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# Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals

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## Abstract

*The purpose of this article is to give new impetus to the topical debate on reforming the ECHR in the wake of the Interlaken Conference, at which the ECHR states parties agreed on a roadmap for the future evolution of the Convention system. We highlight two issues which have so far been underexposed in the literature. First, reform measures relating to the new admissibility criterion, just satisfaction, and the pilot judgment procedure are only partially promising, because they are premised on the condition of their being applicable *telle quelle* in all the states parties. If Convention reforms are to be effective, they must take due account of differing realities relating to a country's human rights situation and the quality of its judiciary. Secondly, given the very high proportion of so-called manifestly ill-founded applications, the Court's practice of rejecting them without giving reasons leads it into a legitimacy problem. We suggest a new provision in the Rules of Court which makes the Court's practice concerning the handling of manifestly ill-founded applications more transparent.*

## 1 Introduction

Today, the European Court of Human Rights (the Court) is in a serious predicament.

With a reach extending to over 800 million individuals within the jurisdiction of the 47 contracting states to the Convention, the Court has fallen victim to its own success. The flood of applications lodged in Strasbourg threatens to clog the Court to the point of asphyxiation, leaving it unable to fulfil its central mission of providing legal protection of human rights at the European level. The caseload crisis

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poses a serious threat to the effectiveness of the whole ECHR system and is the biggest challenge in the history of the Court.

In response to this crisis, the Council of Europe has, over the past decade, embarked on extensive deliberations on possible means to ensure the continued effectiveness of the Court. A number of reform proposals, designed to increase the Court's efficiency, were put forward, addressing in particular the two principal sources of the Court's malaise: the vast number of unmeritorious applications and the many repetitive cases. After giving a brief account of the major challenges faced by the Court and of the reform history, this article provides a critical analysis of key reform proposals. In part, the evaluation is a synopsis of 'pro'/'con' viewpoints expressed during the reform debate. The particular focus of the analysis, however, is on shedding light on a problem which has so far been underexplored in the debate, namely the fact that the effectiveness of most of these key reform proposals is limited, for they, counter-factually, generally presuppose a trustworthy, more or less well-functioning judicial system in the states parties. Another issue which has been absent from the literature on Convention reform so far relates to the problem of the high numbers of clearly inadmissible cases, among which take pride of place the so-called manifestly ill-founded cases, which are rejected by the Court without giving reasons. As a result of this intransparent practice, the Court is manoeuvring itself into a legitimacy problem. Over and above highlighting these two central issues, the purpose of this article is to propose corresponding solutions and thereby stimulate the future debate on Convention reform.

This article was written in the wake of two events signifying milestones for the future of the Court: the ratification of Protocol No. 14<sup>1</sup> by Russia as the last of the 47 states parties to the Convention to ratify it, thus opening the path for a much needed Court reform with the entry into force of Protocol No. 14 as of 1 June 2010; and the Interlaken Conference (18/19 February 2010), where the 47 states parties convened to establish a roadmap for the post-Protocol No. 14 reform process.<sup>2</sup>

## 2 The Court's Predicament

### *A Facts and Figures*

#### *1 Too Many Unmeritorious Cases*

In the early years of the Convention, the number of applications lodged with the Commission was comparatively small, and the number of cases decided by the Court was much lower. Since the 1980s and especially from 1990 onwards, in the context of the substantial enlargement of the Council of Europe, the rapid rise in the number of applications registered<sup>3</sup> with the Commission made it increasingly

<sup>1</sup> 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/Treaties/Html/194.htm>. All links in this article were last accessed in March 2010.

<sup>2</sup> On the Interlaken Conference see, e.g., the website of the Council of Europe at [www.coe.int/t/dc/files/events/2010\\_interlaken\\_conf/default\\_EN.asp](http://www.coe.int/t/dc/files/events/2010_interlaken_conf/default_EN.asp).

<sup>3</sup> The term 'registered applications' henceforth refers to those applications which are registered after preliminary examination and allocated to a decision body, i.e. within the Commission or the Court under the pre-Protocol No. 11 control mechanism, or within the present Court established under Protocol No. 11.

difficult for the pre-1998 Convention institutions to process the applications within a reasonable time.

The statistics illustrate the scale of the steady growth of the Court's caseload burden: The number of registered applications rose from 404 in 1981 to 2,037 in 1993 and to 4,750 in 1997.<sup>4</sup> The entry into force of Protocol No. 11<sup>5</sup> failed to mitigate the caseload problem, with the numbers of applications growing inexorably. While there were 8,400 applications registered in 1999, this figure rose to 35,402 in 2005<sup>6</sup> – which amounts to a twofold increase in the total number of cases registered with the Commission and the Court between 1955 and 1990, i.e., 17,568<sup>7</sup> – and culminated in 2008 with 49,850<sup>8</sup> registered applications.

The workload of the Court has been aptly described as 'an iceberg, only a little tip is visible to the outside world; the great mass remains hidden under water'.<sup>9</sup> Obviously only the cases which are decided by the Court every year are visible. A vast number of cases,

however, remain unnoticed, but they absorb the bulk of the Court's resources. The tip of the iceberg is formed by the number of judgments delivered annually by the Court. There has been a remarkable increase in the 'output' of the Court: while between 1955 and 1989 the Commission and the Court produced approximately just 205 judgments per year, this figure has increased steadily since then: in 2004, the number of judgments issued by the Court was 718, rising to 1,543 in 2008.<sup>10</sup> It is striking to note that a high proportion of the judgments in which the Court finds a Convention violation are so-called repetitive cases (around 70 per cent of the Court's judgments in 2008<sup>11</sup>), particularly concerning length of proceedings, fair trial, right to property, and non-execution of domestic judgments.

The judgments, however, make up only a small part of the Court's overall work. The vast bulk of the Court's caseload comprises cases which are rejected as inadmissible (or struck out). As can be seen from the statistics for 1998–2008, these cases constitute between 90 and 95 per cent of all examined cases. In 2004, for example, 20,350<sup>12</sup> applications were declared inadmissible or struck out of the list (compared to 830 applications declared admissible and 718 cases decided by judgment<sup>13</sup>). Within four years, that figure had increased by around 50 per cent, i.e., a total of

<sup>4</sup> European Court of Human Rights, *Annual Report 2008* (2009) (hereinafter *Annual Report 2008*) at 10, available at: <http://echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports>.

<sup>5</sup> Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby of 1 Nov. 1998, available at: <http://conventions.coe.int/Treaty/EN/Treaties/HTML/115.htm>.

<sup>6</sup> European Court of Human Rights, *Survey of Activities 2005*, at 33, available at: [www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/SurveyofActivities2005.pdf](http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/SurveyofActivities2005.pdf).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Annual Report 2008*, *supra* note 4, at 127.

<sup>9</sup> Schermers, 'The Eleventh Protocol to the ECHR', 19 *European L Rev* (1994) 367, at 370.

<sup>10</sup> *Annual Report 2008*, *supra* note 4, at 12.

<sup>11</sup> Leach, 'On Reform of the European Court of Human Rights', 6 *European Human Rts L Rev* (2009) 725, at 727.

<sup>12</sup> European Court of Human Rights, *Annual Report 2004* (2005), at 118, available at: <http://echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports>.

<sup>13</sup> *Ibid.*

30,164<sup>14</sup> inadmissibility and strike out decisions in 2008 (compared to 1,671<sup>15</sup> applications declared admissible and 1,543<sup>16</sup> cases decided by judgment).

Out of the 30,164 applications declared inadmissible or struck out in 2008, 28,202 were decided by the Committees of three judges pursuant to (pre-Protocol No. 14) Article 28 ECHR,<sup>17</sup> compared to around 1,960 inadmissibility and strike out decisions<sup>18</sup> passed by the Chambers or the Grand Chamber. In other words, in 2008 around 93 per cent of the total number of unmeritorious cases were handled by the Committees. The figures for the preceding years give a similar picture. The corresponding percentages for the years 2004–2007 were, respectively, 97 per cent (2004 and 2005), 94 per cent (2006), and 95 per cent (2007).<sup>19</sup>

The Committees are competent to reject cases which are clearly inadmissible. These encompass those cases which clearly fail to meet the procedural requirements contained in Articles 34 and 35(1) and (2), plainly constitute an abuse of right, or are manifestly ill-founded in the sense of Article 35(3)(a).<sup>20</sup> At present, there exist no official statistics on the composition of the large numbers of cases declared inadmissible by a Committee; neither did we find other detailed

information on the manifestly ill-founded applications. Thus, we can only draw on the little information that does exist on manifestly ill-founded applications and make inferences.<sup>21</sup> In this respect, we ask for indulgence for not being able to live up to scientific rigour in supplying authoritative sources. Nonetheless, judging by the tenor of the debate on reforming the Convention, it seems fair to conclude that the inadmissible cases are in their great majority cases which are referred to as manifestly ill-founded. Put differently, it is principally the manifestly ill-founded cases which account for the overload of the Court. It is therefore particularly important to find solutions in this area.<sup>22</sup>

## 2 *Unbalanced Supply of Applications*

In recent years, the Court has constantly been striving to streamline its methods and procedures.<sup>23</sup> Yet, despite the substantial increase in the Court's case-processing capacity, it cannot keep abreast of the ever-increasing caseload. As a result, there is a considerable backlog

<sup>14</sup> *Annual Report 2008*, *supra* note 4, at 127.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, at 141.

<sup>17</sup> *Ibid.*, at 134.

<sup>18</sup> *Ibid.*

<sup>19</sup> The percentages are based on the figures set out in the respective *Annual Reports* of the Court, available at <http://echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports>.

<sup>20</sup> As amended by Art. 12 of Protocol No. 14.

<sup>21</sup> E.g., the statement in the Final report containing proposals of the CDDH, 4 April 2003, CM(2003)55: '[t]he proposal is to supplement existing procedures for manifestly ill-founded applications' points to the fact that the manifestly ill-founded applications represent a problem for the Court.

<sup>22</sup> See below, at sect. 4B.

<sup>23</sup> Managerial changes include: the creation of a Fifth Section, joint decision on admissibility and on the merits, simplified drafting of the judgments, and a new case-management system. See Lord Woolf, 'Review of the working methods of the European Court of Human Rights', Dec. 2005, available at: [www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORD\\_WOOLFREVIEWONWORKINGMETHODS.pdf](http://www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORD_WOOLFREVIEWONWORKINGMETHODS.pdf).

of cases. In 10 years the number of pending cases has multiplied by 10. As of 31 December 2009, 19,300 applications were pending before a decision body.<sup>24</sup> It is particularly noteworthy that about 60 per cent of all of these pending cases originated from only five countries: Russia (28.1 per cent), Turkey (11 per cent), Ukraine (8.4 per cent), Romania (8.2 per cent), and Italy (6 per cent).<sup>25</sup> Similarly, the statistics for 2005–2008 show that over half of all the cases brought to Strasbourg regularly stemmed from only five countries, the composition of the which varies slightly.<sup>26</sup>

Altogether, the Court faces three principal problems: first, how to filter out the huge mass of manifestly ill-founded applications (about 90 per cent of the Court's caseload); secondly, how to deal with the high proportion of routine, repetitive cases; and thirdly, the fact that the supply of cases is very unbalanced (60 per cent of all cases are lodged against only five states parties).

## B Reform History

The problem of overload has led to two major reforms aimed at enhancing the Court's effectiveness: the outset of the reform process is marked by the entry into force in 1998 of Protocol No. 11 to the ECHR<sup>27</sup>, which provided for a funda-

mental restructuring of the Convention system with a view to improving its efficiency. Yet, this reform proved unable to stem the tide of cases. No sooner had Protocol No. 11 come into force than it became clear that the gathering crisis concerning the Court's caseload called for further reform – a 'reform of the reform', so to speak. The starting signal for the second process of reform was given at the Council of Europe Ministerial Conference held in Rome on 3–4 November 2000, which prompted a reflection process on means of guaranteeing the continued effectiveness of the Court.

That reflection process was initially carried on concurrently by two bodies of the Council of Europe: the so-called 'Evaluation Group' set up by the Committee of Ministers' Deputies and the 'Reflection Group' set up by the Steering Committee on Human Rights (CDDH). Both these bodies sought to identify the main problems of the Court and suggest what possible solutions there might be. The Reflection Group adopted its first activity report on 15 June 2001<sup>28</sup> and forwarded it to the Evaluation Group, which took it into account in preparing its own more substantial report dated 28 September 2001.<sup>29</sup> In that report, it recommended a host of remedial measures aimed at tackling the caseload problem. Two proposals of the Evaluation Group which had a particular impact on the later development of the reform process were those for a separate filtering mechanism (a new division

<sup>24</sup> See [www.echr.coe.int/NR/rdonlyres/C28DF50A-BDB7-4DB7-867F-1A0B0512FC19/0/Statistics2009.pdf](http://www.echr.coe.int/NR/rdonlyres/C28DF50A-BDB7-4DB7-867F-1A0B0512FC19/0/Statistics2009.pdf).

<sup>25</sup> See [www.echr.coe.int/NR/rdonlyres/BBFE7733-3122-40F5-AACA-9B16827B74C2/0/Pending\\_applications\\_chart.pdf](http://www.echr.coe.int/NR/rdonlyres/BBFE7733-3122-40F5-AACA-9B16827B74C2/0/Pending_applications_chart.pdf).

<sup>26</sup> For statistical information on recent years see <http://echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year>.

<sup>27</sup> Protocol No. 11, *supra* note 5.

<sup>28</sup> Document CDDH-GDR (2001)10.

<sup>29</sup> Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, 27 Sept. 2001, Doc. EG Court (2001) 1, published at 22 *Human Rts LJ* (2001) 308.

of the Court composed of appointed assessors<sup>30</sup>) and for a new provision empowering the Court to decline to examine in detail applications which raised no substantial issue under the Convention.<sup>31</sup>

The brainstorming phase was followed by work on the refinement of ideas within the Steering Committee, which led to a first report of the Steering Committee in October 2002,<sup>32</sup> followed by a final report of April 2003.<sup>33</sup> In May 2003, the Committee of Ministers instructed its Deputies to give effect, through the drafting of relevant amendments to the Convention, to the proposals contained in the final report of the Steering Committee. The drafting process culminated in the adoption of Protocol No. 14.<sup>34</sup>

Protocol No. 14 provides, *inter alia*, two procedures to speed up the handling of the mass of clearly inadmissible applications and the many repetitive cases which are covered by well-established case law.<sup>35</sup> However, Russia's non-ratification of Protocol No. 14 has for many years prevented it from coming into force. To circumvent the resulting impasse, and in view of the urgent need for action, Protocol No. 14 *bis* was adopted as an interim solution in May 2009, coming into force on 1 October 2009.<sup>36</sup> Pending entry

into force of Protocol No. 14, it allowed the Court provisionally to apply the abovementioned two procedural measures in respect of all applications lodged against the states parties which had ratified it. After years of reluctance, the Russian parliament voted for the ratification of Protocol No. 14 in January 2010 and thus paved the way for the long-awaited reform of the Court. The deposit by Russia of its instrument of ratification on 18 February 2010 finally enabled Protocol No. 14 to come into force on 1 June 2010.<sup>37</sup> Henceforth, Protocol No. 14 applies 'to all applications pending before the Court as well as to all judgments whose execution is under supervision by the Committee of Ministers'.<sup>38</sup>

Despite the good tidings which Protocol No. 14 will bring, one should be conscious that it is not a panacea. Protocol No. 14 will expedite the processing of cases, but 'it will not itself reduce the volume of cases coming to Strasbourg; it will not turn off the tap; it will not even slow down the flow'.<sup>39</sup> On the other hand, there are limits to the constant pursuit of increased productivity, physical ones, but also the risk of compromising the quality of the services provided by the Court. The measures laid

<sup>30</sup> *Ibid.*, at para. 98.

<sup>31</sup> *Ibid.*, at para. 93.

<sup>32</sup> Interim Report of the CDDH to the Committee of Ministers, 18 Oct. 2002, CM(2002)146.

<sup>33</sup> Final report containing proposals of the CDDH, *supra* note 21.

<sup>34</sup> Protocol No. 14, *supra* note 1.

<sup>35</sup> See below, at sect. 3A.

<sup>36</sup> Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms, available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/204.htm>. As of 7 Jan. 2010, 10 contracting states to the Convention had ratified Protocol No. 14 *bis*.

<sup>37</sup> According to Art. 19 of Protocol No. 14, *supra* note 1, the Protocol enters into force on the first day of the month following the expiration of a period of three months after the date on which all parties to the Convention have expressed their consent to be bound by it.

<sup>38</sup> Art. 20(1) of Protocol No. 14, *supra* note 1.

<sup>39</sup> Speech given by Mr Luzius Wildhaber, President of the European Court of Human Rights, on the occasion of the opening of the judicial year, 21 Jan. 2005, in European Court of Human Rights, *Annual Report 2004*, *supra* note 12, at 34.

down in Protocol No. 14 represent an essential first step in responding to the caseload crisis. They are meant to enable the Court to 'survive', pending the outcome of the longer term reform process. Steven Greer concludes that although Protocol No. 14 'may not solve the current case overload crisis, [it] has, nevertheless, probably bought extra time for further reflection on the Court's future'.<sup>40</sup> With a view to ensuring the long-term effectiveness of the Convention system, a Group of Wise Persons was appointed by the Council of Europe with the mandate to make appropriate proposals, which are put forward in the group's final report.<sup>41</sup>

Russia's ratification of Protocol No. 14 came on the eve of the Interlaken Conference, held on 18–19 February 2010, which marked the latest stepping stone in laying grounds for a yet further reform of the European Court of Human Rights to ensure its long-term effectiveness.<sup>42</sup>

### 3 Principles of Subsidiarity and Embeddedness

The subsidiarity principle which informs the Convention's supervisory system dictates that it is first and foremost the responsibility of domestic authorities, primarily the courts, to protect and ensure respect for the rights safeguarded by

the Convention. The contracting states form the first line of defence of the rule of law and human rights, and it is for them to ensure that effective domestic remedies are in place for redressing violations of the Convention and to guarantee the proper execution of the Court's judgments. As the acting President of the Court put it, the subsidiarity principle signifies that 'States must comply with the Court's case-law and make sure that judgments of the Court are adequately executed, notably by adopting the appropriate general measures and by taking remedial action in respect of cases which could give rise to similar issues'.<sup>43</sup> Thus, the Convention system is premised on the assumption that there are effective protection systems in place at the national level. However, already the mere fact of the scores of repetitive cases reaching Strasbourg indicates that the subsidiarity principle does not operate adequately.<sup>44</sup>

In an important article published in this journal, Helfer argues that where the contracting states fail to live up to their responsibilities as first-line defenders of the Convention, 'the justifications for deference to national decision-makers are diminished or absent',<sup>45</sup> in which case the 'core values underlying the Convention's "special character as a treaty for the

<sup>40</sup> Greer, 'Protocol No. 14 and the Future of the ECtHR' [2005] *Public L* 83, at 104.

<sup>41</sup> Report of the Group of Wise Persons, 15 Nov. 2006, CM(2006)203.

<sup>42</sup> The 'High Level Conference on the Future of the European Court of Human Rights' ended with the passing of the Interlaken Declaration, available at: [www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final\\_en.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf).

<sup>43</sup> Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference, 3 July 2009, at 4, available at: [www.coe.int/t/dc/files/themes/protocole14bis/03072009\\_Memo\\_Interlaken\\_anglais.pdf](http://www.coe.int/t/dc/files/themes/protocole14bis/03072009_Memo_Interlaken_anglais.pdf).

<sup>44</sup> *Ibid.*

<sup>45</sup> Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *EJIL* (2008) 125, at 149.

collective enforcement of human rights”<sup>46</sup> are best served by the Strasbourg Court's adopting a more assertive, interventionist supervisory role vis-à-vis domestic authorities.

This is what the Court has done in modifying its jurisprudence to strengthen its scrutiny of the ECHR states parties' human rights practices. Where domestic authorities failed to investigate alleged human rights abuses, the Court has taken upon itself the function of a first instance finder of fact and legal arbiter; it has developed a more proactive interpretation of Article 13 ECHR; and it has markedly expanded its remedial powers, recommending or ordering specific remedial measures to redress a Convention violation, the most significant manifestation of which is the creation of a novel pilot judgment procedure to remedy a systemic problem at the source of the many repetitive cases of alleged Convention violations.

Helfer has conceptualized these jurisprudential shifts as signalling a trend towards an increased ‘embeddedness’ of the Convention, so to speak, in the national legal systems of the member states. Importantly, in his survey of a host of various implemented or proposed reform measures to redesign the Strasbourg control machinery in response to the Court's alarming caseload crisis, he observes that these measures underpin the principle of embeddedness. The rationale of this principle is for the Council of Europe and the Court to ‘bolster domestic mechanisms for remedying Convention violations at

home, obviating the need for aggrieved individuals to seek relief<sup>47</sup> in Strasbourg. The ultimate goal is for the contracting states to resume their position as the Convention's first-line defenders, i.e., a position where the Court's deference ‘to national decision-makers is (or is once again) appropriate’.<sup>48</sup> Thus, the principle of embeddedness stands in the service of the subsidiarity principle.

The present article fully subscribes to the desirability and need to enhance the embeddedness, as defined by Helfer, of the Court. We believe, however, that, with regard to the array of proposed reform measures aiming at enhancing the Court's effectiveness, the concept of embeddedness should be used more cautiously. While it most clearly captures the Court's enhanced supervisory role in the context of its remedial powers, notably concerning the pilot judgment procedure, it seems to us that the definition of embeddedness reproduced above does not so clearly apply to reform proposals concerning, for example, just satisfaction and the new admissibility criterion without definitional adaptation.

For the purposes of the article particularly relevant are Helfer's qualifying statements as to the prospects of redesigning the Convention system. The success of key reform proposals analysed below crucially depends on the cooperation of national judiciaries with the Strasbourg Court. However, as Helfer stresses, ‘in countries where courts are not fully independent, judges may be reluctant to exercise the muscular judicial review needed to remedy Convention

<sup>46</sup> *Ibid.*, citing App No 14038/88, *Soering v. United Kingdom*, Series A No. 161, 11 EHRR (1989) 439, at para. 87.

<sup>47</sup> Helfer, *supra* note 45, at 159.

<sup>48</sup> *Ibid.*, at 130.



violations at home'.<sup>49</sup> Another challenge to enhancing domestic judicial support for the Court is the fact that, apart from the issue of judicial independence, national judiciaries vary greatly in their effectiveness, as evidenced by the high proportion of repetitive cases concerning unfair trials and excessively lengthy proceedings. Insofar, the present article builds on that of Helfer.

## 4 Analysis of Reform Proposals

### *A Single-judge Formation and Extended Competence of Three-Judge Committees*

The need 'to expedite the handling of applications that do not warrant detailed treatment and to leave the judges with sufficient time to devote to those that do'<sup>50</sup> has led to the adoption of two procedural mechanisms for more efficient processing of the large numbers of inadmissible cases, on the one hand, and the many repetitive, well-founded cases, on the other:

Prior to Protocol No. 14, the preliminary processing of applications was the responsibility of three-judge Committees which, by final decision, were to declare applications inadmissible where such a decision called for no 'further examination'.<sup>51</sup> In such clearly inadmissible cases, i.e. where their inadmissibility is 'manifest from the outset',<sup>52</sup> Protocol No. 14 aims to speed up proceedings by vesting the Committees' filtering function with single judges assisted by non-judicial *rapporteurs* ('single-judge formation').<sup>53</sup> The new single-judge procedure is particularly targeted on the scores of manifestly ill-founded applications. As a measure to guarantee impartiality, a single judge shall not examine applications against the state in respect of which he/she has been elected as a judge.

With a view to dealing more expeditiously with the many repetitive, well-founded cases, Protocol No. 14 extends the competence of the three-judge Committees under Article 28 ECHR. They are not just to rule on the inadmissibility of applications, but may also, in a summary procedure,<sup>54</sup> declare them admissible and decide on their merits when the questions they raise concerning the interpretation or application of the Convention are

<sup>49</sup> *Ibid.*, at 158.

<sup>50</sup> Report of the Evaluation Group, *supra* note 29, at para. 81. See also de Vries, 'Draft Protocol No. 14 bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, Report of the Committee on Legal Affairs and Human Rights', Parliamentary Assembly of Europe, Doc. 11879, 28 Apr. 2009, at 4, para. 6: 'judges must not spend too much time on obviously inadmissible cases (approximately 95% of all applications), they must deal expeditiously with repetitive cases that concern already clearly established systemic defects within states (this represents approximately 70% of cases dealt with on the merits), and by so doing, concentrate their work on the most important cases and deal with them as quickly as possible'.

<sup>51</sup> Former Art. 28 ECHR.

<sup>52</sup> Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, at para. 67, available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>.

<sup>53</sup> New Arts 26 and 27 ECHR as introduced by Arts 6 and 7 of Protocol No. 14. New Art. 27(3) specifies that if a single judge has doubts as to admissibility, he/she shall forward the application to a three-judge Committee or a Chamber.

<sup>54</sup> For details of this 'simplified and accelerated' procedure see Explanatory Report, *supra* note 52, at para. 69.

covered by ‘well-established case-law’ of the Court.<sup>55</sup> Whether case law is well-established or not is obviously a matter of interpretation. According to the Explanatory Report to Protocol No. 14, ‘well-established case-law’ normally means case law which has been consistently applied by a Chamber.<sup>56</sup> Thus, such Committees will take over a large number of the cases formerly submitted to the chambers of seven judges.

If a judge elected in respect of the respondent state is not a member of the Committee, the latter may invite him/her to replace one of the members of the Committee, having regard to all the relevant factors, including whether or not the respondent state has contested resort to the summary procedure.<sup>57</sup> The aim of this provision is that the expertise of the ‘national judge’ in domestic law and practice will be relevant to the issue and will be helpful for the Committee.<sup>58</sup>

However, Amnesty International pointed out that the particular expertise about the laws and legal system of the respondent state would not be necessary in such cases, as the new summary procedure would apply only to those applications ‘which raise issues about which the case-law of the Court is already

clear – manifestly well-founded, repetitive cases’.<sup>59</sup>

It is worthwhile noting that the ‘conviction of a state by an organ of international jurisdiction without the mandatory participation of a judge who has been elected in respect of the respondent state constitutes a small “revolution” in the area of public international law, where the institution of a “national judge” or the “ad hoc” judge has a long tradition, reflecting an aspect of state sovereignty’.<sup>60</sup>

Of all the debated reform proposals, the introduction of the single-judge formation and the new summary procedure for three-judge Committees are considered to have the greatest and most immediate effect in increasing the Court’s case-processing capacity. An evaluation conducted by a study group of the Registry in 2003 found that the new summary procedure would disburden the Chambers of more than 50 per cent of the cases entrusted to them,<sup>61</sup> and in April 2003, the CDDH concluded that it would ‘represent a significant increase in the decision-making potential of the Court’.<sup>62</sup> The Explanatory Report, however, omits an indication of expected productivity gains and simply states that the new procedure

<sup>55</sup> Art. 28 ECHR, as amended by Art. 8 of Protocol No. 14.

<sup>56</sup> Explanatory Report, *supra* note 52, at para 68. The Explanatory Report makes the qualification that exceptionally ‘well-established case-law’ may also refer to a single judgment on a question of principle, particularly if delivered by the Grand Chamber.

<sup>57</sup> *Ibid.*, at para. 71.

<sup>58</sup> *Ibid.*

<sup>59</sup> Amnesty International’s Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights, 1 Feb. 2004, at para. 23, available at: [www.amnesty.org/library/info/IOR61/005/2004/en](http://www.amnesty.org/library/info/IOR61/005/2004/en).

<sup>60</sup> Paraskeva, ‘Reforming the European Court of Human Rights: An Ongoing Challenge’, 76 *Nordic J Int’l L* (2007) 185, at 209.

<sup>61</sup> Impact Assessment of Some of the Reform Proposals Under Consideration, CDDH-GDR (2003)017, at para. 11(a).

<sup>62</sup> Final report, *supra* note 21, Proposal B.1 lit. b.

for Committees 'will increase substantially the Court's decision-making capacity and effectiveness, since many cases can be decided by three judges, instead of the seven currently required when judgments or decisions are given by a Chamber'.<sup>63</sup>

In the medium and longer term, what can be said with certainty is that although the procedural innovations of Protocol No. 14 constitute a key tool in aiming to improve the Court's efficiency, Protocol No. 14 is not 'a panacea, and long-term solutions must be discussed and developed'.<sup>64</sup>

### B Separate Filtering Body

The need for an effective filtering mechanism gave rise to various proposals on a filtering mechanism other than that envisaged by Protocol No. 14/14 *bis*. They include the creation of 'special sections, an application division (whose role and impact would have to be studied), or another filtering body, all within the Court and under its control, the Court properly ruling only on those cases found admissible'.<sup>65</sup>

In its Position Paper of 12 September 2003, the Court observed that the only solution to the caseload problem 'will be to have some separation of initial filtering from adjudication on applications identified as warranting fuller judicial

examination'.<sup>66</sup> Later on, in its response to the Interim Activity Report of the CDDH,<sup>67</sup> the Court expressed its firm conviction that a truly separate filtering body 'will prove essential for the long-term capacity of the system both to produce in good time high-quality and well-reasoned decisions in substantial cases and to dispose of manifestly inadmissible cases with sufficient expedition'.<sup>68</sup>

The idea of establishing within the Court a separate filtering body, composed of people other than the elected judges of the Court (so-called 'assessors') was first put forward by the Evaluation Group,<sup>69</sup> but rejected in the reform process, *inter alia* on the ground that having applications decided by non-elected judges would go against an important *acquis* of Protocol No. 11, which had made the decision-making under the Convention fully judicial.<sup>70</sup>

A more sophisticated proposal for a separate filtering body was advanced by the Group of Wise Persons.<sup>71</sup> It suggested establishing a so-called 'Judicial Committee', a body composed of judges – albeit of lower status than the judges of the

<sup>63</sup> Explanatory Report, *supra* note 52, at para. 70.

<sup>64</sup> Lester, 'The European Court of Human Rights After 50 Years', 4 *European Human Rts L Rev* (2009) 461, at 471.

<sup>65</sup> Memorandum of the President of the ECtHR, *supra* note 43, at 5.

<sup>66</sup> Position paper of the European Court of Human Rights on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee of Human Rights, 12 Sept. 2003, CDDH-GDR (2003)024, at para. 47.

<sup>67</sup> Interim Activity Report, CDDH-GDR(2003)026, Addendum I Final.

<sup>68</sup> Response of the European Court of Human Rights to the CDDH Interim Activity Report, 2 Feb. 2004, CDDH-GDR(2004)001, at para. 7.

<sup>69</sup> Report of the Evaluation Group, *supra* note 29, at para. 98.

<sup>70</sup> Interim Report of the CDDH to the Committee of Ministers, 18 Oct. 2002, CM(2002)146, at paras 23–33.

<sup>71</sup> Report of the Group of Wise Persons, *supra* note 41, at paras 51–65.

Court – who would perform functions which, under Protocol 14, are assigned to single judges (who would deal with clearly inadmissible applications) and Committees of three judges (which would deal with repetitive cases). The Group of Wise Persons recommended that the number of judges of the Judicial Committee should be lower than the number of member states.<sup>72</sup> Further, 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’.<sup>73</sup> The Judicial Committee is not without criticism,<sup>74</sup> but it would no doubt be a pivotal element in optimising the effectiveness of the Court.

In October 2009, Germany circulated a proposal<sup>75</sup> for a new filtering mechanism which involves setting up an additional section of the Court staffed by additional judges, who would, by final decision, rule on (clearly) inadmissible applications. The judges of the additional section would have a status different from that of the elected ‘senior judges’ and their decisions would be final. In a similar vein, the assembly of states parties at the Interlaken Conference called on ‘the Court to

put in place, in the short term, a mechanism within the existing bench likely to ensure effective filtering’.<sup>76</sup> In the longer term, it recommended to the Committee of Ministers that it examine introducing a filtering mechanism within the Court which goes beyond the just mentioned one and the single-judge procedure.<sup>77</sup> Obviously, these are but very vague proposals which need to be concretized. Nevertheless, they encapsulate the states parties’ acknowledgment that more effective filtering arrangements, going beyond the single-judge procedure, are in any case imperative.

A radical proposal for restructuring the current Convention machinery would be to institute a new two-tier system, based on two levels of jurisdiction, perhaps similar to that of the European Union.<sup>78</sup> On this model, one could envisage a Human Rights Tribunal subordinate to the Court (a Human Rights Court of First Instance) which would be competent to decide on admissibility and on the merits of the applications. All cases heard by the Tribunal may be subject to a right of appeal to the second tier Court on points of law only. Alternatively, ‘the Tribunal would deal with admissibility and the

<sup>72</sup> The number of judges would be decided, and be subject to modification, by the Committee of Ministers on a proposal from the Court. See *ibid.*, at para. 53.

<sup>73</sup> *Ibid.*

<sup>74</sup> See, e.g., Bemelmans-Videc, ‘Report of the Group of Wise Persons on the long-term effectiveness of the European Convention on Human Rights control mechanism’, 10 Apr. 2007, AS/Jur (2007) 25, Appendix I, at paras 17–19; Lawson, ‘Guaranteeing the Authority and Effectiveness of the European Convention on Human Rights’, AS/Jur (2008) 05, at 10.

<sup>75</sup> On file with the authors.

<sup>76</sup> Interlaken Declaration, *supra* note 42, at 4, para. 6(c)(i).

<sup>77</sup> *Ibid.*, at 4, para. 6(c)(ii).

<sup>78</sup> In the reform process leading to the adoption of Protocol No. 14, it has been suggested, with a view to alleviating the caseload problems, that regional human rights tribunals be established throughout Europe, with the Strasbourg Court becoming a tribunal of final appeal. This idea was ultimately not endorsed, not only because of the heavy financial burden this would involve, but also because of the risk of diverging standards and case law between the regional courts and the Strasbourg Court.

Court would rule on the merits'.<sup>79</sup> Such a proposal would signify a fundamental departure from the single-body system introduced by Protocol No. 11. Above and beyond the heavy financial burden involved in setting up a Human Rights Court of First Instance, in any case, detailed reflection would be required as to the concrete roles of the lower and higher courts so as to prevent competition problems.

### C New Admissibility Criterion

The idea that the Court should be given some limited additional measure of discretion to reject cases by raising the admissibility threshold, was one of the main pillars of the second reform process. The Evaluation Group's proposal to decline cases for examination which raise no substantial issue under the Convention<sup>80</sup> initiated a protracted debate on the introduction of a new admissibility criterion which was eventually settled by agreement on a proposal now embodied in Article 12 of Protocol No. 14, which amends Article 35(3) of the Convention as follows:

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

...

(b) the applicant has not suffered a significant disadvantage, unless respect

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

The pivotal element of the new admissibility criterion is that of a 'significant disadvantage'. Even where the applicant has not suffered a significant disadvantage, a first safeguard clause ensures that his/her applications is not declared inadmissible if 'respect for human rights' otherwise warrants an examination on the merits. These elements leave a wide margin of appreciation to the Court; one may, however, trust the Court that it will make prudent use of them. As the Explanatory Report to Protocol No. 14 states, '[t]hese terms are open to interpretation (this is the additional element of flexibility introduced); the same is true of many other terms used in the Convention, including some other admissibility criteria. Like those other terms, they are legal terms capable of, and requiring, interpretation establishing objective criteria through the gradual development of the case-law of the Court.'<sup>81</sup> A second safeguard clause ensures that the Court can declare a case inadmissible on account of its trivial nature only if it has been duly examined by a domestic tribunal. The rationale is that every case will receive a judicial examination either at the national or European level, thus reflecting the principle of subsidiarity.

The introduction of a new admissibility criterion has given rise to various criticisms, both of the principle of amending Article 35 of the Convention and

<sup>79</sup> Memorandum of the President of the ECtHR, *supra* note 43, at 5.

<sup>80</sup> Report of the Evaluation Group, *supra* note 29, at para. 93. The CDDH considered that such a provision 'would give too wide a discretion to the Court enabling it to pick and choose the cases it would wish to deal with. It would also entail an important restriction of the right of individual application'. See Final report containing proposals of the CDDH, *supra* note 21, at para. 14.

<sup>81</sup> Explanatory Report, *supra* note 52, at para. 80.

regarding the wording of the criterion. Concerns for the introduction of the new admissibility criterion have been raised by NGOs, some governments, judges of the Court, members of the Registry, and the Parliamentary Assembly. It has been strongly opposed by NGOs across Europe which considered the right of individual application as ‘a vital element of the protection of human rights’ and that ‘curtailing this right would be wrong in principle’. For the NGOs, ‘such a measure would be seen as an erosion of the protection of human rights by CoE member states’,<sup>82</sup> and they feared that the new admissibility criterion ‘will give the ECtHR too wide a discretion to reject otherwise meritorious cases, and will also create real uncertainty amongst applicants and their advisers as to the prospects of the success of their applications to the ECtHR’.<sup>83</sup> The concerns of the NGOs were also shared by some judges of the Court who stressed that ‘on the basis of a new and rather vague, even potentially arbitrary condition’,<sup>84</sup> applications are likely to be rejected ‘independently of whether or not the complaint was well founded’.<sup>85</sup> Criticism has also been launched against the effectiveness of such a new admissibility test. On the basis of interviews with judges and officials in Strasbourg, Greer noted that ‘it was generally agreed . . . that such a test would have little impact upon the ECtHR’s case management’.<sup>86</sup>

<sup>82</sup> Updated Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights, signed by 114 NGOs, Apr. 2004.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> Position Paper of the Court, *supra* note 66, at para. 34.

<sup>86</sup> Greer, *supra* note 40, at 89.

In an impact assessment of an earlier proposal for a new admissibility criterion, a study group of the Registry found that such a proposal ‘would have a rather modest effect’.<sup>87</sup>

In very basic terms, the worth of the new admissibility criterion is that it in any case provides the Court with some additional degree of flexibility in its filtering work to ease its workload. Its effectiveness depends on how the Court will interpret the ‘significant disadvantage’ criterion and what it considers to be ‘due examination’<sup>88</sup> of a case.<sup>89</sup> Precisely because it yet remains to be seen how the Court will go about the new admissibility criterion, at this point in time criticism regarding its effectiveness needs to be taken with a pinch of salt. Nonetheless, given that the interpretive discretion of the Court is bounded by factual circumstances, if only for reasons of legitimacy,

<sup>87</sup> Impact Assessment of Some of the Reform Proposals Under Consideration, CDDH-GDR (2003)017, at para. 11(b). The study group further ‘considered that “clone cases” would in most cases entail a significant disadvantage for the applicant if they concerned deprivation of liberty (criminal length cases) or the restriction of property rights (expropriation, bankruptcy etc.)’.

<sup>88</sup> Helfer suggests that the Court should consider an application as not duly examined by a domestic court if the latter reviews the complaint in question without regard to the Court’s case law, with a view to inducing the domestic courts to align their interpretation of a particular right with the jurisprudence of the Court: see Helfer, *supra* note 45, at 153.

<sup>89</sup> In order to allow time for adequate case law to be developed in respect of the interpretation of the new criterion, Art. 20(2) of Protocol No. 14 provides that for a period of 2 years following the entry into force of the Protocol, the new criterion may be applied only by Chambers or the Grand Chamber of the Court.

one may already anticipate that the new admissibility criterion can only be partially promising. This is because, in light of the second safeguard clause, the new admissibility criterion can be a meaningful innovation only if the instances where a case must be examined in spite of its trivial nature constitute the exception. In other words, the utility of the new admissibility criterion presupposes, by and large, a well-functioning judiciary on the national level. This holds true for one group of contracting states, namely those which account for a bearable number of applications. In these countries, one can arguably count on a national judicial system functioning relatively well. However, for a second group of countries from which the bulk of applications (about 60 per cent as of 1 December 2009<sup>90</sup>) stem, the underlying problem is typically related to a congested and ailing judicial infrastructure.

### D Just Satisfaction

Since assessing the amount of just satisfaction to award to successful applicants means a considerable strain on the Court's time resources, Lord Woolf suggested facilitating the Court's work through the creation of an 'Article 41 Unit'<sup>91</sup> within the Court, which would give guidance on rates of compensation. Going beyond that, the Group of Wise Persons considered that the necessary

relief ought to be brought about by referring the decision on just satisfaction to domestic courts.<sup>92</sup>

States parties would be required to inform the Committee of Ministers which national judicial body had been designated to determine the amount of compensation. The award of just satisfaction should not be hindered by unnecessary formalities or the imposition of unreasonable costs/fees. These national bodies are to determine the amount of compensation within the time-limit set by the Court or the Judicial Committee; furthermore, they would be obliged to follow the Court's case law on just satisfaction and victims would be able to challenge the national decision before the Court or Judicial Committee where a designated national body failed to comply with the Court's case law or deadlines.

The CDDH encouraged the Court further to explain the criteria by which it systematically calculates awards of just satisfaction and concluded that it would be very helpful to proceed with the development of the HUDOC case law database<sup>93</sup> so as to allow analysis of patterns in the

<sup>92</sup> Report of the Group of Wise Persons, *supra* note 41, at para. 96: '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'.

<sup>93</sup> HUDOC, an acronym for Human Rights Documentation, is the online database of the case law of the supervisory organs of the Convention (the Court, the European Commission of Human Rights, and the Committee of Ministers).

<sup>90</sup> See above, at sect. 2A1.

<sup>91</sup> Woolf, *supra* note 23, at 40. Meanwhile, an 'Article 41 Unit' has been established by the Court.

Court's awards of just satisfaction.<sup>94</sup> This could help 'in ensuring realistic expectations on the part of applicants and their legal representatives prior to application and can assist all parties during any later negotiations with a view to a friendly settlement and, in certain cases, subsequent unilateral declarations'.<sup>95</sup> Further, the publication by the Court of a compendium with appropriate guidelines, as suggested, would be of valuable assistance to the domestic courts.

The proposed devolution of the determination of just satisfaction to national courts has prompted criticism, for such a mechanism would create divergent compensation standards across states parties, and hence threaten 'to undermine the equal treatment of victims of human rights violations'.<sup>96</sup> Further, it is argued that such a proposal would complicate and prolong procedures for obtaining redress on the national level,<sup>97</sup> and be self-defeating in terms of effectiveness in view of expected additional complaints to Strasbourg about inadequate awards of just satisfaction at the domestic level.<sup>98</sup>

The proposal of placing the prime responsibility for awarding just satisfaction on domestic courts is an instance

of a general concern to give more extensive effect to the subsidiary role of the Convention's control mechanism by relieving the Court of tasks which could be carried out more effectively by national bodies. It follows that the very rationale of the proposal to 'outsource', so to speak, decisions on just satisfaction is premised on the assumption of there being a trustworthy, efficiently working partner at the domestic level for determining just satisfaction. Hence, the proposal in question can prove a promising tool only in those countries boasting a well-functioning judiciary.

### *E Bounce Back Procedure*

Rick Lawson has proposed a 'bounce back procedure' for repetitive cases:

[A]s soon as the Court has identified that a case only raises issues which it has already dealt with, it returns the case to a domestic court which will deal with it. This may be a special human rights court, or the Supreme Court, which should forward it to the appropriate judicial body. What matters is that there is a designated 'counter-court'.<sup>99</sup>

To objections about the legal feasibility of such a mechanism, Lawson countered that the mere fact of the Court having examined the case and decided to 'bounce' it 'back' in itself constitutes a new fact warranting a re-examination of the case at domestic level.<sup>100</sup> Besides contributing

<sup>94</sup> CDDH Activity Report. Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights, adopted by the CDDH at its 68th meeting, 24–27 Mar. 2008, CDDH(2009)007 Addendum I, at para. 39.

<sup>95</sup> *Ibid.*

<sup>96</sup> Bemelmans-Videc, *supra* note 74, App. I, at para. 26.

<sup>97</sup> *Ibid.*

<sup>98</sup> Cf. Mowbray, 'Faltering Steps on the Path to Reform of the Strasbourg Enforcement System', 7 *Human Rts L Rev* (2007) 609, at 616.

<sup>99</sup> Lawson, *supra* note 74, at 11.

<sup>100</sup> In this regard, one could speak of the 'bounce back' decision having *sui generis* character, similarly to what was argued within the CDDH with respect to a bounce back procedure for cases declared inadmissible on the basis of a new admissibility criterion: see Interim Report of the CDDH to the Committee of Ministers, *supra* note 32, at para. 44(e): 'a decision not to examine a case in detail would rather be a *sui generis* decision'.



to ease the Court's burden, it would force 'the issue to be solved domestically. The learning effect for the domestic system may be larger than from an "outside" judgment delivered in Strasbourg.'<sup>101</sup>

Strong reservations are indicated, apart from the problem of a proper legal basis. Since the repetitive cases originate in a structural or systemic problem at the domestic level, it is not clear what good such a 'bounce back procedure' would be for the applicants so long as the underlying structural or systemic defect persists. The view of the CDDH with respect to the idea of remitting cases declared inadmissible (on the basis of a new admissibility criterion) back to domestic courts is also apposite in the present context:

[A] national supreme court which had to deal with a case remitted back by the Court could regularly find itself in the difficult situation of having to re-examine a case it had already heard in detail some time previously without finding a violation of the Convention, without the circumstances having changed. It would then find again that there had been no violation, which would make no difference to the initial situation.<sup>102</sup>

### F Pilot Judgment Procedure

Although Protocol No. 14 is designed to streamline the processing of repetitive cases using the amended three-judge Committee procedure, on its own it represents only a piecemeal solution to the problem of repetitive cases. In recent years, therefore, the Court has taken to exploring a more far-sighted approach to

tackling this problem, known as the pilot judgment procedure.

Pioneered in the case of *Broniowski v. Poland* and *Hutten-Czapska v. Poland*,<sup>103</sup> the pilot judgment procedure is a tool which allows the Court to select out of a significant number of cases deriving from the same structural or systemic problem in the state concerned one (or more) of them for priority treatment; in adjudicating this 'pilot' case, the Court seeks 'to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue'.<sup>104</sup> The innovative feature of a pilot judgment is that the Court indicates to the respondent state that, in execution of the judgment concerned, it must *inter alia* take general measures – typically the introduction of an effective remedy – to rectify the underlying structural or systemic problem identified at the domestic level. Crucially, pending implementation of the relevant general measures, the examination of all other cases raising the same issue is suspended.

It is worth quoting at length a tentative but lucid formulation given by the Court in 2003 of a pilot judgment procedure. Such a procedure would involve:

[A]n accelerated execution process before the Committee of Ministers which would entail not just the obligation to eliminate for the future the causes of the violation,

<sup>101</sup> Lawson, *supra* note 74, 11.

<sup>102</sup> Interim Report of the CDDH, *supra* note 32, at para 44(c).

<sup>103</sup> App. No. 31443/96, *Broniowski v. Poland*, Judgment (Grand Chamber), ECHR 2004-V; App. No. 35014/97, *Hutten-Czapska v. Poland*, Judgment (Grand Chamber), ECHR 2006-VIII.

<sup>104</sup> The Pilot-Judgment Procedure. Information note issued by the Registrar, 1, available at: [www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information\\_Note\\_on\\_the\\_PJP\\_for\\_Website.pdf](http://www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf).

but also the obligation to introduce a remedy with retroactive effect within the domestic system to redress the prejudice sustained by other victims of the same structural or systemic violation. Whilst awaiting the accelerated execution of the pilot judgment, the Court would suspend the treatment of pending applications raising the same grievance against the respondent State, in anticipation of that grievance being covered by the retroactive domestic remedy. It was stressed in the Court's discussions that, in the event of the respondent State's failing to take appropriate measures within a reasonable time, it should be possible for the Court to re-open the adjourned applications.<sup>105</sup>

Pilot judgments are inspired by a concern for more effective implementation of the subsidiarity principle, namely that it must not be the function of the Court to examine large numbers of repetitive complaints which clog the Court's docket and divert resources from the examination of other more serious complaints. They allow the Court to dispose with a single judgment of a large number of repetitive applications, and thus have the potential to be an effective means for alleviating the Court's caseload. Consequently, the Group of Wise Persons has wholeheartedly encouraged the Court to make the fullest possible use of the 'pilot judgment' procedure.<sup>106</sup> In spite of this, some caveats are in order.

Criticism has been voiced, within the Court itself and by NGOs, that there is no proper legal basis in the Convention for such a broad injunction to the state

to take general measures.<sup>107</sup> In this respect, the Group of Wise Persons noted that '[i]n the light of practical experience, consideration would have 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'.<sup>108</sup> At present, the pilot judgment procedure 'is under development within the Court and not yet susceptible to a formal definition'.<sup>109</sup> With a view to the formalization of such a procedure, Lester argues for the need 'to develop a fair procedure for dealing with pilot cases so that other parties with common interests are able to be represented'.<sup>110</sup> Further, as pilot judgments have far-reaching consequences for a large number of applicants, their use must be considered carefully. As Helfer stresses, 'there is no guarantee that [the "pilot"] case accurately reflects all of the factual and legal issues'<sup>111</sup> underlying the many complaints raising the same grievance, and one must be aware that the pilot judgment procedure entails a far-reaching restriction of the right of individual application.

<sup>107</sup> See Bemelmans-Videc, *supra* note 73, Appendix I, at para. 20; Wołasiwicz, 'Pilot Judgment from the Perspective of the Polish Government Agent and a Proposal of Provisions related to the Existing Pilot Judgments Procedure and So-called Simplified Pilot Judgment Procedure', in J. Wołasiwicz (ed.), *Pilot Judgment Procedure in the European Court of Human Rights*, 3rd Informal Seminar for Government Agents and other Institutions, Warsaw, 14–15 May 2009 (2009), at 31.

<sup>108</sup> *Ibid.*

<sup>109</sup> CDDH Activity Report, *supra* note 94, at para 16.

<sup>110</sup> Lester, *supra* note 64, at 477.

<sup>111</sup> Helfer, *supra* note 45, at 154.

<sup>105</sup> Position Paper of the Court, *supra* note 66, at para. 43.

<sup>106</sup> Report of the Group of Wise Persons, *supra* note 41, at para. 140.

It is crucial for the success of pilot judgments that respondent states act promptly and effectively to remedy the underlying systemic/structural problem. At the very heart of the pilot judgment procedure thus lies the issue of effective execution (by the respondent state) and enforcement (on the part of the Committee of Ministers). It has been stressed that:

[T]his type of judgment raises a more complex problem than the enforcement of an ordinary judgment of the court. This will require the Committee of Ministers to devise a more proactive system of enforcement than at present, providing outside expert assistance. . . . A series of judgments which remain unenforced for political or socio-economic reasons, perhaps due to the extent to which the systemic problem is deeply rooted in the national legal culture, would prove a major setback to the use of this very promising type of judgment.<sup>112</sup>

Whether pilot judgments indeed prove an effective tool for the benefit of the Court, however, depends not just on the procedure's legitimacy and the political will of the respondent states to take the necessary general measures as urged by the Court. It is obvious that the many applicants of repetitive cases can only expect to obtain redress in legal systems which are genuinely independent and impartial in dealing with human rights cases. This, however, is not the case in some European states.

## 5 Suggestions and Conclusion

We aim to highlight two issues which have so far been underexposed in the literature on reforming the Convention machinery. First, reform proposals relating to the new admissibility criterion, just satisfaction, and the pilot judgment procedure are only partially promising. This is because, as follows from the above analysis, they are premised on the condition of their being applicable *telle quelle* in all the states parties, generally presupposing a trustworthy, more or less well-functioning judiciary on the domestic level. However, it is trite to state that there is great variance among the states parties with respect to a country's human rights situation and the quality of the judicial system. If Convention reforms are to be effective, they must take due account of this reality.

The second issue concerns the problem of the manifestly ill-founded applications. They make up the great bulk of the total number of cases rejected as inadmissible (over 90 per cent of the Court's caseload), and thus serve to clog the Court system. Given the very high proportion of manifestly ill-founded applications, the Court's practice of rejecting them without giving reasons leads the Court into a legitimacy problem. In what follows we elaborate on these two issues and propose solutions.

### *A From Absolute Equality to Relative Equality*

The concept of sovereign equality denotes that states, in their mutual legal relations, are formally equal to one another, regardless of their material differences

<sup>112</sup> O'Boyle, 'On Reforming the Operation of the European Court of Human Rights', 3 *European Human Rts L Rev* (2008) 1, at 8.

(politically, economically, militarily) in a pluralistic and heterogeneous world. The most important manifestations of this concept are the ‘one state, one vote’ principle in matters requiring the consent of states, and the principle of *par in parem non habet imperium*. However, in certain instances, this conception of absolute legal equality is relativized to reflect the realities imposed by the differences in political power among states.<sup>113</sup> Notwithstanding, the concept of legal equality serves as the foundational principle of international law and ‘a symbolic concept incorporated into the formal structure of most international institutions’.<sup>114</sup>

In the context of the European Council, the concept of sovereign equality entails that reforms should place all states, *de jure*, on an equal footing. A *prima facie* doubt whether it is justified to introduce the same reform measures in respect of all states parties arises in view of the fact that about 60 per cent of all registered applications originate from only five contracting states.<sup>115</sup> At a closer look, one finds that the systems of judicial relief in these countries are particularly problematic in the field of human rights protection, owing to structural problems affecting the efficiency of the judicial work or to deficiencies concerning respect for the principle of the rule of law.

Given that the effectiveness of reform proposals bearing on the relationship between the Strasbourg Court and the national courts hinges on a trustworthy national judiciary, measuring all states parties by the same yardstick risks, in the end, sacrificing the noble project of European human rights protection on the altar of sovereign equality. Against this background, we propose that the reform proposals concerned ought to differentiate between one group of countries with a fairly well-functioning judiciary and another which comprises the so-called high-case countries with an ailing system of judicial relief. Such differentiation would take into account the widely differing conditions within states affecting the solution to a problem, somewhat similar to the principle of ‘common but differentiated responsibilities’ enshrined in the Rio Declaration. In other words, a more nuanced approach to tackling the workload crisis should be adopted, away from a rigid conception of absolute formal equality in favour of *relative* equality between the states parties. It is worth noting that a first step in this direction has already been undertaken by the Court in according ‘special treatment’, so to speak, by means of the pilot judgment procedure<sup>116</sup> to a particular group of cases.

The need to save the Court from drowning under the sheer volume of cases brought before it calls for more straightforward and audacious solutions. We suggest that in respect of those states parties which account for a disproportionate number of applications (the high-case countries) specific reform

<sup>113</sup> In the IMF and the UN Security Council, with the veto power of its 5 permanent members, the voting procedure departs from respect for full formal equality as votes are weighted unequally to reflect, to some extent, the relative distribution of power among the states at the time when the organizations were founded.

<sup>114</sup> ‘Doctrine of Equality of States’, article in *West’s Encyclopedia of American Law* (2nd edn, 2005), iii, at 497.

<sup>115</sup> See above, sect. 2A1.

<sup>116</sup> See above, sect. 3F.

measures should apply. In order to forestall charges of a politically determined ‘pick and choose’ approach, we propose to objectify the decision whether or not to accord ‘special treatment’, so to speak, to a state party, on the basis of verifiable criteria. That is, if a certain number of criteria are fulfilled (e.g., three out of five) in respect of a particular state, then ‘special’ standards – relating, for example, to the threshold of the admissibility – should apply to that state.

1. A straightforward way of categorization would be to look at the number of applications originating from a particular state party in relation to that state’s population.
2. Another criterion would concern the number of judgments in which the Court has found a particular state party in violation of the Convention. For this criterion to be made workable, a threshold level would need to be identified.
3. A third criterion would relate to whether the domestic legal system of a state reveals a structural or systemic problem which accounts for a large number of (repetitive) cases (see Pilot Judgment Procedure).
4. Another, related, criterion would concern the failure or serious delay on account of domestic public authorities in abiding by final domestic judgments delivered against the state and its entities. This problem has given rise to a continuous flow of judgments in which the Court has found violations of the Convention (Articles 6(1) and 13 ECHR). This criterion is related to criterion no. 3 in that the large number of applications concerning non-execution or delayed execution

of domestic judgments regularly originate from a structural deficiency on the domestic level. This category of cases thus forms a sub-group of the cases encompassed by criterion no. 3. However, in view of the prominence of the present problem, particularly in Russia, we think it advisable to single this category of cases out and include it in a separate criterion.

5. Lastly, one could consider as a criterion the number of interim measures of the Committee of Ministers adopted against a particular state party for not having or for not having fully complied with a Court judgment in relation to the number of cases struck out of the list.

It would be up to the Committee of Ministers to take the final decision on special measures for ‘high case countries’. This decision would require a two-thirds majority of all the representatives entitled to sit on the Committee.

It goes without saying that the above outline represents no more than a first tentative step in mapping out a proposed shift in direction for future debate on Convention reform. The idea of ‘special treatment’ needs to be sharpened, and more sophisticated criteria are of course possible. To conclude, suffice it to say that there is indeed a way to objectify a differentiated treatment of the states parties in the context of Convention reform if the necessary political will can be mustered.

### ***B New Criteria for Manifestly Ill-founded Applications***

According to new Article 27(1) ECHR,<sup>117</sup> a single judge may declare an application

<sup>117</sup> Introduced by Art. 7 of Protocol No. 14, *supra* note 1.

inadmissible (or strike it out of its list of cases) ‘where such a decision can be taken *without further examination*’.<sup>118</sup> This clause refers to the category of cases which are commonly termed clearly or manifestly inadmissible. These encompass all those cases which obviously fail to meet the admissibility criteria of Article 35(1) and (2) of the Convention, which clearly fall under the first and third group of cases<sup>119</sup> mentioned in Article 35(3)(a),<sup>120</sup> or, in the sense of the same provision, are manifestly ill-founded. The Interlaken Conference called on the Court to apply the admissibility criteria in a uniform and rigorous fashion.<sup>121</sup>

As noted, a very high proportion of all cases examined by the Court are declared inadmissible (90–95 per cent), predominantly on the ground that the applications are manifestly ill-founded. It is important to emphasize that the Committee rejects the clearly admissible cases without specifying reasons. A transparent overview of the shortcomings in applications which make them manifestly ill-founded does not exist. The rejection letter informs the applicant lapidarily that ‘[t]he decision is final and not subject to any appeal. . . . You will therefore appreciate that the Registry will be unable to provide any further details about the Committee’s deliberations or to conduct further correspondence relating to its decision in this case’.<sup>122</sup> The

absence of proper reasons for its inadmissibility decisions reflects the Court’s efforts to deal with the huge mass of (clearly) inadmissible cases as expeditiously as possible. While this is certainly a laudable goal, the drawbacks of this practice must not be overlooked.

The term ‘manifestly ill-founded’ resembles an empty ‘black box’, the content of which needs to be filled through interpretation. The conceptual indeterminacy of this term necessarily leaves the Committee a wide measure of discretion in giving substance to it. Without definitional criteria which serve to restrain at least to some extent the otherwise almost unfettered discretionary power of the Committee in considering whether to classify an application as manifestly ill-founded or not, the chances are that the pressing need to free up judicial resources leads the Committee to carry its interpretive powers beyond what was originally conceived to be the legitimate limits of Article 28 ECHR. In other words, there is the danger that the category of manifestly ill-founded applications is used as a tool to control the caseload of the Court. The metaphor of the ‘black box’ alludes to the risk of the Committee ‘hijacking’, so to speak, behind the scenes its interpretive powers to convert Article 28 ECHR into a catch-all clause. Such a practice detracts from one of the most valuable assets the Court possesses: its legitimacy.

The Court’s policy of shrouding its handling of manifestly ill-founded applications in a veil of secrecy has caused widespread dissatisfaction. Given the large numbers of manifestly ill-founded cases, the public needs to know more about this category, which resembles in some ways a magic box. Public confidence in the Court and, particularly, the

<sup>118</sup> Emphasis added.

<sup>119</sup> That is, those cases which are ‘incompatible with the provisions of the Convention or the protocols thereto’ or constitute an abuse of right.

<sup>120</sup> As amended by Art. 12 of Protocol No. 14, *supra* note 1.

<sup>121</sup> Interlaken Declaration, *supra* note 42, at 5, para. 9(b).

<sup>122</sup> Quoted from Lester, *supra* note 64, at 470.

Court's legitimacy in the eyes of the applicants would be enhanced if the Court provided reasons for declaring cases manifestly ill-founded. As Lord Lester writes, 'Given that every proposal to the Committee is accompanied by a report containing the grounds for the proposed rejection of an application, it would not be a significant burden for this analysis to provide the basis for a short, clear set of reasons, and it is wrong to suppose that only the committee needs to see that analysis'.<sup>123</sup>

However, concerns by the Court of taking on an additional burden need not be involved in making decisions on manifestly ill-founded applications more transparent. One may think of including in the Rules of Court a non-exhaustive list of criteria which define the category of manifestly ill-founded cases. It would be a major step towards enhancing legal certainty and transparency if the Court, in its decisions on manifestly ill-founded applications, made reference to the relevant criteria under which it subsumes cases it considers to be manifestly ill-founded.

The existence of such a transparent list of criteria would help the applicants better to figure out their prospective chances of success before the Court and thus discourage many potential applicants from filing clearly inadmissible applications in the first place. Such criteria would not only reinforce the Strasbourg Court, but also be of benefit for the work of national supreme courts. Where relevant case law exists in respect of one of the criteria, the national supreme courts may be likely to feel disposed further to substantiate their decision to dismiss a case by referring to such case law via the applicable criterion.

Thereby, the proposed list of criteria for manifestly ill-founded applications may bring about an additional learning effect with regard to the Court's case law.

Our Proposal for a Draft Article on Manifestly Ill-Founded Applications

Cases are, *inter alia*, manifestly ill-founded when:

1. the complaint fails to disclose sufficient evidence to substantiate a Convention violation;
2. the domestic courts are alleged to have merely misapplied national law or falsely established or evaluated the facts of a case;
3. the domestic court concerned cannot be considered to have overstepped its scope of discretion in assessing evidence or a hearing of witness;
4. the facts of the case plainly do not disclose an interference with a Convention right.
5. where an interference is plainly justified.

A short commentary on some of the criteria is in order: criterion no. 2 gives effect to the principle that the Court is not supposed to serve as a fourth instance court, i.e., a court of appeal from national court decisions. Considerations of judicial expediency and legitimacy suggest that the Court should abstain from 'reconsidering questions of fact or national law that have been considered and decided by national authorities, in line with its case-law according to which it is not a fourth instance court'.<sup>124</sup> A case in

<sup>123</sup> *Ibid.*, at 477.

<sup>124</sup> Interlaken Declaration, *supra* note 42, at 5, para. 9(a).

point for criterion no. 4 would be where it is beyond doubt that the facts in a case concerning Article 3 ECHR do not amount to ‘inhumane treatment’. Another instance of this category of cases is those where state authorities have not overstepped their scope of discretion. A case in point for criterion no. 5 would be the obvious justification of a foreigner’s deportation in light of Article 8(2) ECHR, e.g., the foreigner’s conviction on account of a serious offence.

To conclude, let us be clear on the following. We are plainly aware of the fact that our proposals for a differentiated approach in implementing reform measures and for introducing a list of criteria for the handling of manifestly ill-founded applications are provocative and maybe, to some extent, even visionary. They will certainly raise controversy. As for the first proposal, one can expect outright opposition from states parties which, as a matter of principle, disapprove of departing from the practice of designing reform

proposals which are equally applicable to all the states parties. In particular, such opposition can be anticipated from those states from which a disproportionate number of incoming applications originate. The second proposal would not impinge on states’ interests, but is likely to give rise to misgivings by the Court that it would entail an unnecessary additional burden. Though initial reflexes of opposition are understandable, we are convinced that the Court’s concerns can be addressed and eventually overcome. The proposals are presented as tentative solutions designed to stimulate future debate on reforming the Convention in the wake of the Interlaken Conference. To be sure, the success of Convention reform hinges on the dynamics of the political process, which, to recall a famous dictum of Max Weber, resembles ‘slow, strong drilling through hard boards, with a combination of passion and a sense of judgment’.