legal and administrative measures
- Reserving the issue of just satisfaction (Article 41 of the Convention)
- Information by the Court to the Committee of Ministers, General Assembly and Human Rights Commissioner on the procedure adopted and further developments.
- A common practice at the end of the Pilot Procedure for the Court to support the agreement of a friendly settlement and strike out the remaining applications.

Although the Court would have preferred this solution,¹²¹ Protocol n° 14 did not provide for a Convention level legal basis for the Pilot Judgment. A dedicated Rule 61 was inserted in the Rules of Court and came into force on 31 March 2011. It provides that the parties shall be consulted before the start of the procedure and that the Court shall identify in the judgment the remedial measures the State is required to take. It may also impose a time-limit on the adoption of such measures and that any friendly settlement must also cover general measures and redress for other/potential applicants. In addition, where a State fails to abide by a pilot judgment, the Rule provides that the Court will normally resume its examination of the adjourned cases.¹²²

4.4.2. The results

According to the Court's statistics, after a peak in 2009, use of the pilot judgment technique has reduced the total number of judgments delivered, whilst increasing the number of applications dealt with.¹²³

The procedure has not been spared from criticism, principally as regards the non-fixed criteria for the choice of the "leading" application and more generally for the

¹²¹ L. Wilhaber, Pilot Judgments in Cases of Structural or Systemic Problems, cit., and, in general for the Pilot Judgment Procedure: D. Haider, The Pilot-Judgment Procedure of the European Court of Human Rights, cit.

¹²² M. O' Boyle, The future of the European Court of Human Rights, German Law Journal, 12 German Law Journal 1862-1877 (2011), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1388>.

¹²³ Overview 1959-2013 Echr, European Court of Human Rights/ Council of Europe, 2014, available at http://www.echr.coe.int/Documents/Overview_19592013_ENG.pdf.

presumed lack of competence in the Court to express its views on abstract issues rather than by reference to the facts of individual cases¹²⁴. Some commentators have also argued that, although a successful initiative to reduce one aspect of the case overload, the Pilot Procedure is insufficient to solve the problem of repetitive applications.¹²⁵ These should be resolved primarily at national level, by resolving the structural problem, or at least by introducing effective remedies to allow cases to be dealt with internally.¹²⁶

During his speech on the occasion of the opening of the 2013 judicial year, the ECtHR's President pointed out the importance of the Pilot procedure in that it allows an analysis of an underlying systemic – or structural – situation that is at variance with the Convention. Following this analysis, the Court may give guidance to the State on suitable remedial measures.¹²⁷ He affirmed that the use of Pilot Judgments, more intense than ever in 2012, was one of the factors contributing to reducing the backlog 2012.

The Court further commented, at the end 2014, on the issue of systemic problems by way of response to a Report of the Steering Committee of Human Rights.¹²⁸ It reported that in some State Parties, such as Romania, Serbia, Italy and Turkey, internal remedies had been established to allow applicants to seek redress for systemic issues at national level. For instance, in Turkey, a constitutional complaint procedure as well as a compensation commission for damages arising from excessive length of proceedings had been introduced, which allowed the Court to declare thousands of applications inadmissible for non-exhaustion of internal remedies.

4.5. Friendly settlements and unilateral declarations

4.5.1. *The measure*

Friendly settlements and unilateral declarations are two instruments to resolve disputes before the European Court of Human Rights that constitute an alternative to judgments.

¹²⁴ S. Wallace, Much ado about nothing? The pilot judgment procedure at the European Court of Human Rights, E.H.R.L.R., 2011, 1, p. 71-81, and D. Haider, The Pilot-Judgment Procedure of the European Court of Human Rights, cit., p. 239.

¹²⁵ European Law Institute (ELI) Statement on Case-Overload at the European Court of Human Rights, 2012, available at http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-1-2012_Statement_on_Case_Overload_at_the_European_Court_of_Human_Rights.pdf.

¹²⁶ See, ex multis, Press conference, President Dean Spielmann, Strasbourg 29 January 2015, available at: http://www.echr.coe.int/Documents/Speech_20150129_Press_Conference_2015_FRA.pdf; Analysis of Statistics 2015, Council of Europe, January 2015.

¹²⁷ Available in the 2013 annual report: http://www.echr.coe.int/Documents/Annual_report_2013_prov_ENG.pdf

¹²⁸ See Response of the Court to the "CDDH report containing conclusions and possible proposals on ways to resolve the large number of applications arising from systemic issues identified by the Court", ECHR, 20 October 2015, available at: http://www.echr.coe.int/Documents/2014-ECHR_response_CDDH_report.pdf.

Friendly settlements are covered by Article 39 of the Convention. This provision has been amended by Protocol n° 14 in order to encourage such type of conflict resolutions. The Court can place itself at the parties' disposal for the purpose of facilitating friendly settlements at any stage in the proceedings, not only after the application has been declared admissible, as had been provided for prior to the amendment. Rule of Court 62 is dedicated to this procedure, although this rule, last amended in 2012, continues to provide that a declaration of admissibility is required in order to trigger the friendly settlement procedure.

In practice, the Chambers or their Presidents enter into contact with the opposing parties, taking any steps that appear to be appropriate to facilitate a friendly settlement. Negotiations are confidential and without prejudice to the arguments in the contentious proceedings. When a friendly agreement is achieved, the Court, after having verified that respect for human rights is guaranteed, issues a strike out decision. However, when the agreement is limited to a claim of just satisfaction, the Court will issue a judgment. As provided by the amended Article 39 of the Convention, the Committee of Ministers supervises the execution of friendly settlements, as an exception to the rule that the Committee of Ministers is only competent for the supervision of the execution of judgments.

The instrument of **Unilateral Declarations** was introduced in 2001 via case-law, Article 37, paragraph 1, letter c) of the Convention providing the legal basis for the strike-out decision. Where an applicant refuses the terms of a friendly settlement proposal, the responding government may file a request to strike out the application and make a public and adversarial (unlike the confidential friendly settlement) unilateral declaration acknowledging the violation of the Convention and undertaking to provide the applicant with redress. Requests can be made in absence of a previous attempt to reach a friendly settlement in exceptional circumstances only. When the Court considers that the proposal affords respect for human rights, it may strike the application out of the list, in whole or in part, even though the applicant wishes the examination of his case to be continued. The procedure is governed by Rule 62A of the Rules of Court, introduced in 2012.¹²⁹ In the *Tashin Acar* judgment¹³⁰ the Court elaborated some clear acceptance criteria for unilateral declarations.

It is uncertain whether the infringement procedure can also apply with regard to these instruments, as Article 46 of the Convention refers only to judgments and not to decisions. The Court has recalled that the Committee of Ministers is competent for the execution of friendly settlements and final judgments. In case the government would not respect the terms of a unilateral declaration, the Court can decide to

¹²⁹ Rules of Court, European Court of Human Rights, 1 January 2014, Registry of the Court, Strasbourg, available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

¹³⁰ *Tashin Acar v. Turkey* (preliminary objection) [GC], no. 26307/95, 6 May 2003, see, in particular, point 67 of the judgment.

restore the application to the Register according to Article 37, paragraph 2 of the Convention.¹³¹

4.5.2. *The results*

Friendly settlements and unilateral declarations are often used to provide a satisfactory outcome to repetitive cases¹³² in areas of well-established case law; in particular, as an outcome of the pilot judgment procedure. It is quite hard to get precise data on the friendly settlement and unilateral declaration provisions. The number of the former has been in the range of 400 to 800 from 2007 to 2011,¹³³ rising to 1,303 and 1,481 in 2012 and 2013 respectively, with a new record having been achieved in 2014, with almost 1,700 friendly settlements. Whilst the number of unilateral declarations has decreased in recent years, being 703 in 2011, 606 in 2012 and 409 in 2013 their number increased again to 502 in 2014. These data must, of course, be read together with the data for the number of applications decided.

Concerning the impact on the case overload, the data in our possession do not allow for a thorough analysis, but it can be observed that friendly settlements and unilateral declarations have constituted 3.7% in 2014, 2% in 2013 and 2012, and 3% in 2011 of the total of the applications disposed of. They reached 10% of the applications disposed of in 2015. During that year, while the number of friendly settlements slightly decreased, the number of unilateral declarations multiplied almost six times. If one considers that most of the applications are inadmissible, it makes for a huge percentage of meritorious applications. Also, they allow for a speedy disposal of cases, especially useful in repetitive applications.

At the Interlaken Conference, within the framework of repetitive applications, State parties were called, with the support of the Court, to facilitate friendly settlements and unilateral declarations.¹³⁴ Even more intensely, the Izmir Declaration invited them to give priority to the resolution of repetitive cases by way of friendly settlements or unilateral declarations and encouraged the Court's role in this respect as well as the need for creating awareness of friendly settlements as an integral part of the Convention system.¹³⁵ Finally, the Brighton Declaration was silent with respect

¹³¹ *Ivaylo Kraev v. Bulgaria*, application n. 43007/04, Committee Decision (Fifth Section –UD), October 2010, p. in fine.

¹³² H.Keller and D. Suter, in their study 'Friendly Settlements and Unilateral Declarations' (in *The European Court of Human Rights after Protocol 14, Preliminary Assessment and Perspectives*, Samantha Besson (ed.), Schulhess, 2011, operate a distinction between mass procedures and repetitive ('clone') cases. The former refers to way in which cases are processed: mergers of several applications originating from different fact stemming from the same problem. Whereas, according to the authors, repetitive (clone) cases refer to the content of applications, those in which a systemic or general problems are dealt with at the same time.

¹³³ They were 389 in 2007; 670 in 2008; 479 in 2009, 415 in 2010; 829 in 2011.

¹³⁴ High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, op.cit., point D, 7.

¹³⁵ High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration, op.cit., point E, 1

to these two instruments, whereas the Brussels Declaration only encouraged the recourse to these measures alternative to litigation.

Some observers expressed the view that ‘mass procedures’ are now an indispensable tool to resolve similar cases efficiently and could theoretically be exploited by applicants to circumvent the significant disadvantage criterion.¹³⁶ It may be observed that this inference would be correct only if the Court took a more favourable approach towards use of the new criterion. On the other hand, friendly settlements and unilateral declarations can be unsatisfactory to those applicants who would prefer a fully-fledged judgment declaring a violation of the Convention. Also, the average award of compensation for unilateral declarations and friendly settlements tends to be substantively lower than that for the average judgement.

The same observers have underlined that the Court has a tendency to consider these two instruments together, under the umbrella of ‘strike out’ decisions. Other than the fact that the figures can be misleading as the Court could strike out also other categories of judgments, this tendency may be misleading, as they have different requirements. In particular, one requires the applicant’s agreement and the other one not. They also differ from the enforcement point of view.¹³⁷

Some NGOs have called for an extension of the competence of the Committee of Ministers to the enforcement of unilateral declarations.¹³⁸ This could maybe make this procedure more efficient.

4.6. Priority Policy

4.6.1. *The measure*

In 2009, the Court amended Rule of Court 41, concerning the order in which it deals with applications, by introducing a **Priority Policy**. Until that time, cases had been processed and adjudicated mainly on a chronological basis. The priority policy is based on importance and urgency of the issues raised. It leaves the possibility to the Chambers or their Presidents to derogate from such criteria to give priority to a particular application.

The Policy introduces different categories for the allocation of the applications. Categories I-III are the top priority applications (urgent / structural or endemic questions and issues of general interest / Articles 2,3,4 and 5§ 1 respectively). Category IV is composed of Chamber cases which do not fall within the top three

¹³⁶ H.Keller and D. Suter, in their study ‘Friendly Settlements and Unilateral Declarations’, op.cit.

¹³⁷ H.Keller and D. Suter, in their study ‘Friendly Settlements and Unilateral Declarations’, cit.

¹³⁸ The Helsinki Foundation for Human Rights, Unilateral Declarations under the supervision fo the Committee of Ministers, available at: <http://www.europapraw.org/en/news/apel-o-poddanie-jednostronnych-deklaracji-etpcz-nadzorowi-komitetu-ministrow>.

categories and which cannot be classified as repetitive applications; Category V covers repetitive applications and Categories VI and VII are inadmissible applications. Thus Category VII applications are dealt with by a Single Judge. The policy concentrates more resources on the most important cases, being the most serious and those disclosing the existence of problems capable of generating large number of additional cases.¹³⁹

4.6.2. *The results*

The Court has been somewhat inconsistent in the application the Priority Policy in the first years of its introduction. This makes it useful to briefly examine the annual data.¹⁴⁰ Precise data on the first six months of application (second half of 2009) are not available. Nonetheless, it can be affirmed that the situation of priority applications by the end of 2010 was not ideal, despite the fact that the number of applications dealt with within these categories had increased by 68%. For example, 21% of Category I “urgent” applications had been pending for more than one year and 64% of Category II applications were awaiting a first examination.

In 2011, the Court extended its efforts on the first three category-cases, increasing the number of applications dealt with by 5%. The number of applications in these categories concluded by friendly settlement or unilateral declaration also rose from 40 in 2010 to 146. At the end of 2012, the amount of pending priority applications was around 6,600, an increase by 30%, compared to the previous year, of applications that had been dealt with. 61% more priority applications were declared inadmissible or struck out. Out of the total number of judgments delivered, 33% were priority ones. In 2013 the trend changed, as the number of priority applications dealt with decreased by 14%, and the number of priority applications giving rise to a judgement decreased by 5%. Those concluded by friendly settlement or unilateral declaration went from 158 to 247. As of 31 December 2014, there were 7.380 top-three category cases pending, not a big difference compared to the 7.520 of the previous year.

At the end of 2015, the top three category cases amounted to 11, 400, that is to say almost 18% of the total number of pending cases.¹⁴¹ As their number continues to rise, they are one of the main current challenges before the Court. However, the positive aspect is that the number of priority cases dealt with at different stages of the proceedings increased by 10%: moreover 37% more priority applications were communicated to the respondent governments.¹⁴²

¹³⁹ See The Court’s Priority Policy, European Court of Human Rights, http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

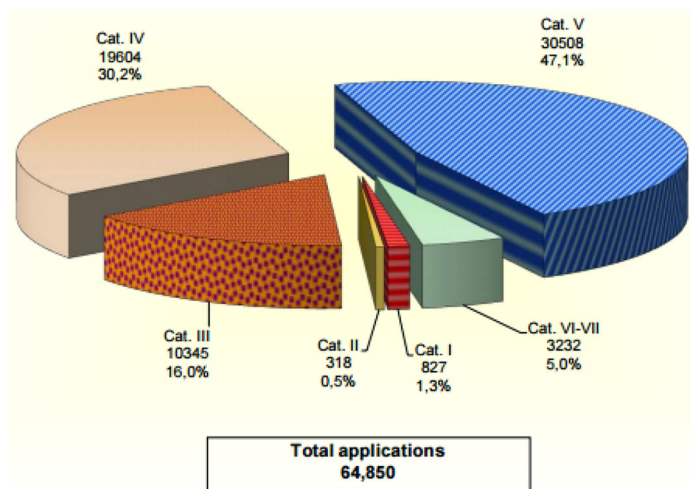
¹⁴⁰ The following data are available on the respective Analysis of the statistics documents, available on the website of the Court: [http://www.echr.coe.int/sites/search_eng/pages/search.aspx#{"fulltext":\["analysis"\]}](http://www.echr.coe.int/sites/search_eng/pages/search.aspx#{).

¹⁴¹ See Analysis of the Statistics 2016, ECHR, January 2016.

¹⁴² Ibidem.

The table below presents the situation of pending cases by priority category in 2015.

Chart 4. The Court's total caseload by priority category



Source, Analysis of Statistics 2015 ECtHR

The Court has a wide margin of manoeuvre in its application of the Priority Policy, which can sensibly influence the volume of pending applications and the ratio of the various categories within them. For example, in 2011 fewer judgments were delivered, but the focus was given to the top three categories, which was quite the opposite of what happened in 2013. In 2014, there was again an increase in dealing with the top three categories. The outcome of the implementation of the priority policy has to be read in conjunction with the introduction of new formations. While they seem to have different scope, these two reforms in fact complete each other. With the introduction of the single judge formation and the new competences of the three judges committees, judges have more time to dedicate to more serious issues.

In 2014, almost half of the high priority (Category I to III) applications originated from two States: Russia and Romania, Turkey being third on this unflattering podium. Also, almost half of the cases are part of the “Brighton backlog” which, despite the increase in by 30 of the number of cases disposed of in 2014, has increased by 16%. In 2015, 35% of the top three category cases were to be considered as “Brighton backlog”. These cases take precedence over all others and more resources are dedicated to them.

The comments on this new policy have been quite positive overall.¹⁴³ In particular, it is seen as potentially beneficial for the quality of the judgments and for their consist-

¹⁴³ See, *in* *alio*s, L. Wildhaber, Criticism and case-overload: Comments on the future of the European Court of Human Rights *cit.* p. 14.

ency.¹⁴⁴ However, there have also been warnings over the fact that the policy could risk diverting resources from the high volume of non-meritorious, non inadmissible cases, which have become a major issue.¹⁴⁵

There have also been proposals to push the principle much further, allowing judges to decide that some of the applications, given their low priority, should be struck out by applying Article 31, paragraph 1 of the Convention – something similar to a certiorari procedure (see *infra*, part 6).¹⁴⁶

4.7. New Rule of Court 47

4.7.1. *The measure*

On 1 January 2014 an amended **Rule 47** requiring stricter conditions for applying to the Court came into force.

The first major change introduced concerns the application form that every applicant has to complete on filing an application.¹⁴⁷ A simplified version of the form is published on the Court's website and can be downloaded. Any form sent to the Court must be completed in full and accompanied by copies of the relevant supporting documents, including, when an applicant has a representative, the power of attorney or from of authority signed by the applicant. The Court may reject any incomplete application.

The second major change concerns the interruption of the period within which an application must be made to the Court, that is, six months from delivery of the final decision of the highest domestic court with jurisdiction to rule on the matter. For the period to be interrupted, the application will now have to fulfill all the conditions set out in Rule 47.

During its first year of application, Rule 47 served as a basis for striking out half of the total of 25, 100 applications disposed of administratively, a figure that doubles that of the previous year; quite an effective measure then. President Spielmann has taken the trouble to explain that applicants whose applications are rejected under the

¹⁴⁴ P. Mahoney, *The European Court of Human Rights and its Ever-growing Caseload: Preserving the Mission of the Court While Ensuring the Viability of the Individual Petition System*, cit., p. 20

¹⁴⁵ P. Mahoney, *The European Court of Human Rights and its Ever-growing Caseload: Preserving the Mission of the Court While Ensuring the Viability of the Individual Petition System*, cit., p. 20

¹⁴⁶ European Law Institute (ELI) *Statement on case-overload at the European Court of Human Rights*, cit., recommendation C. 1); P. Mahoney, *The European Court of Human Rights and its Ever-growing Caseload: Preserving the Mission of the Court While Ensuring the Viability of the Individual Petition System*, cit., p. 25

¹⁴⁷ The application form requires information on the applicant's data, a statement of the facts, an explanation of the alleged violation of the articles of the Convention, the exhaustion of domestic remedies, any *lis pendens* before other international jurisdictions. It is downloadable from the website of the Court (http://www.echr.coe.int/Pages/home.aspx?p=applicants&c=#n1365511805813_pointer).

application of Rule 47 are fully entitled to apply again.¹⁴⁸ This is true, provided that they are still in time! Also, the Court has pointed that the rule, far from being meant to discourage new applicants, fosters a sense of responsibility that should lead to higher standards of excellence.¹⁴⁹

4.7.2. The results

In fact, in 2014, 23% of new applications (almost one quarter of the total) failed to comply with the Rule 47. In 2015 the number of cases disposed of administratively increased by 29%, reaching 32, 400. Of these, 45% were disposed of under Rule 47.¹⁵⁰ The most common grounds of rejection are the failure to submit complaints, to provide relevant documents, to provide a statement of violations; to provide documents showing that the domestic remedies have been exhausted¹⁵¹. These deficiencies seem to be (simply) symptomatic of the lack of a legal assistance, or more generally, of legal literacy, notwithstanding that the individual application is one of the cornerstones of the whole system.

One could therefore wonder whether the Court has gone too far with the strictness of this new Rule and risks not addressing serious violations committed against people which, because of illiteracy or any other reason, are unable to complete the application form. This probably explains why, as the Interlaken and the Courts Report 2014 state, some exceptions to the application of Rule 47 have been made.¹⁵² Indeed, the Court considers still necessary to clarify the application requirements to potential users, pointing out the most common mistakes.

As regards the interruption of the six-month period, as the Court says, it does not appear to have led in any increase in the rate of rejections for failure to comply with the six-month limit.

In general, the Court affirmed that Rule 47 is an efficient tool, able to make the processing of applications easier and faster, and an efficient filter for vexatious or non-serious applications. As a result, more time can be dedicated to more important cases.

¹⁴⁸ Press conference, President Dean Spielmann, Strasbourg 29 January 2015, available at: http://www.echr.coe.int/Documents/Speech_20150129_Press_Conference_2015_FRA.pdf.

¹⁴⁹ Foreword, Provisional Annual Report 2014, ECHR 2015, available at: http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf.

¹⁵⁰ Analysis of the Statistics 2015, ECHR, January 2016.

¹⁵¹ Source: Interlaken Process and the Court (2014 report), European Court of Human Rights, 28 January 2015

¹⁵² Ibidem.

4.8. Infringement proceedings

4.8.1. *The measure*

Protocol n° 14 introduced the possibility for the Committee of Ministers to lodge an application against State Parties that are not compliant with a judgment of the Court. Article 46, paragraph 4 of the Convention provides that if the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds, refer to the Court the question whether that Party has failed to fulfill its obligation.

4.8.2. *The results*

Although this possibility was introduced as “the most important” amendment in the context of execution by the explanatory memorandum to Protocol n° 14,¹⁵³ it had not been put into practice at the beginning of 2016, possibly due to political reasons. Commentators have argued that, if put in practice, this could be a very powerful tool to solve some of the systemic problems afflicting the Convention system and hopefully provide a strong deterrent to recalcitrant State Parties.¹⁵⁴

4.9. Seconded lawyers

4.9.1. *The measure*

A number of arrangements have been made between the Court and the States Parties, some promoted by the EU-funded and Brussels-based European Judicial Training Network, for the **secondment to the Court of senior lawyers and judges**. The Committee of Ministers’ Resolution (2012)2 of 15 February 2012 governs secondments for longer than one year.¹⁵⁵ This practice had been encouraged during the Interlaken Conference, when States were incited to second national judges and, where appropriate, other high-level independent lawyers to the Court Registry.¹⁵⁶ From 2009 to 2015 around 65 people have worked as seconded lawyers, enrolled within a scheme with a professional training dimension.¹⁵⁷

¹⁵³ Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>, point 15.

¹⁵⁴ See E. Lambert Abdelgawad, *L’exécution des jugements: les requêtes en manquement et en interprétation*, in *The European Court of Human Rights after Protocol 14, Preliminary Assessment and Perspectives*, Samantha Besson (ed.), Schulhess, 2011, p. 93 et ss; F. Tulkens, *La Cour européenne des droits de l’homme et la déclaration de Brighton. Oublier la réforme et penser à l’avenir*, cit., p. 313

¹⁵⁵ See: Information Note from the Registrar, secondment to the Registry of national lawyers, 8 October 2012, European Court of Human Rights, available at: http://www.ucps.sk/subory/informat_vna_n_ta.pdf.

¹⁵⁶ High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, cit.

¹⁵⁷ Interlaken Process and the Court (2015 report), European Court of Human Rights, 12 October 2015

In 2015 there were overall fewer seconded lawyers than in the previous year, mainly explained by the fact that many of them departed after having achieved the objective of their secondment, in many cases dealing with the backlog of Single Judge cases from Russia.¹⁵⁸

4.9.2. The results

Seconded lawyers have obviously helped to reduce the backlog. This must be integrated in a more general increase of human resources (see § 4.11). The use of seconded qualified personnel by the State Parties is of course something positive. One must however get guarantees concerning, precisely, the required qualifications. It represents a very flexible instrument, easy to implement when needed, and easy to dismantle when it has become superfluous.

4.10. E-justice policy, dissemination and other “soft measures”

The Court has been very active in developing both easier ways of communication with parties and dissemination of information on the ECHR system, in the most complete, rapid and accessible way possible.¹⁵⁹

In 2015, a new platform for secure sites used by the governments for communicating electronically with the Court has been launched, hoping to reach 44 State Parties. At the same time, a platform for electronic communication with applicants was being tested. Written pleadings and other documents can already be filed electronically. Parties can now check on the current procedural state of applications. In addition, the Court has opened a twitter account which also hosts its press release. Hudoc is now available on mobile devices and is translated in Russian and Turkish; wider functionalities have been added to the portail. The Practical Guide on admissibility criteria is at its third edition in 20 languages and is being regularly updated, and so are case law guides and a series of topic-specific manuals and factsheets. In addition, the Court has drawn up an IT strategy document identifying priorities and expected results for the period 2016-2020.

The HRTF (see § 2.2) project of translation of case-law to be included in Hudoc has so far allowed for something like 3,000 translations in 12 target languages (it has been decided that the project will be funded for a fourth year).¹⁶⁰ In addition, different stakeholders have been invited to include in Hudoc all translations available, which

¹⁵⁸ Interlaken Process and the Court (2015 report), European Court of Human Rights, 12 October 2015

¹⁵⁹ See, in general, Interlaken Process and the Court (2014 report), European Court of Human Rights, 28 January 2015 and Interlaken Process and the Court (2015 report), European Court of Human Rights, 12 October 2015.

¹⁶⁰ The beneficiaries have so far been: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Moldova, Montenegro, FYROM, *ibidem*.

has led to a total of 12, 500 documents. The Registrar in 2014 repeated the proposal that State Parties consider translating the most important and Europe-wide relevant decisions each year.

Training sessions and study seminars have also been organised, again with the help of the HRTF, for judges and lawyers, in particular those coming from states where this is more needed. The Court also tries to develop and maintain dialogue with State Parties, at high government or judicial level.

All these actions contribute concretely to the awareness of the ECHR system among those concerned and therefore indirectly to its correct functioning.

4.11. Increase of human resources

After all these changes, one must mention that the Registry's human resources have increased quite substantially. In 2000, there were 274 agents, representing an expenditure of more or less 15 million euro. In 2007, this had increased to 549 agents, costing 35 million euro and, in 2015, 660 agents costing 49 million euro. Some of these resources have obviously been needed to deal with the enormous workload brought by the enlargement of the Council of Europe. Others have been justified by the backlog. Regrettably, the amount of information about this essential topic remains limited, though it is absolutely essential for a management analysis.

A special way to finance this has been, as proposed during the Brighton Conference, a **special bank account** of the Court. It has been opened in order mainly to finance the recruitment of jurists to deal with the backlog and the most high priority cases.¹⁶¹ The account is open for voluntary donations by State Parties, which may be subject to the condition that the funds are used for specific purposes. At the end of 2015, a total 2,806,600 euros had been collected from 22 State Parties, about 78% of which have been spent on hiring additional expert lawyers for two years. More lawyers are to be hired should the Court receive more contributions.¹⁶²

¹⁶¹ Ouverture d'un compte spécial pour la Cour européenne des droits de l'homme, Communiqué de presse du Greffier de la Cour, CEDH 266 (2012) 21.06.2012.

¹⁶² Interlaken Process and the Court (2015 report), European Court of Human Rights, 12 October 2015

5. GLOBAL RESULTS

In a press release of 24 October 2013, the Registry of the Court informed that the methods employed since the entry into force of Protocol n° 14 had succeeded in reducing the backlog of cases; the number of pending applications was around 96, 000 whereas in 2011 it had reached its maximum of above 161, 000. This positive trend has continued since then, the number of pending applications reaching the low of 64, 850 at the end of 2015. Most remarkably, in 2015 the backlog of single judge cases had been absorbed. Inadmissible cases can now be dealt with speedily and the Court's resources dedicated to other challenges. These figures show how in a few years the Court has made a tremendous improvement.

On the occasion of the formal opening of the year on 30 January 2014,¹⁶³ President Spielmann affirmed that the backlog of manifestly inadmissible applications concerning a number of State Parties, such as Turkey, Romania and Poland, has been eliminated. Others, such as Germany and France, no longer have backlog, and it was supposed to be the same for Russia in 2014 (though this may no longer be valid, having regard to the events linked to the Ukrainian crisis). The Court intended to dispose of its backlog of single judge cases by the end of 2015.¹⁶⁴ As a matter of fact, according to President Raimondi's presentation in 2016, at the end of 2015, there were 64,850 cases pending. They included 11,500 priority cases, 19,600 normal cases, and 30,500 repetitive cases¹⁶⁵.

A positive element is that, while in the latest years the number of incoming applications has become quite stable (which is in itself a positive figure), the number of closed cases had increased by almost 6% – an equation that results in a decrease in the backlog. At the end of the 2013, the Court had dealt with more or less 93, 000 applications, around 80, 000 of which through single judge formations, a slightly smaller number as compared to the previous year. In 2014 the number of applications disposed of amounted to around 86, 000, slightly less than in 2013, but the ratio of single-judge decisions in this figure dropped by 69%. In 2015 this was even more striking. Allocated applications dropped by 28% and the number of single judge decisions fell by 62%.

The backlog of single judges cases being absorbed, the filtering section, will, as explained previously, be also charged with the treatment of repetitive cases, following the 'one in-one out' methodology. In addition, a new ICT system is being deployed to make the WECL procedure speedier.¹⁶⁶ It is however not so likely that

¹⁶³ Conférence de presse, cit.

¹⁶⁴ Press conference, President Spielmann, Strasbourg 29 January 2015, available at: http://www.echr.coe.int/Documents/Speech_20150129_Press_Conference_2015_FRA.pdf.

¹⁶⁵ Press conference 28 January 2016.

¹⁶⁶ http://www.echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf. See Speech of President Raimondi, Press conference, 28 January 2016, available at: http://www.echr.coe.int/Documents/Speech_20160129_Raimondi_JY_ENG.pdf.

this positive trend will keep the same pace in the long run, as it is mainly dependent on the disposal of simple cases. Once they have been ruled, it will be harder for the Court to dispose of such a high number of applications.¹⁶⁷ Concerning repetitive cases, they currently amount to more or less half of the pending cases (30,500 out of 64,850). The new WECL working methods, allowing for such cases to be dealt with rapidly yet thoroughly should allow the Court to clear this backlog in the next two or three years.¹⁶⁸

The current challenges are thus the high priority cases, the number of which unfortunately continues to rise. So does the Brighton backlog¹⁶⁹. Similar issues appear for non-priority, non-repetitive cases: they mainly originate from just four states, and their Brighton backlog has been increasing. They were around 19,600 at the end of 2015.¹⁷⁰ Clearly, some very impressive improvements have been made, but the ECtHR has not yet completely eliminated the backlog.

Such an impressive improvement was obtained thanks to numerous measures. The creation of the Filtering Section, the new criteria on inadmissibility, the single judges, the ICT improvements and the various ways of personnel increase all played a role. Most interestingly, their coordinated implementation provided some added value. This brings us back to a fundamental conclusion: increase of means must imperatively be associated with a reform of process. Otherwise, there is a substantial risk of losing a good part of the benefits brought by the increase of means.

¹⁶⁷ D. Spielmann, The successes of and challenges for the European Court, seen from the inside, in Proceedings, Conference on the long-term future of the European Court of Human Rights, Oslo, 7-8 April 2014, available at: <http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Proceedings-Oslo-2014.pdf>, p. 42 ss.

¹⁶⁸ CDDH report on the longer-term future of the system of the European Convention of Human Rights, 11 December 2015, available at: [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/CDDH\(2015\)R84_Addendum%20I_EN-Final.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/CDDH(2015)R84_Addendum%20I_EN-Final.pdf).

¹⁶⁹ According to the Brighton Declaration (para 20(h)), the ECtHR should deal with all incoming applications within one year of registration, either by rejecting it or communicating it to the Government, with a further target of terminating the proceedings within another two years. The "Brighton Backlog" comprehends all applications not dealt with in line with these criteria.

¹⁷⁰ See Speech of President Raimondi, Press conference, 28 January 2016, available at: http://www.echr.coe.int/Documents/Speech_20160129_Raimondi_JY_ENG.pdf.

6. OTHER POSSIBLE FUTURE REFORMS

In that framework, other measures for the handling of the applications by the ECtHR have been proposed or debated but not (yet) adopted. One of the advantages of a serious and open preparatory process is that a lot of propositions are advanced. In October 2012, August 2013, January 2015, and October 2015 respectively, the Court published the reports called “The Interlaken Process and the Court”, as a follow up to the international high level conferences.¹⁷¹ These documents mention a series of supplementary measures that the Court could adopt in the future. First, of course, changes should be expected as a consequence of the entry into force of Protocols n° 15 and 16 to the Convention. The impact of the reforms introduced by these two Protocols will be largely dependent on the way in which the Court itself, and the national jurisdictions, approach them. Again, none of this was evoked only once in the EU debates.

6.1. A default judgment procedure

The 2012 report mentions that the Court’s ‘Standing Committee on Working Methods’ had been tasked with looking at a possible default judgment procedure. Reference is made to the Brighton Declaration, which advocated for a new form of procedure involving the determination of a small number of **representative applications**. This suggestion emerged at a time when the Court had received many thousands of individual applications against Hungary concerning pension entitlements. According to the 2012 report, the outcome of this proposal will depend on the will of State Parties and the Committee of Ministers to respond to the Brighton Declaration. However, the 2013 report explains that rather than on on this default judgment procedure – as it calls it – the Court had in fact focused on streamlining the procedure for repetitive cases as much as possible, in particular regarding non-enforcement cases against Ukraine.

This kind of procedure has been also presented by the European Law Institute’s statement of 2012. It envisaged a process whereby, in the wake of a pilot judgment finding a violation, the Court would, without the usual examination of cases taken to judgment, transmit repetitive applications to the Committee of Ministers by means of a formal “default” judgment. Such judgment would be dealt with by the Committee and the respondent State in the framework of the general measures of execution of the pilot judgment that shall be adopted at national level. The legal basis of this could be set either by a modification of the Rules of Court or, if necessary, by amendment of the Convention.¹⁷²

¹⁷¹ Both available at <http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=>.

¹⁷² European Law Institute (ELI) Statement on case-overload at the European Court of Human Rights, cit., recommendation B (1).

This procedure would in other words include the treatment of repetitive applications as part of the process of execution of the pilot judgments, which comes within the remit of the competence of the Committee of Ministers – not of the Court. It would be possible considering that Article 41 of the Convention, on just satisfaction, does not impose an obligation, but rather a possibility for the Court to afford just satisfaction. The proposal reflects the observation that respondent States are in any event obliged, in executing a pilot judgment, to introduce national remedial measures assuring reparation for the victims of the systemic violation found in the pilot judgment itself.¹⁷³

A dedicated drafting group under the authority of the CDDH (GT-GDR-C) finally adopted, in January 2013, a report which concluded that, under the current circumstances, there would be no significant added value to designing and introducing a representative application procedure. In particular, they found that the procedure would have a negative impact on the right to individual petition, since one case would have *res iudicata* effect on other applications. It also wouldn't produce any advantage compared to the pilot procedure. On 30 April 2013, the Ministers' Deputies endorsed such conclusions and recommended that, at that stage, no further action be taken at inter-governmental level.¹⁷⁴

6.2. A new filtering mechanism

Already in 2006, the group of Wise Men envisaged the possibility of establishing a **new filtering mechanism**, with the admonition that it should not, however, constitute a mere replica of the old European Commission of Human Rights. They foresaw a mechanism which would be attached to – but separate from – the Court. This had to guarantee, on the one hand, that individual applications result in a judicial decision and, on the other hand, that the Court be relieved of a large number of cases, enabling it to focus on its essential role. This body would be called the “Judicial Committee”. It would, in particular, perform functions which, under Protocol n° 14, are assigned to committees of three judges and single judges. The members of the Judicial Committee would be judges enjoying full guarantees of independence. Their number should be smaller than that of the State Parties and reflect a geographical and gender balance, and should be based on a system of rotation between states. The term of office of its members would be limited in duration in accordance with rules to be laid down by the Committee of Ministers.¹⁷⁵

¹⁷³ See P. Mahoney, *The European Court of Human Rights and its Ever-growing Caseload: Preserving the Mission of the Court While Ensuring the Viability of the Individual Petition System*, cit.; see also L. Wildhaber, *Criticism and case-overload: Comments on the future of the European Court of Human Rights* cit. p. 14.

¹⁷⁴ Information available at: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-C_en.asp.

¹⁷⁵ Report of the Group of Wise Persons to the Committee of Ministers, cit.

The idea of a new filtering mechanism was discussed during the Interlaken Conference. In that occasion, it was suggested to the Committee of Ministers to examine the setting up of a filtering mechanism within the Court going beyond the single judge procedure and the procedure provided for within the existing bench.¹⁷⁶

In 2011 the CCDH reported, *inter alia*, about the possibilities for enhanced filtering mechanisms within the Court and the treatment of repetitive applications. It was specified that not all of the 47 members of the CCDH were convinced of the necessity of a new filtering mechanism. One of the possibilities on the table was that of appointing senior Registry lawyers to be responsible for filtering, possibly under the supervision of a judge. This hypothesis could present the disadvantage of reverting to a system similar to that in place before the entry into force of Protocol n° 11. Such filtering decisions have an administrative rather than judicial nature. Other possibilities were evoked: to entrust filtering to a new category of judges, exclusively dedicated to this task; or, inspired by the *ad litem* judges mechanism of the International Criminal Tribunal for the former Yugoslavia, to appoint temporary judges, with the same task and status as the incumbent ones.¹⁷⁷ Other proposals put on the table comprise that of entrusting the filtering of applications which are inadmissible for procedural reasons to registry lawyers, and those whose inadmissibility lies on reasons based on the merits to judicial figures.¹⁷⁸

Luzius Wildhaber, former President of the Court, also analysed other possibilities, such as allocating seconded national judges to the task of filtering. For him, these solutions, along with the one of the appointment of national judges, would imply a consistent expenditure of resources, considering in particular the staff that should assist these new figures. In his view, whichever new mechanism is created, it should be given the mandate to declare a higher number of cases inadmissible, thus allowing the Court to consolidate the existing edifice and focus on its main mission, which is the promotion of the overall effectiveness of human rights in all State Parties. One way to foster this trend would be to make wider use of the significant disadvantage criterion: the Court should not be stuck to deal with trivial issues. Mr. Wildhaber proposed to set up a conference to draw the organisational chart of a new ECtHR which would decide or discard all cases within a year, discussing what the real cost of rendering prompt justice would be.¹⁷⁹

¹⁷⁶ High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, *cit.*

¹⁷⁷ CDDH Interim Activity Report, Steering Committee for Human Rights (CDDH), CDDH(2011)R72 Addendum I, Strasbourg, 1 April 2011, Council of Europe, available at: http://www.coe.int/t/dghl/standardsetting/cddh/Interim_Activity_Reports/CDDH_2011_R72Add%20I%20-%20CDDH%20Interim%20Activity%20Report%20_ECHR%20amendment%20measures.pdf.

¹⁷⁸ Open Society Foundations, The 'Filtering' Debate, ECHR Reform 5, Fact Sheets: Reform of the European Court of Human Rights, February 2012, available at <http://www.opensocietyfoundations.org/sites/default/files/echr5-filtering-20120227.pdf>.

¹⁷⁹ Luzius Wildhaber, Filtering Mechanisms, in *The European Court of Human Rights after Protocol 14, Preliminary Assessment and Perspectives*, Samantha Besson (ed.), Schulhess, 2011 p. 203-.

Michel O'Boyle, Deputy Registrar of the ECtHR, expressed the view that some unpopular decisions should be taken for the sake of expeditious justice, such as seeking to staunch the flow of hopeless cases – by imposing fees or obligatory legal representation – and/or by improving its filtering capacity by either empowering the Registry lawyers to act as 'assistant judges' or by creating a judicial filtering body composed of 'junior' judges creating an additional section. For him, only profound changes could be capable to free the Court up to examine more serious applications.¹⁸⁰

The European Law Institute proposed to give mandate to the Steering Committee for Human Rights to monitor the need to create a separate filtering mechanism.¹⁸¹ Some NGOs have pointed out that the need for an additional filtering mechanism should only be faced in case it would be established that all the measures deployed so far are actually not sufficient to cope with the overload of applications. Given the encouraging results of the latest years, where the unmeritorious applications are no longer a threat, this reflection is particularly pertinent nowadays.¹⁸²

As per the treatment of repetitive applications, means to improve effectiveness in their handling are being tested. For example, the possibility to entrust such kind of applications to any possible new filtering mechanism has been put forward, but there seems to be general consensus on the need for them to be dealt with by Judges and not by registry officials. All of the proposed options would have to comply with budgetary constraints, the options involving the Registry only would of course have a lighter impact than those implying the appointment of further judges.¹⁸³

It has to be pointed out that a separated filtering mechanism, as compared to the existing mechanism of the Filtering Section composed of Single Judges, would probably imply a more time-consuming disposal of the cases, as the immediate possibility of the single judge to directly struck out or declare inadmissible the cases would be wiped out. From the point of view of speed, it is thus not necessarily an improvement.

It also must be emphasised that the right to have one's individual applications adjudicated upon has been put into question by some commentators. Alternatively, it has been proposed to make it more difficult to file an individual application, for example through the introduction of fees or making the representation by a lawyer compulsory. This is why the need for reiterating the centrality of the individual application within the Convention system has been felt by the international conferences and the supporters of that approach.

¹⁸⁰ M. O'Boyle, *The Future of the European Court of Human Rights*, cit. p. 1870-1871.

¹⁸¹ European Law Institute (ELI) *Statement on case-overload at the European Court of Human Rights*, cit.

¹⁸² Open Society Foundations, *The 'Filtering' Debate*, cit.

¹⁸³ CDDH Interim Activity Report, Steering Committee for Human Rights (CDDH), CDDH(2011)R72 Addendum I, Strasbourg, 1 April 2011, Council of Europe, cit.

6.3. A certiorari procedure

It has been even debated whether some kind of *certiorari* procedure should be introduced, where the Court could select which applications to determine and which not.¹⁸⁴ The proposed procedure would be enshrined in a binding legal text, and would operate either through an extensive application of the striking out provision of the Convention, Article 37§ 1(c), or by a Treaty amendment where the judges would be allowed to decide that an application is not of such a nature to warrant adjudication on the merits.

Former President Wildhaber expressed the wish for a radical reform featuring a two-track structure where the current system would apply to certain categories of very important cases, such as those alleging the most serious violations of the Convention rights, the balance of the cases being subject to a “leave to appeal” system, in which a limited number of cases would be speedily decided.¹⁸⁵ This would however need a preliminary analysis of the cases in order to establish the level of importance.

He even suggested that tailor-made-country-specific solutions should be adopted, in order to face the fact that, for many years, 60 to 70% of the applications emerge from a handful of States. Politically, of course, this would be extremely difficult to negotiate in the framework of the Council of Europe.

6.4. Judicial Fees

In a report addressed to the Committee of Ministers in 2010 the Steering Committee for Human Rights analysed the possibility of imposing **fees** or charges on applicants. This was meant to respond to a call for measures that would contribute to a sound administration of justice launched at Interlaken. The report investigated the feasibility and advantages and disadvantages of fees, deposit or penalty systems.¹⁸⁶ The Court in a position paper before the Izmir Conference adopted on 4 April 2011 expressed its opposition to fees but seemed to be open to the idea of compulsory

¹⁸⁴ See, in particular, the proposal of the European Law Institute (ELI) Statement on case-overload at the European Court of Human Rights, July 6th 2012, available at http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-1-2012_Statement_on_Case_Overload_at_the_European_Court_of_Human_Rights.pdf. Proposal (C) Otherwise meritorious applications, number 2; and its comment by M Francis Jacobs in the foreword, p. 8-9. It has been strongly criticized by F. Tulkens, la Cour européenne des droits de l’homme et la déclaration de Brighton. Oublier la réforme et penser à l’avenir, in Cahiers de droit européen, 2012, n° 2, p. 339-340, who said this would go against the sense of history.

¹⁸⁵ L. Wildhaber, Rule of law: “Constitutional Court” or “guardian of individuals”?, in Proceedings, Conference on the long-term future of the European Court of Human Rights, Oslo, 7-8 April 2014, available at: <http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Proceedings-Oslo-2014.pdf>, p. 92 ss.

¹⁸⁶ CDDH first report on Implementation of the Interlaken Declaration, Steering Committee on Human Rights, Council of Europe, Strasbourg, 18 June 2010, CDDH(2010)010 Addendum I, available at http://www.coe.int/t/dghl/standardsetting/cddh/Interim_Activity_Reports/CDDH_2010_010%20Add%20-%20CDDH%20first%20report%20on%20implementation%20of%20the%20Interlaken%20Declaration%20FINAL%20EN%2018-06-10.pdf.

representation by a lawyer. The proposal to accept only applications in the two working languages was not even discussed.¹⁸⁷ The Izmir Declaration contained a call to continue to examine the issue of charging fees to applicants and other possible new procedural rules or practices concerning access to the Court.¹⁸⁸ Noticeably, the Brighton Declaration already underlined at its point 2 that the right to individual application is the “cornerstone” of the system of the Convention.

These issues can well be inserted in the increasingly popular debate over which should be the main role of the ECtHR. This debate puts on the table two seemingly mutually exclusive determinations: a constitutional court or a court for the individuals.

6.5. More flexible revision of rules

The idea of a **statute** for the Court, had been discussed already in the report of the Group of Wise Men (see *supra*) with a view to allowing for procedural rules to be amended with a lighter procedure than that required to amend the Convention. Later, in the Brighton Declaration, the Conference noted with appreciation the continued consideration as to whether a **simplified procedure for amending provisions of the Convention** relating to organisational matters could be introduced, whether by means of a Statute for the Court or a new provision in the Convention, while taking full account of the constitutional arrangements of the State Parties.¹⁸⁹

On the other hand, the CCDH pointed out in 2011 that some issues dealt with outside of the Convention could be suitable for an “**upgrading**” and be included in the text. These are, in particular, the interim measures, the pilot judgment procedure and the unilateral declarations; however, such suggestion was not considered a priority or feasible in the short run.¹⁹⁰ More recently, the report of the dedicated working group of the CDDH has not excluded the opportunity of such an “upgrading”.¹⁹¹

¹⁸⁷ See Luzius Wildhaber, *Filtering Mechanisms*, in *The European Court of Human Rights after Protocol 14, Preliminary Assessment and Perspectives*, Samantha Besson (ed.), Schulhess, 2011 p. 211

¹⁸⁸ High Level Conference on the Future of the European Court of Human Rights, organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe, Council of Europe, 27 April 2011, available at http://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf, see follow up plan, right of individual petition. The application of fees was criticised by See Luzius Wildhaber, *Filtering Mechanisms*, cit p. 211, and by F. Tulkens, *la Cour européenne des droits de l’homme et la déclaration de Brighton. Oublier la réforme et penser à l’avenir*, p. 326.

¹⁸⁹ High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 19-20 April 2012, available at http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

¹⁹⁰ CDDH Interim Activity Report, Steering Committee for Human Rights (CDDH), CDDH(2011)R72 Addendum I, Strasbourg 1 April 2011, Council of Europe, available at: http://www.coe.int/t/dghl/standardsetting/cddh/Interim_Activity_Reports/CDDH_2011_R72%20Add%20I%20-%20CDDH%20Interim%20Activity%20Report%20_ECHR%20amendment%20measures.pdf.

¹⁹¹ CDDH Report containing conclusions and possible proposals for action concerning the procedure for the amendment of the Rules of Court and the possible ‘upgrading’ to the Convention of certain provisions of the Rules of Court <http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH%282014%29R82-Add-I-en.pdf>, Steering Committee for Human Rights, Council of Europe

The “Rules Committee” of the Court is currently debating, with the participation of governments, on the possible changes to the Rules of Court resulting from the entry into force of Protocol n° 15 and eventually Protocol n° 16, as well as on the possible introduction of a rule on consultation with the State Parties and the applicants’ representatives.¹⁹²

6.6. More personnel

Regarding the budget issues, the 2015 report states that the Court has been faced with a budgetary decision leading to a reduction of staff and that the situation could deteriorate in 2016. It, however, pointed out that the Court needs more staff to meet the targets in the Brighton Declaration. Apparently, the Court needed 3.75 million euros over eight years to recruit 40 extra lawyers. The generosity of State Parties on the dedicated bank account could become very important.

6.7. A more complete reform

The debates and reflection on the reform of the Court are not confined to academia or International conferences. The Council of Europe has put forward a comprehensive series of **debates on the future of the Court and the possible paths for reform**.

The Committee of Ministers is at the head of a reform process mechanism which gives terms of reference to the Steering Committee for Human Rights (CDDH) and the Committee of experts on the reform of the Court (DH-GDR), a specialist plenary body subordinate to the CDDH. The work of the DH-GDR is prepared in smaller drafting groups (GT-GDR-A to G) that deal with specific issues. In the past, other subordinate bodies of the CDDH were also involved in the reform process. An open consultation has been launched and a list of independent experts has been asked to contribute.¹⁹³

In particular, dedicated drafting groups were appointed for the research and proposals in specific targets.¹⁹⁴ The “GT-GDR-F” was required to prepare, by the end of 2015, a report containing opinions and possible proposals concerning the longer-

¹⁹² Interlaken Process and the Court (2014 report), European Court of Human Rights, 28 January 2015.

¹⁹³ Ibidem.

¹⁹⁴ In particular:

- An evaluation of the effects of Protocol no. 14 and the implementation of the Interlaken and Izmir Declarations on the Court’s situation (GT-GDR-A)
- Draft Protocol no.15 to the Convention, amending various points concerning the Preamble, the admissibility criteria applicable to individual applications, the procedure for relinquishment of a case from a Chamber to the Grand Chamber of the Court, and the age-limit for judges (GT-GDR-B)
- A possible ‘representative application procedure’ before the Court (GT-GDR-C)
- A Guide to Good Practice in respect of domestic remedies (GT-GDR-D)
- A toolkit to inform public officials about the State’s Convention obligations (GT-GDR-D)
- How to resolve applications arising from systemic issues (GT-GDR-D)
- Whether to enable the appointment of additional judges to the Court (GT-GDR-E).

term future of the Convention system. After its examination by the DH-GDR, the report was then examined and adopted by the Steering Committee for Human Rights for transmission to the Committee of Ministers.¹⁹⁵

The report was published on 11 December 2015.¹⁹⁶ Among many documents, it is an exceptionally high quality one (most unfortunately, not a single one of that quality has been presented in the European Union during four years of legislative debate about the future of the EU courts system). It contains an introductory section explaining all of the main changes the Court underwent since its creation, as well as the main features of the current system. This shows that there probably is a need for clarification and synthesis. The report then presents three sections gravitating around the issue of authority. The first section covers the authority of the Convention mechanism and the issue of national implementation, the second the authority of the Court itself, and the third the authority of the Court's judgments, with a focus on their execution and supervision. The subdivisions examine the possible responses that can be activated within or outside the existing structures. The last chapter tackles the issue of the place of the Convention mechanism in the European and International legal order. The centrality of the concept of authority catches the attention. It is linked to the fact that the implementation of the Convention system as a whole, rather than the functioning of the Court itself, is what is at stake.

Regarding the backlog issue, the Group observed that the number of pending applications had decreased, thanks to the application of Rule 47 as well as the new national effective remedies. It welcomed the absorption of the single judge cases backlog and stressed the importance of dealing with the other categories of cases. It pointed out that, as noted by the Registrar, the challenge at stake regards the two objectives of clearing the backlog and handling the annual influx of cases, which require different answers due to the fact that they are of different nature. The backlog clearance is a temporary issue while the annual influx is a permanent challenge. Concerning the second aspect, it stressed, among others, the responsibility of legal representatives for providing the applicants with adequate information and underlined the need to foster co-operation within the legal professions.

The report mentions the experiment of a "project focus approach", according to which, for some of the larger countries, cases have been allocated to lawyers specializing in certain areas of the Convention. The result of such experiments remains to be seen. A specialization of the Registry lawyers is consequently examined. This thus concerns the lawyers, not the Judges. As the backlog is absorbed, more resources can be dedicated to treating the annual influx. However, for the Group, it remains crucial to address the root causes of the high influx of cases in the first place.

¹⁹⁵ See: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DOCUMENTS-GroupF_en.asp.

¹⁹⁶ CDDH report on the longer-term future of the system of the European Convention of Human Rights, 11 December 2015, available at: [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/CDDH\(2015\)R84_Addendum%20I_EN-Final.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/CDDH(2015)R84_Addendum%20I_EN-Final.pdf).

A paragraph is dedicated to the possibility of introducing some sort of certiorari procedure. The Group found that the positive results of the latest years weaken the need for such a solution. It also questioned its discretionary character and pointed out that it could lead to a lack of legitimacy. It also reaffirmed the centrality of the role of individual applications. Very interesting is also the part of the report where the Group stressed the importance of maintaining the ability to revise working methods to respond to circumstances, in particular through the participation of State Parties. It regrets that State Parties are not always consulted thoroughly when it comes to amending Rules of Procedure.

A dedicated section of the website of the Council of Europe is publicly available.¹⁹⁷ These web-pages focus on intergovernmental work on the reform of the Court since the Rome Ministerial Conference of 2000, which led to Protocol n° 14 and a series of non-binding instruments. They cover notably the 2006 Report of the Group of Wise Persons and the successive High-level Conferences on the reform of the Court that took place between 2010 and 2012 at Interlaken, Izmir and Brighton, and follow-up to these events, including the adoption and opening for signature in 2013 of Protocols n° 15 and 16.

¹⁹⁷ <http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/>.

CONCLUSIONS

These conclusions are divided into two parts. The first covers the specific characteristics of the challenges before the ECtHR. The second endeavours to draw some lessons from the ECtHR's experience for the reform process of the EU courts. As mentioned at the beginning, there are important differences between the two systems. However, from the point of view of judicial management and reform management, many of the problems remain substantially the same.

A. Lessons for the European Court of Human Rights

Considering the specific characteristics of the challenges before the ECtHR, there is clearly a fundamental problem of implementation. After 1989, the Council of Europe underwent enormous and simultaneous changes. The organization was enlarged to include a number of new states many of which were confronted with serious human rights issues. At the same time the scope of the protection of human rights was being enlarged. The jurisdiction of the ECtHR became mandatory. Taken together these changes provoked a kind of perfect legal storm. The heterogeneity (political, legal, economic, linguistic...) of the State Parties is clearly much greater in the ECHR system than in the EU. Additionally, the ECHR lacks efficient sanction mechanisms. The "pathology" of some State Parties' behaviour can thus be much greater, and may provoke huge waves of applications. Judgments may be implemented weakly, and the saga never stops. There can be no complete solution without a better implication of State Parties in implementation of the ECtHR's jurisprudence. Hence the importance of the Brussels Conference conclusions, of the enhancement of the role of the Committee of Ministers, and of the development of dialogue between the ECtHR and the courts of the State Parties.

From 2000 to 2012, the number of applications before the ECtHR rose from 10,000 to 65,000. During the same period, the number of pending applications went from 16,000 to 162,000. Of course, the repetitive nature of many applications in part represented an artificial inflation of numbers. This evolution was nevertheless an enormous institutional shock. What the ECtHR has managed to do in this extremely difficult context is most impressive. A catalogue of the examined and adopted measures during the last 15 years could provide a classic example of judicial reform in all State Parties.

The ECtHR is not yet out of the woods, but it has made essential progress. Some systemic problems remain and recent developments in Russia, Ukraine and Turkey, for example, are unlikely to reduce them. Important structural reforms may yet be needed, possibly encompassing a greater role for the Council of Ministers, a new

filtering system, and some technical instruments to allow the ECtHR to concentrate on essential legal challenges.

Furthermore, there also remains a strong potential tension between access to justice and judicial efficiency. The fundamental question is simple: how much are the authorities prepared to pay to provide a system for 800 million people where everybody, without legal assistance, can sue any Member State for any violation of human rights? This admirable concept cannot be sustained without at the very least corresponding financial resources, if not occasional concessions of state sovereignty. Until now, the system has managed to adapt remarkably well. It has strongly improved its performance while compromising very little on its essential objectives.

How was this done? The process deserves a lot of attention. There was a lot of technical preparation. A good reform in depth first requires a good reflection in depth. This pays in the long term. Such a reflection allows for the development of a global and long term strategy. There is otherwise a great risk of taking short term decisions, the global and long term consequences of which are not fully understood. Consultation was also very broad, and transparency very great. This also pays in the long term. It improves the quality of reflection. Autocratic managers usually see debates as a loss of time. However, especially for complex reforms, it is the absence of debate which at the end leads to a loss of time. Managerial measures were implemented before there was any large increase of personnel. This is essential, since huge increases of personnel can impede the efficacy of managerial measures. Additionally, such increases of personnel as were implemented were progressive and targeted. This is also essential, since it allows one to draw lessons from experience. Managerial reforms take time, trial and error, and adjustments. Some increases of personnel were also flexible in that they were targeted and temporary. The Registry was expanded while the question of any increase of the number of judges was put on the backburner. This also was essential, because in an international context it is most difficult to provide for a limited increase in the number of judges (let alone a temporary increase). Furthermore, increasing the number of judges develops the most unstable part of the machine, which is not propitious for long term productivity¹⁹⁸.

Had the ECtHR followed after 2000 the counter-example of the CJEU, it would be now saddled with 94 human rights judges, which would be much more difficult to coordinate, and would lead to higher costs, greater inflexibility and a more unstable structure.

¹⁹⁸ For the sake of clarity, this was precisely what had been recommended by the author for the reform of the EU courts in 2011: see *The reform of EU courts (I)*, § 3. One does not need to be a rocket scientist to draw such basic conclusions. What is amazing is the total inability of all EU institutions involved to simply open such a reflection process.

B. Lessons for the reform process of the EU courts

Comparing the reform process in the Council of Europe and in the European Union, a lot of basic lessons immediately catch the eye. Some of them concern the preparation of the reform, others its substance.

B.1. Weaknesses of process

The reform of the ECtHR was far better prepared than that of the CJEU. In the former, a lot of conferences were organized and a lot of propositions debated. Many experts were consulted. External contributions were even warmly encouraged. None of this happened at any stage in the EU. The preparation process was much more open in the case of the ECtHR than the EU. A lot of stakeholders were consulted in the ECtHR process. Nobody was consulted in the CJEU process. Not the lawyers (despite consequences for the appeal system), nor the national courts (despite potential consequences for the system of preliminary rulings), nor the social partners (particularly the trade unions directly concerned by the suppression of the Civil Service Tribunal), nor the academic world. Additionally, the General Court's opinion on its own reform was not only neglected, but it was deliberately hidden from the legislative authorities. Thus apart from the Court of Justice, the rest of the world was treated as if it could have no opinion on the issues raised: a thoughtless zone.

The ECtHR process was far more transparent. A lot of documents, external and internal, were put at the disposition of the public. None of this happened in the CJEU. The simple comparison between the two courts' websites is quite striking. Even after five years of legislative proceedings, no part of the CJEU's web site refers to them. There is not even a single preparatory document in the public domain. Observers have been reduced to making requests for access to administrative documents under Article 15 § 3 TFEU. This absence of transparency is especially surprising, even paradoxical, since the CJEU possesses the right to initiate legislation in the EU legislative process, whereas the ECtHR does not possess such a right in the context of a revision of the ECHR¹⁹⁹. Its transparency obligations are thus greater.

All this led to many elementary realities simply not being considered. To give a simple illustration, although the alleged objective of the CJEU's reform was to reduce delays in the time required to deal with cases, no one in the four EU institutions involved paid the least consideration to the limited number of hearing weeks. In the CJEU,

¹⁹⁹ One cannot resist here urge the urge to quote the excellent judgment of the Court of Justice in *Turco* (C-39/25 P). "Increased openness... enables citizens to participate more closely in the decision making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity [...]. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights" (points 45-46).

there are ten weeks of judicial holidays, in addition to which there are a further four weeks during which hearings are not held. With additional days of leave, one could conclude that the EU courts do not hold hearings during fourteen weeks at the year (over three months). This obviously does not lead to accelerated judicial proceedings²⁰⁰.

This weak preparation is quite surprising in a legislative process having a huge constitutional impact. To give a point of comparison, during the previous reform of the EU Court of Justice's statute in the framework of the Nice Treaty, the Court of Justice had provoked a serious and open preparatory debate. Moreover in theory the transformation of a traditional Treaty negotiation process into a legislative ought to have had the opposite result. The new reform process thus reflects a deterioration of the management ability of the European Court of Justice, and generally of the other EU institutions.

B.2. Weaknesses of substance

Considering the substance of the reform, the ECtHR depth of preparation allowed for the evaluation and comparison of a lot of different measures. It also allowed many possible managerial measures to be adopted before embarking upon any increase of personnel, notably an increase in the number of judges. The open, transparent and progressive process allowed for a serious evaluation of the results of the reforms (although the statistical analyses might be improved).

Postponing increases of personnel has also constrained the actors to an in depth reflection about the evolution of the ECtHR system that was designed to operate in a different context. In such a context, can some functions be automated? Can some be entrusted to the Registry? Can some be entrusted to single judges? Can some be sent to smaller chambers? Can the capabilities of personnel be improved? None of this reflection happened in the CJEU framework.

Limited and reversible increases of personnel allowed the Council of Europe to explore whether that solution was productive and the extent to which it was. In an international context, an increase in the number of judges risks creating enormous political problems (as revealed by the excruciating debate in the EU). Furthermore, it develops the most unstable component of the court, which is detrimental to productivity and reduces the benefits of any training. Additionally, it is also the most inflexible solution, since it is impossible to reverse in the case where there is a reduced

²⁰⁰ Another benefit of a serious preparation would have been to revisit useful memories from the past. Before 1989, the Court of Justice had sought to create a limited Court of First Instance consisting of a few judges. The Member States refused to do this and imposed one judge per state. In 2002, the Court of Justice had proposed to add six additional judges to the EGC. That request was refused exactly for the same reason. "Those who cannot remember the past are condemned to repeat it." (Santayana).

workload. Finally, it is by far the most expensive solution. This does not mean such a solution must never be contemplated. However, it means that it should be contemplated only once all of the others have been fully explored.

ICT also deserves to be mentioned. Obviously, the ECtHR's system has been developed to support the structural changes to the Court's functioning. This concerns especially the creation of the Filtering Section and of the new regime limiting admissibility. It is interesting that this system's quality has led to its progressive use in other fields of Council of Europe competence. The CJEU's ICT system does not meet by far the same standards.

Needless to say, in the legislative process, the Commission, the Council, and finally the Parliament also failed to explore the available alternative, more productive, and less costly measures. The doubling of the judges is thus a collective failure of the EU institutions system. It led to the creation of the largest international court in the world to deal with what remains a limited amount of cases²⁰¹. Worse, the mistakes of the past tend to provoke new ones. From 2011 to 2015, the Court of Justice underlined persistently the need to increase as quickly as possible the number of judges, even when the size of the backlog was diminishing. From 2015, reality brought it to furnish other justifications²⁰². In 2016, new justifications were still presented. The Court of Justice's president indicated that doubling the number of judges was designed to provide for a "more committed bench"²⁰³ (though such an absence of commitment had never been mentioned before, least of all established²⁰⁴.) Simultaneously, he also explained that doubling the number of judges was meant to facilitate a transfer of competence to hear preliminary references to the General Court²⁰⁵.

These statements are in complete contradiction with the original justification for the reform. In 2011, the Court of Justice had precisely explained that it was indispensable

²⁰¹ To give an idea of the new resources brought by the 2016 reform, in 2002 the EGC closed 411 cases with 15 cabinets comprehending 30 legal secretaries. To maintain the same ratio should mean that 56 cabinets comprehending 224 legal secretaries close at least 1646 cases per year. In 2015 881 cases were filed in the EGC. Additionally, the number of onerous competition cases has fallen and nearly 50% of the caseload now consists of what are acknowledged to be more straightforward trademark cases (and this without even considering other factors, like ICT for example).

²⁰² See The reform of the EU Courts II, § 5.1.1.-5.1.2.

²⁰³ M. Newman, EU court revamp will spark more antitrust appeals to deeply committed bench, Lenaerts says, MLex, 17 June 2016. An additional problem in that regard is that precisely those cases tend now to disappear, as M. Newman had indicated previously: Bottleneck eases at EU court, as new judges prepare to arrive, MLex 9 February 2016.

²⁰⁴ See the valid observations of Judge A. Collins, The General Court: Enlargement or Reform?, King's College, Annual Law Conference, 11 March 2016.

(<http://www.kcl.ac.uk/law/research/centres/european/index.aspx>).

By way of example, the judgment of the General Court of 12 June 2014 in Intel (T-286/09) comprehends no less than 1647 paragraphs. The translation of its final version in all EU languages took more than one year to complete. One wonders what type of additional "bench commitment" is to speed up that process, and how it could be managed.

²⁰⁵ M. Newman, Lower EU court could field national questions, interpret law, says Lenaerts, MLex, 20 June 2016.

to regroup all appeals and prejudicial rulings and that this precluded the use of specialized courts²⁰⁶. Now, having provoked the abandonment of specialized courts, it proposes to separate appeals and prejudicial rulings, without any reflection in depth, or any consultative process. This approach increases again the risk of adopting additional piecemeal and ill-conceived measures.

As already indicated by the author in 2011, essential reforms of the judicial system require a global and long term preliminary reflection²⁰⁷. In the present context, this requires a lot of questions to be answered. (1) Is the Court of Justice itself in difficulty? Until now this did not seem obvious. It has approximately 750 cases per year, adjudged by 28 judges and 11 Advocate Generals (each with a cabinet of 7 persons)²⁰⁸. To give a point of comparison, the cabinets' resources are five times bigger in the European Court of Justice than in the US Supreme Court. At first sight, it does not seem that the workload is five times heavier. These 39 cabinets also have recourse to an administrative service of the institution to deal with part of their judicial work²⁰⁹. Until now, the only real reason that seems to justify a possible transfer of jurisdiction to hear preliminary rulings to the EGC is... the need to justify doubling the number of the latter's judges. (2°) If the Court appears in difficulty, one needs first to examine possible managerial changes. (3°) If these managerial changes are insufficient, one needs then to examine the available options, and make a serious analysis of each of them. (4°) If, and only if, the transfer of some prejudicial rulings to the EGC appears to be the best option, one must then examine the modalities of such a transfer. It is obviously difficult to distinguish between different kinds of preliminary rulings and the need for coordination between the two competent courts would increase.

The long term view can bring precious insights on any reform. It is of interest to note that, in 2004, there were 30 judges' cabinets in the entire institution. In 2016, there are 86 cabinets (95 in 2019!). This more or less multiplies the number of judges and advocate generals by more or less 200% in 12 years (together with a corresponding and an additional growth in the number of legal secretaries). In the meantime, the number of cases appears to have increased by approximately 70%. This does not give the appearance of overworked cabinets (especially with the progress of ICT). On the other side, since 2003, the increase in the size of the administrative services was far more modest (at less than 70%).

²⁰⁶ See The reform of EU courts I, § 4.

²⁰⁷ See The reform of EU courts I, § 2.

²⁰⁸ Recent internal reforms have made greater use of Advocate Generals in the judicial treatment of cases, though it remains to be seen whether this is the best use of that resource.

²⁰⁹ See The reform of EU courts II, § 5.3.1.

One must also examine which cases are serious ones. In the Court of Justice, as in the General Court, a number of cases are not in fact dealt with, since they are manifestly inadmissible or unfounded. For example, in 2015, 94 cases of the EGC were closed immediately without any communication to the defending party. 111 were additionally dismissed for other reasons.

In conclusion, during the last 15 years, due partly to the enlargements of the EU, there has been an enormous expansion of judges' (and advocate generals') cabinets. The development of the administration has been more limited. In the administration, additionally some areas have seen the creation of too many top jobs²¹⁰. In a nutshell, the CJEU saw a huge mechanical expansion of cabinets and a rise of top jobs, but an insufficient development of the administration, an evolution which is a very good recipe for more costs and less results. The usual caveat about Mexican Armies applies. The doubling of the General Court risks aggravating this imbalance.

Seen in that perspective, the strategy of the ECtHR can largely be considered as a model. Reflection in depth in an open, inclusive and transparent process. Evaluation of many possible managerial measures. Implementation of managerial measures first. Limited targeted, and reversible increases of personnel, that allow for regular feedback. Priority largely given to more stable and less expensive personnel, which allows for more investment in new capabilities.

The doubling of the size of the EU General Court offers a perfect counter-example. No reflection in depth. As far as the process is concerned, no open, inclusive and transparent preparation (an initial weakness aggravated by the inability of the Council and the Parliament to bring any additional relevant input). This was compounded by the refusal to provide the General Court's opinion about its own reform to the Parliament and the Council (for instance can one imagine in a similar context the Commission refusing to communicate to the Parliament and the Council the Agency for Pharmaceutical Products' opinion about its reform in depth?). The latest evolution of the backlog was also not communicated to them. Additionally, the Court fed the legislature with strongly debatable information in unsigned, unregistered and undated documents.

As far as the substance of the reform is concerned, immediate priority was given to the most expensive and irreversible increase of personnel. Simultaneously, over the years, limited, reversible and less costly increases of personnel were adamantly refused, in spite of the "urgency", though such increases did not require a heavy legislative procedure and were successively proposed by (a) the Commission, (b) the Parliament and (c) the Council. The possible development of the Registry's role was utterly neglected. And so were any connections with the development of the ICT system. All this brings to a manifestly excessive increase of judges, with the collateral damage of destabilising the cabinets' personnel. This is worse than basic management by numbers. This substitutes apples for pears, unstable apples for stable pears, and costly apples for less expensive pears.

²¹⁰ The recent example of creation of a new director position (the second rank in the EU administration) to manage a service of four persons refers (see The Reform of the EU Courts II, § note 120).

This does not prevent some observers from deploring the persistence of occasional judicial delays. “How is it possible, they ask, that the press and some judges indicate they sometimes do not have work when cases are not dealt with?”²¹¹ These people, like many judges, tend to have a “judgo-centric” vision of the world. This will be easily understood by the readers of our previous reports. Making judgments, especially in an international, unstable and multilingual court, is a complex process. If you want to obtain results, you need to study all components of the process. Otherwise, you can perfectly have a strong increase of input (and doubling a court is certainly a massive one) without obtaining a strong improvement of output. This is precisely what the author recommended in 2011 and was not done during four years by the EU institutions²¹².

The final observation is that, in spite of their functional and geographical proximity, there seems to have been absolutely no collaboration in reflection between the ECtHR and the CJEU. Considering that there already had been a very impressive high quality reflection in 2010 in the ECtHR about the backlog, one can but wonder why.

For an unsophisticated observer, all this could give the impression that all EU institutions involved took essentially care of their own corporatist interest. For the Court of Justice, this could be seen firstly an opportunity to abolish the specialized courts, and also to obtain a lot of additional resources, thanks to a persistent invocation of “urgency” though it was in fact diminishing in an attempt to preclude all serious debate. It could be said that this also circumvented the constraints of the budgetary interinstitutional agreement aimed at reducing the number of personnel in all EU Institutions. For the Commission, this proposal could allow to deepen the synergy with the Court while simultaneously killing any development of specialized courts. The experience of the Civil Service Tribunal showed that such courts tend to control the Commission’s decisions in a stricter way. For the Council, the aim seemed to allow the Member States to appoint as many people as possible, even at the price of huge expense and destabilization of the Court. This also facilitated greater interventions in the internal functioning of the General Court²¹³. The Parliament alone earned nothing in the game, behaving in fact like a simple second chamber of the Member States. It is telling that almost all “government” parties more or less supported the doubling of the General Court, whereas most “opposition” ones voted against. Worse, the Parliament spent a lot of time... finding reasons to explain why there was no time to organize an impact assessment. It reached a glorious compromise, also

²¹¹ See various press sources in *The reform of EU courts II*, § 5.3.1. Add Die Press, Gericht: Richter fürchten, Daumen drehen zu müssen, 25 May 2016.

²¹² 2016 has provided new interesting insights about the management aspects of the problem. For example, six judges will not be renewed (and possibly seven). Most of these judges have been left in the dark by their national government about their renewal during many months (though a letter had already been sent about the need for certainty in time by the EGC to the Member States in March 2015). Among these judges, one will have remained only six years, one three years and a half (and one... possibly ten months), in a court where heavy judicial proceedings may take four years.

²¹³ See *The reform of EU courts II*, § 5.3.5.

against all principles of public finance, that an audit would be conducted on the need to spend money... after the money had been spent. In the whole story the Parliament appears as a particularly pathetic guardian of the public purse. Nowhere in the history of the European Union can one find such a consensus of its institutions to support a manifestly excessive spending against the express request of the authority concerned (i.e. the General Court).

This evolution, alas, only amplifies previous ones. The doubling of the judges of the General Court has now become the new symbol of a generally obese EU institutional system. The Treaty of Nice had already produced an obese Commission, and the Treaty of Lisbon more obese institutions (Parliament, Court of Auditors and even the Central Bank). The EU now also has an obese Court of Justice. The primacy of representation over efficiency has led to a system where the top tier of each institution is manifestly excessive compared to its tasks (sometimes at the detriment of the other tiers). This not only costs much but also makes these institutions more difficult to manage. It is high time that the leaders in charge of European affairs remember the immortal words of Mies van der Rohe. In EU politics, as in management or architecture, "less is more".

One can but hope that in the future the whole decision process will be reformed to prevent the repetition of such saddening events, and that the example of the European Court of Human Rights will become the example to follow.

Egmont – Royal Institute for International Relations
Rue des Petits Carmes 15, 1000 Brussels, Belgium
www.egmontinstitute.be

Lay-out : punctilio.be

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