



*Ministers' Deputies*

## **CM Documents**

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### **979bis Meeting, 15 November 2006**

Report of the Group of Wise Persons to the Committee of Ministers

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*Appointment, terms of reference and work of the Group*

- 1 The Heads of State and Government of the Council of Europe member states, meeting in Warsaw on 16 and 17 May 2005, decided in their Action Plan to set up a Group of Wise Persons to consider the long-term effectiveness of the ECHR control mechanism, including the initial effects of Protocol No. 14 and the other decisions taken in May 2004. They asked them to submit, as soon as possible, proposals going beyond these measures, while preserving the basic philosophy underlying the Convention.
  
- 2 At their 927<sup>th</sup> meeting, on 25 May 2005, the Ministers' Deputies entrusted their Chair, in conjunction with the Chairman of the European Court of Human Rights Liaison Committee, with carrying out the necessary consultations in order to present at the earliest opportunity proposals regarding the composition of the Group of Wise Persons set up by the Summit to draw up an overall strategy to ensure the long-term effectiveness of the Convention.
  
- 3 At their 937<sup>th</sup> meeting, on 14 September 2005, the Deputies decided that the Group of Wise Persons would comprise the following persons:
  - Mr Rona AYBAY, Turkey,
  - Ms Fernanda CONTRI, Italy,
  - Mr Marc FISCHBACH, Luxembourg,
  - Ms Jutta LIMBACH, Germany,
  - Mr Gil Carlos RODRIGUEZ IGLESIAS, Spain,
  - Mr Emmanuel ROUCOUNAS, Greece,
  - Mr Jacob SÖDERMAN, Finland,
  - Ms Hanna SUCHOCKA, Poland,
  - Mr Pierre TRUCHE, France,
  - Lord WOOLF of BARNES, United Kingdom,
  - Mr Veniamin Fedorovich YAKOVLEV, Russia.

- 4 The Ministers' Deputies invited the Secretary General of the Council of Europe to provide the Group of Wise Persons with the appropriate assistance and asked the Group to submit an interim report on its work to the 116<sup>th</sup> session of the Committee of Ministers in May 2006.
- 5 On 18 October 2005, Mr Rodriguez Iglesias was elected Chair of the Group. On 9 November 2005, the Group appointed Mr Kurt Riechenberg, law clerk at the Court of Justice of the European Communities, as its secretary.
- 6 After being set up on 18 October 2005, the Group held meetings on 9 November and 7 December 2005 and on 9 January, 6/7 February, 6 March, 30/31 March, 24/25 April, 12 May, 14/15 June, 11/12 September and 4/5 October 2006.
- 7 The Group drew up an interim report which was presented by its Chair to the Committee of Ministers on 19 May 2006 [document CM (2006) 88]. This report incorporates much of the content of that document.
- 8 The Group was assisted in its work by Mr Patrick Titium, Deputy Head of the Legal Advice Department, and Ms Susan Bradbury, Administrative Assistant, who were placed at its disposal by the Secretary General of the Council of Europe. The Group invited the Registrar of the Court, Mr Erik Fribergh, to attend its meetings.
- 9 In the course of its work, the Group:
- gave hearings to Mr Luzius Wildhaber, President of the European Court of Human Rights, Ms Maud De Boer Buquicchio, Deputy Secretary General of the Council of Europe, and Mr Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe;

- held a meeting with NGOs, namely Amnesty International and the AIRE Centre (at their request);
- held a meeting with members of the Court, at which they reported on their work to implement the four main innovations introduced by Protocol No. 14, namely the single judge/rapporteur system, the new competence of committees under Article 28 amended, the new admissibility criterion provided for in Article 35 amended, and the new “admissibility/merits” procedure under Article 29 amended;
- held a meeting with the staff of the Registry, the main focus being on how cases are processed and prepared for hearing in the divisions and how the committees’ decisions are prepared;
- gave a hearing to Mr Roeland Böcker, Chair of the Steering Committee for Human Rights.

10 The Group also considered a large amount of written material, in particular:

- resolutions and recommendations of the Parliamentary Assembly and the Committee of Ministers;
- documents produced by the Court, in particular the report by its committee on working methods;
- the report drawn up under the authority of Lord Woolf entitled “Review of the working methods of the European Court of Human Rights”;
- the comments by Mr Hammarberg, Commissioner for Human Rights of the Council of Europe, following the interim report.

- 11 The Chair of the Group also met representatives of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe on 7 June 2006. The committee members expressed the wish that a link be established in the final report between the work of the Court and the tasks performed by other Council of Europe bodies (in particular the Parliamentary Assembly's monitoring work). They also raised the issue of the independence of judges.
- 12 They further expressed the wish that the filtering body mentioned in the interim report should not be a replica of the old European Commission of Human Rights.
- 13 Lastly, the Group took note of the many comments made following the presentation of the interim report.

#### I. THE CONTEXT

##### *Human rights protection in the Council of Europe framework*

- 14 It is important to begin by reiterating the fundamental importance attaching to human rights protection in the Council of Europe framework and the diversity of the means employed to achieve this, as it is in this context that the role and long-term effectiveness of the judicial control must be assessed.
- 15 The enlargement of the Council of Europe and the accession to the European Convention on Human Rights (hereinafter "the Convention") of the central and east European democracies have contributed to stability in the whole of Europe. The Convention and the Court have become genuine pillars in the protection of human rights and fundamental freedoms. For its part, the Committee of Ministers plays an important role in monitoring the execution of judgments.

- 16 Since the Convention forms part of the national law of the member states, the remedies available at national level must be effective and well known to their citizens. Indeed, they constitute the first line of defence of the rule of law and human rights. Initially, it is for the national courts to protect human rights within their domestic legal systems and to ensure respect for the rights safeguarded by the Convention. The principle of subsidiarity is one of the cornerstones of the system for protecting human rights in Europe.
- 17 In addition, the Council of Europe has set up many other institutions and bodies in the human rights field. These have proved their commitment and effectiveness. Not only is there the Commissioner for Human Rights. The European Committee for the Prevention of Torture, the European Commission against Racism and Intolerance, the Advisory Committee on the Framework Convention for the Protection of National Minorities and the European Committee on Social Rights also play important complementary roles.
- 18 It should also be remembered that the Council of Europe has a number of information offices which were set up pursuant to Committee of Ministers Resolution (99)9.
- 19 The Group noted with great interest the lessons drawn from the Warsaw information office project. In view of the success of this innovative initiative, the functions of such offices could be expanded and strengthened. In particular, they could provide potential applicants with information on admissibility issues and familiarise them with the existing domestic remedies and other, non-judicial remedies. These offices could assist in making citizens more aware of how the Convention operates and so save them from initiating proceedings unnecessarily or prematurely, without exhausting domestic remedies.
- 20 Furthermore, in many member states, non-judicial institutions such as ombudsmen, petition committees and human rights institutions play or could play a significant role in providing information on, and promoting, human rights.

21 Lastly, civil society plays a significant part in human rights protection. Partnership with civil society has always been important in the Council of Europe. It is reflected inter alia in the participation of many non-governmental organisations in the Organisation's activities. These play a leading role in the field of human rights protection which it is important to maintain and expand.

### *The judicial control mechanism*

22 The setting up of a Court whose jurisdiction is binding on all the States Parties to the Convention represents the basic mechanism for supervising compliance by the Contracting Parties with the rights recognised in the Convention.

23 The right of individual application enshrined in Articles 34 and 35 of the Convention is the most distinctive feature of this control mechanism. The Court is the only international court to which any individual, non-governmental organisation or group of individuals have access for the purpose of enforcing their rights under the Convention. The right of individual application is today both an essential part of the system and a basic feature of European legal culture in this field.

24 This protection mechanism confers on the Court at one and the same time a role of individual supervision and a "constitutional" mission. The former consists in verifying the conformity with the Convention of any interference by a state with individual rights and freedoms and making findings as to any violation by the respondent state. Its other function leads it to lay down common principles and standards relating to human rights and to determine the minimum level of protection which states must observe.

25 The Group stresses that the credibility of the human rights protection system depends to a great extent on execution of the Court's judgments. Full execution of judgments helps to enhance the Court's prestige and the effectiveness of its action and has the effect of limiting the number of applications submitted to it.

***The explosion in the number of cases***

- 26 The exponential increase in the number of individual applications is now seriously threatening the survival of the machinery for the judicial protection of human rights and the Court's ability to cope with its workload. This dramatic development jeopardises the proper functioning of the Convention's control system. This trend has been clear since the entry into force of Protocol No.11 and the abolition of the European Commission of Human Rights.
- 27 It should be stressed that over 90% of cases brought before the Court are declared inadmissible. At the end of September 2006, 89,000 cases were pending before the Court. Of this total, 24,650 individual communications are awaiting "regularisation" as applications. Many of these cases have been pending for a very long time. In addition, out of the total mentioned above, 21,900 are chamber cases.
- 28 This situation, which, despite the various measures taken by the Court, is likely to get worse, is extremely serious. If nothing is done to resolve the problem, the system is in danger of collapsing. It is the Group's responsibility, therefore, to recommend effective measures to remedy this situation on a permanent basis, thus making it possible to ensure the long-term effectiveness of the Convention's control mechanism. Achieving this is the main purpose of this report.

***Protocol No. 14***

- 29 Protocol No. 14 is designed to give the Court the necessary procedural means and flexibility to process all applications within a reasonable time, while enabling it to concentrate on the most important cases. It seeks in particular to reduce the time spent by the Court on manifestly inadmissible and repetitive cases.

- 30 The changes introduced by Protocol No. 14 will no doubt be extremely useful. The Group can only add its voice to those who have already stressed the need for this protocol to enter rapidly into force.
- 31 The Group is pleased to note that only 1 more instrument of ratification is now needed for this protocol to enter into force.
- 32 It will not be possible to make a final assessment of the effects of the entry into force of Protocol No. 14 until it has been in operation for some time. However, it can already be anticipated that the reforms it introduces will not be sufficient to enable the Court to find any lasting solution to the problem of congestion. According to estimates produced within the Court, the increase in productivity resulting from the implementation of this protocol might be between 20 and 25%.
- 33 The Group expects Protocol No. 14 to be rapidly implemented. It takes this protocol as a starting point. Its proposals go further than the protocol and are designed to ensure that the Court is able to perform its specific functions fully and on a long-term basis.
- 34 Lastly, although the Group's proposals are aimed at the long term, attention should be drawn to the need to take exceptional measures as of now to reduce the backlog. The Group calls on the member states to support the measures which the Court will be required to take for this purpose, by making the necessary resources available to it.

*A Court able to perform its essential functions*

- 35 In accordance with Article 32, paragraph 1 of the Convention, "the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto". The Group believes that the Court should be relieved of a large number of cases which should not "distract" it from its essential role. Manifestly inadmissible or repetitive cases, in particular, need to be considered in this connection.

- 36 It is important, therefore, to set out measures which will enable the Court to concentrate on its function as the custodian of human rights by relieving it of a whole body of litigation which places an unnecessary burden on it. The *raison d'être* of this high-level European Court is to monitor states' compliance with human rights. Its authority and effectiveness will be all the greater if it is able to concentrate on interpretation and application of the Convention through decisions on the merits given within a reasonable time.
- 37 There is a fundamental conflict between the size of the population who have access to the Court with the right to lodge an individual application and the Court's responsibility as the final arbiter in human rights matters for so many different states. No other international court is confronted with a workload of such magnitude while having at the same time such a demanding responsibility for setting the standards of conduct required to comply with the Convention.

## II. THE PROPOSED REFORM MEASURES

### *Introduction*

- 38 With a view to proposing reforms based on the foregoing considerations, the Group examined a range of measures relating notably to the functioning of the judicial control system established by the Convention and to decentralised actions at the level of member states. The combined effect of the different proposals adopted should ensure the efficient long-term functioning of the control mechanism.
- 39 The measures which the Group is proposing concern the structure and modification of the judicial machinery, the relations between the Court and the States Parties to the Convention, alternative (non-judicial) or complementary means of resolving disputes and the institutional status of the Court and judges. They are arranged under ten headings:

1. Greater flexibility of the procedure for reforming the judicial machinery
2. Establishment of a new judicial filtering mechanism
3. Enhancing the authority of the Court's case-law in the States Parties
4. Forms of co-operation between the Court and the national courts - Advisory opinions
5. Improvement of domestic remedies for redressing violations of the Convention
6. The award of just satisfaction
7. The "pilot judgment" procedure
8. Friendly settlements and mediation
9. Extension of the duties of the Commissioner for Human Rights
10. The institutional dimension of the control mechanism.

40 The Group also considered other possible lines of reform which it finally decided not to pursue.

41 Thus, it thought that the setting up of "regional courts of first instance" would entail a risk of diverging case-law and be costly. An innovation of this kind would also be likely to raise a large number of procedural issues.

42 The Group also decided not to pursue the idea of giving the Court a discretionary power to decide whether or not to take up cases for examination (a system analogous to the *certiorari* procedure of the United States Supreme Court). It felt that a power of this kind would be alien to the philosophy of the European human rights protection system. The right of individual application is a key component of the control mechanism of the Convention and the introduction of a mechanism based on the *certiorari* procedure would call it into question and thus undermine the philosophy underlying the Convention. Furthermore, a greater margin of appreciation would entail a risk of politicising the system as the Court would have to select cases for examination. The choices made might lead to inconsistencies and might even be considered arbitrary.

43 The Group is fully aware that implementation of the ideas and proposals put forward in this report is not budget-neutral. It feels, however, that it is essential to accept the additional cost involved in view of the importance of the issue at stake, which is nothing less than ensuring the long-term effectiveness of the control mechanism of the Convention. The Group's discussions have therefore been structured around three main objectives, the first being to harmonise the principles underpinning the Convention system, the second to ensure its long-term effectiveness and the third to guarantee its budgetary viability.

**A. Concerning the structure and modification of the judicial machinery**

**1. Greater flexibility of the procedure for reforming the judicial machinery**

44 The Group believes that it is essential to make the judicial system of the Convention more flexible. This aim could be achieved through an amendment to the Convention authorising the Committee of Ministers to carry out reforms by way of unanimously adopted resolutions without an amendment to the Convention being necessary each time.

45 This method has been used on numerous occasions in the European Communities. One notable example was the setting up of the Court of First Instance. The Treaty of Nice subsequently introduced the possibility for the Council to create "judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas". It was this means that was employed to set up the new European Union Civil Service Tribunal. In addition, under Article 245, second paragraph, of the treaty, the provisions of the Statute of the Court of Justice of the European Communities, with the exception of Title I, may also be amended by the Council acting unanimously. This reform facilitated the adjustments to the Community judicial system that were deemed necessary having regard to the trends in litigation.

46 Such a method could prove effective in the long term as a tool for making the Convention system more flexible and capable of adapting to new circumstances. The Group notes,

however, that this method cannot apply to the substantive rights set forth in the Convention or to the principles governing the judicial system. Furthermore, any amendment would have to be subject to the Court's approval.

47 The idea underlying the proposal is to create a system structured around three levels of rules governing the system, viz:

- first of all, the Convention itself and its protocols, for which the amendment procedure would remain unchanged;
- secondly, the “statute” of the Court, ie a legal level whose content would need to be defined, comprising provisions relating to the operating procedures of the Court (and the “Judicial Committee” – see paragraphs 51 et seq);
- lastly, texts such as the Rules of Court, which could be amended by decisions taken by the Court itself.

48 The innovation suggested by the Group is the establishment of a “second” level of rules: the statute. The provisions of a statute could be amended by the Committee of Ministers, with the Court's approval.

49 If the European Union model were to be followed, the statute would be appended to the Convention and would form part of it, but, in accordance with a provision of the Convention itself, its provisions, with some exceptions, would be subject to a “simplified” amendment procedure, ie by decision of the Committee of Ministers with the Court's agreement. The statute of the Court should include all the provisions of section II of the Convention (and those governing the operation of the Judicial Committee, see paragraphs 51 et seq) with the exception of the following provisions, which could either be kept in the body of the Convention or included in the statute, but would be explicitly excluded from any possibility of “simplified” amendment:

- Art. 19 (Establishment of the Court)
- Art. 20 (Number of judges)
- Art. 21 (Criteria for office)
- Art. 22 (Election of judges)
- Art.23 (Terms of office and dismissal)
- Art. 24, paragraph 1 (Registry)
- Art. 32 (Jurisdiction of the Court)
- Art. 33 (Interstate cases)
- Art. 34 (Individual applications)
- Art. 35, paragraph 1 (Admissibility criteria)
- Art. 46 (Binding force and execution of judgments)
- Art. 47 (Advisory opinions)
- Art. 51 (Privileges and immunities of judges)

50 The criterion governing this choice is the removal from the “simplified” amendment procedure of provisions defining key institutional, structural and organisational elements of the judicial system of the Convention, namely the establishment of the Court, its jurisdiction and the status of its judges.

## **2. Establishment of a new judicial filtering mechanism**

51 The Group notes that Protocol No. 14 opens up significant possibilities for more efficient processing of cases by assigning new responsibilities to committees of three judges and by introducing the figure of the single judge. The Court is currently studying ways of implementing these possibilities, in particular a system whereby a number of judges might perform these new functions on an annual rotating basis.

52 The Group, whose proposals are aimed at the long term, beyond Protocol No. 14, recommends the setting up of a judicial filtering body which would be attached to, but

separate from the Court, in order to guarantee, on the one hand, that individual applications result in a judicial decision and, on the other, that the Court is 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 No. 14, are assigned to committees of three judges and single judges.

- 53 The members of the Judicial Committee would be judges enjoying full guarantees of independence. Their number should be less than the number of member states. It would be decided – and could be modified – by the Committee of Ministers on a proposal from the Court. The composition of the Judicial Committee should reflect a geographical balance as well as a harmonious 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.
- 54 The members of the Judicial Committee, like those of the Court, should be of high moral character and possess the qualifications required for appointment to judicial office. They would be subject to the same requirements as the members of the Court with regard to impartiality and meeting the demands of a full-time office. Candidates’ professional qualifications and knowledge of languages should be assessed by the Court in an opinion prior to their election by the Parliamentary Assembly.
- 55 In principle, the Judicial Committee would have jurisdiction to hear:
- all applications raising admissibility issues;
  - all cases which could be declared manifestly well-founded or manifestly ill-founded on the basis of well-established case-law of the Court.

- 56 The power of the Judicial Committee to hear cases on the merits would also entail, where such cases are concerned, the exercise of the same powers as the Court in respect of just satisfaction (in this connection, see paragraphs 94 et seq).
- 57 Institutionally and administratively, the Judicial Committee would come under the Court's authority. The Group considers that, in order to ensure harmonious co-operation between the two bodies, the Chair of the Judicial Committee should be a member of the Court appointed by the Court for a set period.
- 58 For the same reason, the Judicial Committee should draw on the support of the Registry of the Court. It would be useful if a section of the Registry were assigned to the Committee. This section could be headed by a deputy registrar. There should be no rigid separation, however, so that it is possible to make optimum use of the Registry's human resources by placing its staff members' professional and linguistic skills at the service of both bodies.
- 59 As is already the case at present, each application should first be examined by the Registry, which would then refer it either to the Judicial Committee where it appears in principle to fall within its jurisdiction, or, if not, to the Court.
- 60 The Group considers that, if effective filtering of the many inadmissible applications is to be achieved, it is important to ensure that applications provide all the information necessary for assessing their admissibility within the time-limit set by the Convention and that the time-limit is strictly applied, save in exceptional circumstances where the Court or the Judicial Committee might give leave for an application to be lodged out of time. The Group is pleased to note that the Court has devised an application form which will soon be available in electronic form. When the Registry receives an application which seems admissible but does not contain all the information needed to assess its admissibility, it should quickly make the form available to the applicant and draw his or her attention to the need to submit an application in the proper form within the time-limit set by the Convention.

- 61 The Judicial Committee could refer a case to the Court either if it considered that it lacked jurisdiction or if it considered that the case raised admissibility or substantive issues which would warrant consideration by the Court.
- 62 The Court could also refer a case to the Judicial Committee if it considered that the case fell within the jurisdiction of the latter. It could, however, decide to keep the case if it deemed this preferable in the interests of the proper administration of justice, for example for reasons of procedural economy.
- 63 The Group believes that it would be inappropriate to provide for the possibility of appealing against the decisions of the Judicial Committee. Providing for such a possibility would place an additional burden on the control system and jeopardise the aim of easing the Court's workload.
- 64 However, the Court should be given a special power allowing it, of its own motion, to assume jurisdiction to review any decision adopted by the Judicial Committee. This procedure could be initiated by the President of the Court or by the Chair of the Committee (him/herself a member of the Court).
- 65 The decisions of the Judicial Committee should, in principle, be taken by benches of three judges. However, since the Judicial Committee would perform, among others, functions which, under Protocol No. 14, are assigned to a single judge, the Group considers it appropriate that provision should also be made for manifestly inadmissible cases to be heard by a single judge.

**B. Concerning the relations between the Court and the States Parties to the Convention****3. Enhancing the authority of the Court's case-law in the States Parties**

66 The dissemination of the Court's case-law and recognition of its authority above and beyond the judgment's binding effect on the parties would no doubt be important elements in ensuring the effectiveness of the Convention's judicial control mechanism.

67 It was with this in mind that, in the interim report, the Group referred to the possibility of making certain recommendations on "*judgments of principle*".

68 After discussing the matter in greater depth, the Group believes that it would be difficult to arrive at a precise definition of this category of judgments. Furthermore, it is not always possible to identify in advance all the cases that might give rise to judgments of principle.

69 The Group therefore does not make any proposal as to a specific procedure for dealing with such cases. It merely recommends that judgments of principle – like all judgments which the Court considers particularly important – be more widely disseminated.

70 The authority of the Court's case-law could also be enhanced through judicial co-operation with national courts. This aspect is dealt with in paragraphs 76 et seq.

71 The Group considers that national judicial and administrative institutions should be able to have access to the case-law of the Court in their respective language. This would assist them in identifying any judgments which might be relevant to deciding the cases before them.

72 In the Group's view, responsibility for translation, publication and dissemination of case-law lies with the member states and their competent bodies. Each country should make its own arrangements while taking due account of the importance of these texts.

- 73 On the other hand, it is for the Court to decide, as is already the case, which judgments to publish in full (or in summary form, as the case may be, including judgments on the admissibility of applications) and to ensure a structured presentation of these documents. Regular production of handbooks or other summaries in languages other than the Council of Europe official languages, in hard copy and/or in electronic form, might also constitute a useful means of dissemination.
- 74 These publications should be distributed as widely as possible, particularly within public institutions such as courts, investigative bodies and prison administrations, and non-state entities such as bar associations and professional organisations. Law faculties should also figure among the most important recipients of these publications. The basic principles of international and European law should be compulsory subjects in both secondary and university-level education.
- 75 In this connection, the Group emphasises the importance of implementing Committee of Ministers Recommendation (2002) 13 and Resolution (2002)58 of 18 December 2002, on the publication and dissemination in the member states of the text of the Convention and the case-law of the European Court of Human Rights.

#### **4. Forms of co-operation between the Court and the national courts – Advisory opinions**

- 76 The Group paid close attention to the relations between the Court and the national courts. The latter have responsibility for protecting human rights by upholding the Convention within their sphere of competence.
- 77 It should be noted in this connection that the national courts are called upon in particular to guarantee the effectiveness of domestic remedies and, where appropriate, the award of just satisfaction and proper execution of the Court's judgments. The Group therefore

recommends that the Council of Europe continue and expand as far as possible its activities relating to human rights training for national judges.

- 78 The role of the member states' highest courts in applying the Convention is of paramount importance. The Group notes with satisfaction that the Court is maintaining and expanding its contacts with these courts. It emphasises the usefulness of those contacts and the importance of maintaining and even strengthening them.
- 79 The Group studied the possibility of institutionalising the links between the Court and the highest courts in the member states.
- 80 In this connection, the introduction of a preliminary ruling mechanism on the model of that existing in the European Union was discussed. However, the Group reached the conclusion that the EU system is unsuitable for transposition to the Council of Europe. The preliminary ruling mechanism represents an alternative model to the judicial control established by the Convention, which requires domestic remedies to be exhausted. The combination of the two systems would create significant legal and practical problems and would considerably increase the Court's workload.
- 81 On the other hand, the Group considers that it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto. This is an innovation which would foster dialogue between courts and enhance the Court's "constitutional" role.
- 82 Requests for an opinion would always be optional for the national courts and the opinions given by the Court would not be binding.
- 83 The rules governing this category of advisory opinions should differ from those governing opinions given at the request of the Committee of Ministers, which are provided for under

Article 47 of the Convention. Opinions given at the request of a national court should not be subject to the restrictions laid down in paragraph 2 of that provision.

84 The Group also believes that, to enhance the judicial authority of this type of advisory opinion, all the States Parties to the Convention should have the opportunity to submit observations to the Court on the legal issues on which an opinion is requested.

85 The Group is aware of the repercussions which the proliferation of requests for opinions might have on the Court's workload and resources, since the requests for opinions and the member states' observations would also need to be translated. In addition, providing such opinions would not be the Court's principal judicial function. Accordingly, the Court's new advisory jurisdiction should be subject to strict conditions.

86 It is proposed in this connection that:

- a) only constitutional courts or courts of last instance should be able to submit a request for an opinion;
- b) the opinions requested should only concern questions of principle or of general interest relating to the interpretation of the Convention or the protocols thereto.
- c) the Court should have discretion to refuse to answer a request for an opinion. For example, the Court might consider that it should not give an answer in view of the state of its case-law or because the subject-matter of the request overlaps with that of a pending case. It would not have to give reasons for its refusal.

## **5. Improvement of domestic remedies for redressing violations of the Convention**

87 The Group considers that, to ensure effective judicial protection of the rights secured by the Convention, domestic remedies for redressing violations of those rights should be improved.

88 The length of proceedings in civil, criminal and administrative cases, which is one of the main sources of litigation before the Court, highlights the need for such an improvement. Registry statistics show that the relevant cases represent a considerable workload for the Court. It has been estimated that this category of cases accounted for 25% of all judgments delivered in 2005.

89 One of the reasons for this profusion of cases is the fact that the majority of states do not have domestic procedures for redressing the damage resulting from the length of proceedings. The same question arises with regard to other violations, such as excessive length of detention pending trial, which is prohibited by Article 5, paragraph 3 of the Convention.

90 Several countries have introduced legislative, judicial and other machinery to remedy this type of shortcoming. The purpose of these solutions is to enhance the subsidiary nature of the central control mechanism by giving potential applicants satisfaction at domestic level before they submit an application to the Court.

91 Provided it is effective, the introduction of such a mechanism at domestic level would relieve the Court of a considerable number of cases. Persons seeking justice would not need to apply to the Court to obtain redress. In accordance with the rule of subsidiarity, it would be for the States Parties to pass appropriate legislation. States should, however, comply with a number of uniform criteria which can be derived from the Court's case-law.

92 Indeed, in a Grand Chamber judgment (cf SCORDINO v. Italy No 1 of 29 March 2006 – no 183), the Court set out the guidelines to be adopted:

- a combination of two types of remedy, one designed to expedite the proceedings, the other to afford compensation;
- in the latter case, there is a margin of appreciation depending, inter alia, on the standard of living in the country concerned;
- an application for compensation must remain an effective, adequate and accessible remedy. It must comply with the reasonable-time requirement;
- the same applies to the execution of the decision;
- the applicable procedural rules may not be exactly the same as for ordinary applications for damages;
- procedural and registration costs must not significantly reduce the compensation requested;
- where the national court has not afforded appropriate and sufficient “redress”, the applicants can still claim to be “victims” and obtain compensation from the Court for pecuniary and non-pecuniary damage and the payment of costs and expenses.

93 Going beyond Recommendation (2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies, a Convention text should be introduced placing an explicit obligation on the States Parties to introduce domestic legal mechanisms consistent with the criteria noted above to redress the damage resulting from any violation of the Convention, and especially those resulting from structural or general shortcomings in a state’s law or practice.

## **6. The award of just satisfaction**

- 94 The Group considers that changes to the rules laid down in Article 41 of the Convention are necessary. The proposed reform would concern the function assigned both to the Court and to the Judicial Committee, which, in cases where it was competent to find a violation of the Convention, would exercise the same powers as the Court in this regard. The proposal is based on the principle of subsidiarity and is inspired by a concern to relieve the Court and the Judicial Committee of tasks which could be carried out more effectively by national bodies. This would apply in particular where expert reports were needed owing to the factual complexity of a case.
- 95 The question does not arise where the Court or, where appropriate, the Judicial Committee, finds a violation of the Convention but considers that there are no grounds for awarding compensation to the victim, in particular because full reparation is possible or because the judgment finding the violation constitutes sufficient reparation in itself.
- 96 On the other hand, where the Court or, where appropriate, the Judicial Committee holds that the victim must be awarded compensation, it is proposed that the general rule should be that the decision on the amount of compensation is referred to the state concerned. However, the Court and the Judicial Committee would have the power to depart from this rule and give their own decision on just satisfaction where such a decision is found to be necessary to ensure effective protection of the victim, and especially where it is a matter of particular urgency.
- 97 Where the decision on the amount of compensation is referred to the state, it should discharge this obligation within the time-limit set by the Court or the Judicial Committee.
- 98 It would be for the state to determine the arrangements for affording just satisfaction while complying with the following requirements:

- each state should designate a judicial body with responsibility for determining the amount of compensation and inform the Committee of Ministers of the Council of Europe of the body so designated;
- the progress of the procedure should not be hindered by unnecessary formalities or the charging of unreasonable costs or fees.

99 Lastly, the determination of the amount of compensation should be consistent with the criteria laid down in the Court's case-law and the victim would be able to apply to the Court, or to the Judicial Committee where the latter gave the decision finding a violation of the Convention, to challenge the national decision by reference to those criteria, or where a state failed to comply with the deadline set for determining the amount of compensation.

## **7. The “pilot judgment” procedure**

100 Among the many different initiatives taken by the Court to speed up the processing of the cases brought before it, the Group focused particular attention on the measures to facilitate increased use of the “pilot judgment” procedure.

101 In its judgment of 22 June 2004 in the *Broniowski v Poland* case, which concerned the compatibility with the Convention of legislative provisions affecting a large number of people (approximately 80,000), the Court for the first time found a systemic violation, which it defined as a situation where “the facts of the case disclose the existence, within the [domestic] legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of [a right safeguarded by the Convention]” and where “the deficiencies in national law and practice identified in the applicant's individual case may give rise to numerous subsequent well-founded applications”. The Court also found in this case that the violation originated in a “widespread problem which resulted from a malfunctioning of Polish legislation and

administrative practice and which has affected and remains capable of affecting a large number of persons”.

- 102 In that connection, the Court directed that “the respondent State must, through appropriate legal measures and administrative practice, secure the implementation of the property right in question in respect of the remaining (...) claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1”
- 103 The object in the Court’s designating a case for a “pilot-judgment procedure” is to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the Convention right in question in the national legal order. One of the relevant factors considered by the Court in devising and applying that procedure has been the growing threat to the Convention system resulting from large numbers of repetitive cases that derive from, among other things, the same structural or systemic problem (see judgment of 19 June 2006 in the case of *Hutten-Czapska v. Poland*, para 234).
- 104 In its Rules for the supervision of the execution of judgments of 10 May 2006 [CM(2006)90], the Committee of Ministers said that it will give priority to supervision of judgments in which the Court has identified a systemic problem (Rule 4, paragraph 1). In addition, Resolution (2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem invited the Court to identify in these judgments what it considered to be the underlying systemic problem and the source of this problem and to notify such judgments to, among others, the states concerned and the Committee of Ministers.
- 105 The Group supports these developments. In the light of practical experience, consideration would need to be given in future to the question of whether the existing judicial machinery, including the Court’s rules of procedure, will suffice for this model to be able to produce the desired results or whether a reform of the Convention should be contemplated in this

connection. In any event, the Group encourages the Court to use the “pilot judgment” procedure as far as possible in future. To ensure that victims who have already applied to the Court do not have to wait indefinitely for just satisfaction, time-limits subject to supervision by the Court should be laid down.

**C. Concerning alternative (non-judicial) or complementary means of resolving disputes**

**8. Friendly settlements and mediation**

106 The Group notes that Protocol No 14, in an amendment to Article 39 of the Convention, provides that the Court “may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights”.

107 The Group also notes with approval that the Registry of the Court is already stepping up its efforts to encourage parties to reach friendly settlements in cases that lend themselves to the mediation approach.

108 In order to reduce the Court’s workload still further and to assist both victims and member states, recourse to mediation at national or Council of Europe level should be encouraged where the Court, and more particularly the Judicial Committee, considers that an admissible case lends itself to such a solution. Proceedings in the cases concerned would be suspended for a limited and identified period pending the outcome of the mediation. This method of settlement would in any event be subject to the parties’ agreement.

**9. Extension of the duties of the Commissioner for Human Rights**

109 Appointed under Resolution (99)50 of the Committee of Ministers, the Commissioner for Human Rights functions independently and impartially to “identify possible shortcomings in the law and practice of member states concerning the compliance with human rights as embodied in the instruments of the Council of Europe, promote the effective

implementation of these standards by member states and assist them, with their agreement, in their efforts to remedy such shortcomings”. Protocol No. 14 introduces a provision allowing the Commissioner to submit written observations and take part in hearings before the Court.

- 110 The Group considers that the Commissioner should have the necessary resources to be able to play a more active role in the Convention’s control system, acting either alone or in co-operation with European and national non-judicial bodies. In particular, the Commissioner should respond actively to the announcement of Court decisions finding serious violations of human rights. The Commissioner could also promote the setting up of bodies with responsibility for resolving human rights violations through mediation at national level.
- 111 Under his mandate, the Commissioner facilitates the activities of national ombudsmen and similar institutions. However, these are not always competent in human rights matters. The Committee of Ministers might consider adopting a recommendation with the aim of assigning such competence to them.
- 112 The Group notes with approval that the Commissioner is extending his current co-operation with national and regional ombudsmen and national human rights institutes in order to form an active network of all these institutions, so as to disseminate appropriate information on human rights and, as far as their competence permits, take action on alleged violations and abuses.
- 113 This network could help to reduce the Court’s workload with the active support of the Commissioner, who could identify a specific problem in a state likely to trigger a large number of applications to the Court and help to find a solution to the problem at national level in conjunction with the national ombudsman. National ombudsmen could also play a role in informing the public about the right to apply to the Court by distributing application forms and, above all, informing the public about the Court’s mandate and competence and about the admissibility criteria contained in the Convention.

**D. Concerning the institutional status of the Court and the judges**

**10. The institutional dimension of the control mechanism**

- 114 The Group considered a number of institutional issues which are of undoubted importance for the effectiveness of the Convention's judicial control system.
- 115 They looked first of all at the question of whether the existing legal framework offers all the guarantees that are essential to ensure the independence of judges.
- 116 In this connection, they noted the total lack of any social security scheme (coverage for medical expenses and pension entitlement). It considers the setting up of such a scheme to be of vital importance.
- 117 Secondly, the Group considers that the professional qualifications and knowledge of languages of candidates for the post of judge should be carefully examined during the election procedure.
- 118 For this purpose, before the Parliamentary Assembly considers the candidatures, an opinion on the suitability of the candidates could be given by a committee of prominent personalities possibly chosen from among former members of the Court, current and former members of national supreme or constitutional courts and lawyers with acknowledged competence.
- 119 The Group also looked at the particularly sensitive issue of the number of judges. It noted that the present system as provided for under Article 20 of the Convention is based on the principle that the Court consists of a number of judges equal to the number of States Parties to the Convention.

- 120 In the Group's opinion, the logic underlying the new role proposed for the Court and the setting up of the Judicial Committee should lead in due course to a reduction in the number of judges, bringing it into line with the Court's functional requirements and the need to ensure consistency of case-law.
- 121 The Group therefore recommends limiting the number of members of the Court while ensuring the presence of a national judge of the State party to a dispute through the appointment of an ad hoc judge. In order to respect the principle of equality between States Parties to the Convention, it would be appropriate if the judges were elected on the basis of a system of rotation between states.
- 122 It should be noted that, in most international courts, the number of judges is significantly less than the number of States Parties. It need only be pointed out that the International Court of Justice consists of 15 judges and that the Inter-American Court of Human Rights based in San José (Costa Rica) – which, like the European Court, protects human rights in a regional framework – has only 7 judges for 23 States Parties.
- 123 The foregoing considerations may be applied to the proposed Judicial Committee, subject to the following reservations: first, it would be appropriate for the Court to participate in the procedure for electing the members of this Committee, and secondly, it would be disproportionate to provide for the presence of a national judge of the respondent member State in all cases coming under this Committee's jurisdiction.
- 124 Lastly, in the interests of enhancing the Court's independence and effectiveness, the Group recommends granting it the greatest possible operational autonomy, as regards in particular the presentation and management of its budget and the appointment, deployment and promotion of its staff.

### III. SUMMARY

125 The survival of the machinery for the judicial protection of human rights and the Court's ability to cope with its workload are seriously under threat from an exponential increase in the number of individual applications which jeopardises the proper functioning of the Convention's control system. It is essential to recommend effective measures to remedy this situation on a permanent basis, thus making it possible to ensure the long-term effectiveness of the Convention's control mechanism, without the right of individual application being affected, and allowing the Court to concentrate on its function as the custodian of human rights by relieving it of a whole body of litigation which places an unnecessary burden on it.

#### THE PROPOSED REFORM MEASURES

126 The Group has adopted a set of proposals of different kinds, which, combined, should ensure the efficient functioning of the control mechanism in the long term.

#### A. Concerning the structure and modification of the judicial machinery

##### 1. Greater flexibility of the procedure for reforming the judicial machinery

127 The Group believes that it is essential to make the judicial system of the Convention **more flexible**. This could be achieved through an amendment to the Convention authorising the Committee of Ministers to carry out reforms by way of unanimously adopted resolutions without an amendment to the Convention being necessary each time. This method would make the Convention system more flexible and capable of adapting to new circumstances, but would not apply to the substantive rights set forth in the Convention or to the principles governing the judicial system.

128 The system created would be structured around three levels of rules, namely:

- the Convention itself and its protocols, for which the amendment procedure would remain unchanged;
- the “statute” of the Court, ie a legal level whose content would need to be defined, comprising provisions relating to the operating procedures of the Court. This second level would be an innovation. The provisions of this statute could be amended by the Committee of Ministers with the Court’s approval;
- texts such as the Rules of Court, which could be amended by the Court itself.

## **2. Establishment of a new judicial filtering mechanism**

- 129 A judicial filtering body should be set up which would be attached to, but separate from, the Court, in order to guarantee, on the one hand, that individual applications result in a judicial decision and, on the other, that the Court can be relieved of a large number of cases and focus on its essential role.
- 130 The members of the Judicial Committee would be judges enjoying full guarantees of independence. Their number should be less than the number of member states. It would be decided – and could be modified – by the Committee of Ministers on a proposal from the Court. The composition of the Judicial Committee should reflect a geographical balance as well as a harmonious 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.
- 131 The members of the Judicial Committee, like those of the Court, should be of high moral character and possess the qualifications required for appointment to judicial office. They would be subject to the same requirements as the members of the Court with regard to impartiality and meeting the demands of a full-time office. Candidates’ professional

qualifications and knowledge of languages should be assessed by the Court in an opinion prior to their election by the Parliamentary Assembly.

- 132 The Judicial Committee would have jurisdiction to hear all applications raising admissibility issues and all cases which could be decided on the basis of well-established case-law of the Court allowing an application to be declared either manifestly well-founded or manifestly ill-founded. The Judicial Committee's jurisdiction to decide cases on the merits would involve, where such cases are concerned, the exercise of the same powers as the Court in respect of just satisfaction.
- 133 Institutionally and administratively, the Judicial Committee would come under the Court's authority. It would be chaired by a member of the Court, appointed by the latter for a set period, and would draw on the support of the Registry of the Court, thus enabling it to make optimum use of the Registry's human resources. There would be no possibility of appealing against the decisions of the Judicial Committee, although the Court would have a special power allowing it, of its own motion, to assume jurisdiction in order to review any decision adopted by the Judicial Committee.

## **B. Concerning the relations between the Court and the States Parties to the Convention**

### **3. Enhancing the authority of the Court's case-law in the States Parties**

- 134 The dissemination of the Court's case-law and recognition of its authority above and beyond the judgment's binding effect on the parties would no doubt be important elements in ensuring the effectiveness of the Convention's judicial control mechanism. The Group recommends that judgments of principle and judgments which the Court considers particularly important be more widely disseminated in line with the recommendations of the Committee of Ministers.

#### **4. Forms of co-operation between the Court and the national courts – Advisory opinions**

135 The Group considers that it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto, in order to foster dialogue between courts and enhance the Court's "constitutional" role. Requests for an opinion, which would be submitted only by constitutional courts or courts of last instance, would always be optional and the opinions given by the Court would not be binding.

#### **5. Improvement of domestic remedies for redressing violations of the Convention**

136 Domestic remedies for redressing violations of the rights secured by the Convention should be improved. The length of proceedings in civil, criminal and administrative cases, which is one of the main sources of litigation before the Court, highlights the need for such an improvement, which would be achieved by means of a Convention text placing an explicit obligation on the States Parties to introduce domestic legal mechanisms to redress the damage resulting from any violation of the Convention, and especially those resulting from structural or general shortcomings in a state's law or practice.

#### **6. The award of just satisfaction**

137 Changes to the rules laid down in Article 41 of the Convention are necessary to relieve the Court and the Judicial Committee of tasks which could be carried out more effectively by national bodies (especially when expert reports are needed).

138 Where the Court or, where appropriate, the Judicial Committee holds that the victim must be awarded compensation, the decision on the amount of compensation would be referred to the state concerned. However, the Court or, as appropriate, the Judicial Committee would

have the power to depart from this rule and give its own decision on just satisfaction where such a decision was found to be necessary.

- 139 The state should discharge its obligation to award compensation within the time-limit set by the Court or the Judicial Committee. It would be for the state to determine the arrangements for this, while complying with certain requirements. The amount of compensation should be consistent with the criteria laid down in the Court's case-law. The victim would be able to apply to the Court or to the Judicial Committee where the latter gave the decision finding a violation of the Convention, to set aside the national decision by reference to those criteria, or where the state failed to comply with the time-limit set for determining the amount of compensation.

#### **7. The "pilot judgment" procedure**

- 140 The Group encourages the Court to make the fullest possible use of the "pilot judgment" procedure. In the light of practical experience, consideration would need to be given in future to the question of whether the existing judicial machinery, including the Court's rules of procedure, will suffice for this model to be able to produce the desired results or whether a reform of the Convention should be contemplated in this connection.

#### **C. Concerning alternative (non-judicial) or complementary means of resolving disputes**

#### **8. Friendly settlements and mediation**

- 141 In order to reduce the Court's workload, recourse to mediation at national or Council of Europe level should be encouraged where the Court, and more particularly the Judicial Committee, considers that an admissible case lends itself to such a solution. Proceedings in the cases concerned would be suspended pending the outcome of mediation. This method of settlement would be subject to the parties' agreement.

## **9. Extension of the duties of the Commissioner for Human Rights**

142 The Group considers that the Commissioner should have the necessary resources to be able to play a more active role in the Convention's control system, acting either alone or in co-operation with European and national non-judicial bodies. In particular, the Commissioner should respond actively to the announcement of Court decisions finding serious violations of human rights. The Commissioner could also lend his assistance to mediation machinery at national level. Under his mandate, the Commissioner facilitates the activities of national ombudsmen and similar institutions. The Committee of Ministers might consider adopting a recommendation aimed at assigning them competence in human rights matters in all cases. The Group notes with approval that the Commissioner is extending his current co-operation with national and regional ombudsmen and national human rights institutes in order to form an active network of all these institutions. This network could help to reduce the Court's workload with the active support of the Commissioner.

### **D. Concerning the institutional status of the Court and judges**

#### **10. The institutional dimension of the control mechanism**

143 The Group thought that the existing legal framework should offer all the guarantees that are essential to ensure the independence of judges. In this connection, it considers the setting up of a social security scheme (coverage for medical expenses and pension entitlement) to be of vital importance.

144 The professional qualifications and knowledge of languages of candidates for the post of judge should be carefully examined during the election procedure. For this purpose, before the Parliamentary Assembly considers the candidatures, an opinion on the suitability of the candidates could be given by a committee of prominent personalities possibly chosen from among former members of the Court, current and former members of national supreme or

constitutional courts and lawyers with acknowledged competence. As regards the members of the proposed Judicial Committee, the prior opinion should be given by the Court.

- 145 The Group also looked at the particularly sensitive issue of the number of judges. In the Group's opinion, the logic underlying the new role proposed for the Court and the setting up of the Judicial Committee should lead in due course to a reduction in the number of judges.
- 146 Lastly, in the interests of enhancing the Court's independence and effectiveness, the Group recommends granting it the greatest possible operational autonomy, as regards in particular the presentation and management of its budget and the appointment, deployment and promotion of its staff.