

# Another Step in the Reform of the European Court of Human Rights: The Report of the Group of Wise Persons

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## I. Introduction

The control mechanism of the European Convention on Human Rights (ECHR) is considered to be “the most effective international system for the protection of individual human rights to date”.<sup>1</sup> However, the system’s success has brought with it a caseload which the European Court of Human Rights has found more and more difficult to handle. The massive influx of individual applications is leading to a rapid accumulation of pending cases before the Court, resulting in lengthy proceedings.<sup>2</sup> In the last few years, numerous reform activities within the Council of Europe have been undertaken to enable the Court to deal more efficiently with its caseload. Thus, the Committee of Ministers adopted Protocol No. 14 to the Convention at its 114<sup>th</sup> Ministerial Session in May 2004.<sup>3</sup> The member states committed themselves to ratify the Protocol as speedily as possible so as to ensure its entry into force within two years. To this date, however, Protocol No. 14 has not yet entered into force because the ratification of the Russian Federation is still pending.<sup>4</sup>

The Protocol’s entry into force is certainly a very important step to guarantee the stability of the Convention system. Some of the reform measures introduced by Protocol No. 14 are essential to improve the effectiveness of the control mecha-

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<sup>1</sup> Thomas Buergenthal, *The Evolving International Human Rights System*, 100 *Am. J. Int’l L.* 783, 792 (2006).

<sup>2</sup> See Council of Europe, *Survey of Activities, Strasbourg 2007*, 2 [hereinafter *Survey of Activities*], available at: <[http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey\\_2006.pdf](http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey_2006.pdf)>.

<sup>3</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, opened for signature May 13, 2004, Council of Europe T.S. No. 194 [hereinafter *Protocol No. 14*], available at: <<http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>>. For the principal stages in the preparation of Protocol No. 14 see Council of Europe, *Explanatory Report to the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention* [hereinafter *Explanatory Report*], available at: <<http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>>.

<sup>4</sup> See Press Release 816 (2006), Council of Europe, *Russian State Duma Votes Against the Ratification of Protocol 14 to the European Convention on Human Rights: Declaration by Council of Europe Secretary General Terry Davis* (Dec. 22, 2006), available at: <<https://wcd.coe.int/ViewDoc.jsp?id=1078355&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>>.

nism and will prove successful shortly after Protocol No. 14 enters into force.<sup>5</sup> However, it is widely agreed that – even if Protocol No. 14 enters into force – additional reform measures will be needed in the foreseeable future. Consequently, the Heads of State and Government of the Council of Europe decided as early as May 2005 to establish a Group of Wise Persons (GWP).<sup>6</sup> The GWP was asked 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”.<sup>7</sup> In addition, the GWP should submit “proposals which go beyond these measures, while preserving the basic philosophy underlying the ECHR”.<sup>8</sup> After having developed an Interim Report in May 2006,<sup>9</sup> the GWP submitted its Final Report to the Committee of Ministers on November 15, 2006.<sup>10</sup>

After examining the main reason for further reform measures, this article addresses the premises for the new reform of the Convention system. The article then discusses the various reform proposals contained in the GWP’s Report and develops additional suggestions on its follow-up.

## II. The Need for Further Reform

The GWP’s Report acknowledged that the main threat to the effectiveness of the control system is the exponential growth in the number of individual applications lodged with the Court under Article 34 of the ECHR. The massive increase in the number of individual applications is “seriously threatening the survival of the machinery for the judicial protection of human rights and the Court’s ability to cope with its workload”.<sup>11</sup> Despite the Court’s enhanced productivity in processing applications, there were 89,887 applications pending before the Court by the end of

<sup>5</sup> For an overview see Martin Eaton/Jeroen Schokkenbroek, Reforming the Human Rights Protection System Established by the European Convention on Human Rights, 26 HRLJ 1-17 (2005); Helen Keller/Martin Bertschli, Erfolgspotenzial des 14. Protokolls zur Europäischen Menschenrechtskonvention, EuGRZ 204-229 (2005); Patricia Egli, Zur Reform des Rechtsschutzsystems der Europäischen Menschenrechtskonvention, ZaöRV 64 (2004), 759-794.

<sup>6</sup> See Third Summit of Heads of State and Government of the Council of Europe, Warsaw, Poland, May 16-17, 2005, Warsaw Declaration, 2, available at: <[http://www.coe.int/t/dcr/summit/20050517\\_decl\\_varsovie\\_en.asp?>](http://www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp?>).

<sup>7</sup> Third Summit of Heads of State and Government of the Council of Europe, Warsaw, Poland, May 16-17, 2005, Action Plan, I.1., CM(2005)80 final (May 17, 2005), available at: <[http://www.coe.int/t/dcr/summit/20050517\\_plan\\_action\\_en.asp?>](http://www.coe.int/t/dcr/summit/20050517_plan_action_en.asp?>).

<sup>8</sup> Ibid.

<sup>9</sup> Minister’s Deputies, Interim Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)88 (May 10, 2006), available at: <<https://wcd.coe.int/ViewDoc.jsp?id=998185&BackColorInternet=9999CC&BackColorIntranet=FFBB55>>.

<sup>10</sup> Minister’s Deputies, Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203 (Nov. 15, 2006) [hereinafter GWP Report], available at: <<https://wcd.coe.int/ViewDoc.jsp?id=1063779&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FDC864>>.

<sup>11</sup> GWP Report, *supra* note 10, 26.

2006.<sup>12</sup> The GWP were of the opinion that the reforms contained in Protocol No. 14 will be “extremely useful”.<sup>13</sup> However, according to estimates prepared by the Court, the increase in productivity resulting from the implementation of Protocol No. 14 might be between 20 and 25 %.<sup>14</sup> Given the enormous caseload of the Court, this increase in productivity will not suffice to guarantee the Court’s long-term effectiveness as can be illustrated by the following figures. The latest activity report of the Court estimates that 50,500 new applications were lodged with the Court in 2006. In the same year, the Court disposed of 28,160 cases, either by rendering a final judgment, declaring them inadmissible or striking them from the Court’s list of cases.<sup>15</sup> Assuming hypothetically that the amount of individual applications filed with the Court does not continue to rise in the future and that Protocol No. 14 results in a productivity increase of 25 %, the number of new applications still exceeds the number of cases disposed of by the Court by about 15,300 applications. As a consequence, the number of cases pending before the Court would still continue to grow. The rapid accumulation of pending cases before the Court results in lengthy proceedings, frustrating the aim of the Convention system to deliver justice in a timely manner. It is therefore of vital importance that additional reform measures beyond Protocol No. 14 are examined.<sup>16</sup>

### III. The Premises for Further Reform

The acknowledged need for further reform measures to guarantee the Convention’s control mechanism presents a more fundamental question: what shall the premises for the new reform be? The Heads of State and Government of the Council of Europe asked the GWP to submit their proposals for the long-term effectiveness of the Convention’s control mechanism, going beyond the reform measures introduced by Protocol No. 14, “while preserving the basic philosophy underlying the Convention”.<sup>17</sup> However, the Heads of State and Government did not clarify which aspects form part of the Convention’s “basic philosophy”. There are generally two aspects of the Convention’s control mechanism that are considered to represent its basic aims. First, it gives every victim of an alleged Convention violation the right to seek and obtain vindication both for his or her infringed

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<sup>12</sup> See Survey of Activities, *supra* note 2, at 3.

<sup>13</sup> GWP Report, *supra* note 10, 30.

<sup>14</sup> *Ibid.*, 32.

<sup>15</sup> See Survey of Activities, *supra* note 2, at 38.

<sup>16</sup> See Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge 2006, 42-47; Paul Mahoney, *Parting Thoughts of an Outgoing Registrar of the European Court of Human Rights*, 26 HRLJ 345, 346 (2005); Alastair Mowbray, *Protocol 14 to the European Convention on Human Rights and Recent Strasbourg Cases*, 4 Hum. Rts. L. Rev. 331, 336 (2004); Lucius Caflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, 6 Hum. Rts. L. Rev. 403, 423 (2006).

<sup>17</sup> GWP Report, *supra* note 10, 1.

rights, and where appropriate, for financial compensation of the harm suffered (“individual justice”).<sup>18</sup> Second, as the Court stated in *Ireland v. the United Kingdom*, its judgments serve not only to decide individual cases but, “more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties” (“constitutional justice”).<sup>19</sup> In the reform process leading to the adoption of Protocol No. 14, the preservation of these two functions was controversially discussed. In view of the Court’s increasing caseload, some argued that the most effective way to reform the Court’s control mechanism would be to emphasize the constitutional justice function over the individual justice function.<sup>20</sup> Others warned that the individual justice function constitutes the Convention’s key objective and should not be curtailed.<sup>21</sup>

Would it be desirable to establish a more constitutional Court, not accessible to everyone but dealing with more cases of principle, thereby setting human rights standards for Europe? Or should the member states try to preserve the Court’s ability to deliver individual as well as constitutional justice? The GWP’s Report seems to be slightly ambiguous on this point. On the one hand, the Report acknowledged that the system’s control mechanism “confers on the Court at one and the same time a role of individual supervision and a ‘constitutional’ mission”.<sup>22</sup> On the other hand, the Report stressed that the Court should be “relieved of a large number of cases which should not ‘distract’ it from its essential role”<sup>23</sup> (presumably its ‘constitutional’ mission). In particular, manifestly inadmissible or repetitive cases were considered to place an “unnecessary burden”<sup>24</sup> on the Court. However,

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<sup>18</sup> As the Court just recently stressed in *Mamatkulov and Askarov v. Turkey*, Eur. Ct. H.R., App. Nos. 46827/99 and 46951/99, 122, Feb. 4, 2005: “[T]he Convention right to individual application (...) has over the years become of the highest importance and is now a key component of the machinery for protecting the rights and freedoms set out in the Convention.”

<sup>19</sup> *Ireland v. the United Kingdom*, 25 Eur. Ct. H.R. (Ser. A) at 239 (1978).

<sup>20</sup> See Luzius Wildhaber, A Constitutional Future for the European Court of Human Rights?, 23 HRLJ 161, 162-163 (2002); Greer, *supra* note 16, at 169-175; Steven Greer, Constitutionalizing Adjudication Under the European Convention on Human Rights, 23 Oxford J. Legal Stud. 405, 406-407 (2003); Jean-François Flauss, Faut-il transformer la Cour européenne des droits de l’homme en juridiction constitutionnelle?, Le Dalloz, 1638, 1641 (2003); Paul Mahoney, New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership, 21 Penn. St. Int’l L. Rev. 101, 105-106 (2002).

<sup>21</sup> See Marie-Aude Beernaert, Protocol 14 and New Strasbourg Procedures: Towards Greater Efficiency? And At What Price?, Eur. Hum. Rights Law Rev. 544, 553 (2005); Marie-Bénédicte Dembour, “Finishing Off” Cases: The Radical Solution to the Problem of the Expanding ECtHR Caseload, Eur. Hum. Rights Law Rev. 604, 612, 622 (2002); Philip Leach, Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery? 27 HRLJ 11-25 (2006); Gérard Cohen-Jonathan, Propos introductifs, in: Gérard Cohen-Jonathan/Jean-François Flauss (eds.), La réforme du système de contrôle contentieux de la Convention européenne des droits de l’homme, Bruxelles 2005, 42-44.

<sup>22</sup> GWP Report, *supra* note 10, 24.

<sup>23</sup> *Ibid.*, 35.

<sup>24</sup> *Ibid.*, 36.

it can be argued that a shift to a more constitutional Court would fail to acknowledge that the two functions of the Court are not separate but interdependent. The legitimacy theory of compliance, propounded by Thomas Franck, provides a useful theoretical tool for explaining this interrelation. The basic premise of Franck's legitimacy theory is that an international rule (as well as an international institution) perceived to have a high degree of legitimacy generates a correspondingly high measure of compliance on the part of those to whom it is addressed.<sup>25</sup> The legitimacy of a rule or of a rule-applying institution "is a function of the perception of those in the community concerned that the rule, or the institution, has come into being endowed with legitimacy: that is, in accordance with right process".<sup>26</sup> Franck identifies four elements as indicators for the legitimacy of an international institution: determinacy, symbolic validation, coherence and adherence.<sup>27</sup>

With regard to the European Court of Human Rights, we must remember that it is not – in contrast to the constitutional courts in the member states – established according to a democratically legitimised constitution. The Court is an international institution established by an international treaty, and the implementation of its decisions is unsupported by an effective structure of coercion comparable to a national enforcement system.<sup>28</sup> Compliance with the "constitutional" decisions of the Court therefore depends in part on the perception of the Court as a legitimate international institution. This perception is affected decisively by the institution's symbolic validation which is described as the "cultural and anthropological dimension"<sup>29</sup> of Franck's legitimacy theory. The Court's legitimacy thus is enhanced by the right to individual application which is considered to be a "basic feature of European legal culture"<sup>30</sup> by the Court itself. This assessment is shared by the GWP's Report<sup>31</sup> whose importance was stressed by the Council of Europe mem-

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<sup>25</sup> Thomas Franck, *The Power of Legitimacy Among Nations*, New York 1990, 16; Thomas Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 *Am. J. Int'l L.* 88, 93 (2006).

<sup>26</sup> Thomas Franck, *Legitimacy in the International System*, 82 *Am. J. Int'l L.* 705, 711 (1988).

<sup>27</sup> *Ibid.*, at 725.

<sup>28</sup> The Court's judgments are transmitted to the Committee of Ministers of the Council of Europe which supervises their execution (art. 46(2) of the ECHR). The Committee of Ministers verifies whether states in which a violation of the Convention has been found have taken adequate remedial measures to comply with the specific or general obligations arising out of the Court's judgments. However, under the present system, the Convention does not provide the Committee of Ministers with means to force a defaulting state to execute the Court's judgments. Protocol No. 14 will empower the Committee of Ministers, under certain conditions, to bring interpretation and infringement proceedings before the Court. See Explanatory Report, *supra* note 3, 96-100.

<sup>29</sup> Franck, *supra* note 26, 725.

<sup>30</sup> European Court of Human Rights, *Opinion of the Court on the Wise Persons' Report*, at 1 (April 2, 2007) [hereinafter *Opinion of the Court*], available at: <<http://www.echr.coe.int/NR/rdonlyres/26457EAB-2840-4D71-9ED7-85F0F8AE0026/0/OpinionoftheCourtontheWisePersonsReport.pdf>>.

<sup>31</sup> GWP Report, *supra* note 10, 23.

ber states.<sup>32</sup> These statements mirror the public opinion on the right to individual application, which is considered a “highly symbolic”<sup>33</sup> element of the Convention system. Therefore, the Court’s goal to provide any individual who claims to be a victim of a human rights violation with an international remedy can add to the perceived legitimacy of the institution. A higher degree of legitimacy, in turn, results in stronger compliance with the Court’s judgments, thereby promoting its constitutional function. Hence, a reform beyond Protocol No. 14 should reaffirm the two basic roles the Court has played to date: to deliver individual as well as constitutional justice.<sup>34</sup>

## IV. The Proposed Reform Measures

### 1. Structure and Modification of the Control Mechanism

#### 1.1. Greater Flexibility in Reforming the Judicial Machinery

In order to make the reform of the Convention system more flexible, the GWP proposed an amendment to the Convention authorising the Committee of Ministers to carry out reforms by way of unanimously adopted resolutions and with the Court’s approval. According to the Report, this “simplified” amendment procedure could be applied only to certain provisions relating to the operating procedures of the Court, forming a “statute” to the Convention. The statute should include all articles of section II of the Convention (and those governing the operation of the Judicial Committee proposed by the GWP) with the exception of certain provisions defining key institutional, structural and organisational elements of the judicial system. The simplified procedure would not be applicable to the provisions on the establishment of the Court and its Registry (arts. 19, 24(1)), its jurisdiction (arts. 32-34, 35(1), 47), the status of judges (arts. 20-23, 51), and the binding force and execution of the Court’s judgments (art. 46).<sup>35</sup>

<sup>32</sup> Minister’s Deputies, Decisions, 984th mtg., Item 1.6, 2, CM/Del/Dec(2007)984 (Jan. 22, 2007), available at: <[https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec\(2007\)984&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2007)984&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75)>.

<sup>33</sup> Mahoney, *supra* note 16, at 346. The importance of the right to individual application is also stressed by Marie-Louise Bemelmans-Vidéc, Comments on the Wise Persons’ Report from the Perspective of the Parliamentary Assembly of the Council of Europe, in: Council of Europe, Future Developments of the European Court of Human Rights in the Light of the Wise Persons’ Report, Strasbourg 2007, 45; Amnesty International, Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights, 8, AI Index IOR 61/008/2003 (Dec. 1, 2003), available at: <<http://web.amnesty.org/library/index/engior610082003>>.

<sup>34</sup> See Patricia Egli, Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism?, 17 J. Transnat’l L. & Pol’y 1, 26-28 (2007).

<sup>35</sup> See GWP Report, *supra* note 10, 44, 49.

As the GWP rightly stressed, such a method could prove in the long term to be an effective tool for making the Convention system more flexible and capable of adapting to new circumstances.<sup>36</sup> It could help to avoid the time-consuming process of drafting, adoption and, in particular, ratification of Protocols to amend the Convention. The ratification history of Protocol No. 14 provides a good example for this concern. However, it is important to clearly define the key institutional elements which would only be able to be reformed by a Convention amendment and the provisions encompassed in the “statute” which could be altered through the proposed simplified procedure. According to the GWP’s Report, Article 35(1) of the ECHR belongs to the key institutional provisions which cannot be amended in a simplified procedure. Given that the additional admissibility criteria in Article 35(2)-(4) of the ECHR are central aspects of the right to individual application, these paragraphs of Article 35 should also be excluded from any simplified amendment procedure. This exception would guarantee that the existing admissibility criteria are not altered without a thorough discussion within the member states. In this context, it is important to note that the introduction of a new admissibility criterion in Article 35 by Protocol No. 14 was very controversial throughout the whole reform process.<sup>37</sup>

## 1.2. Introducing a New Filtering Mechanism

The GWP also recommended introducing a judicial filtering body attached to, but separate from the Court. This new filtering body – the so-called “Judicial Committee” – would have jurisdiction to hear all applications raising admissibility issues, and all cases which could be declared manifestly well-founded or manifestly ill-founded on the basis of well-established case-law of the Court.<sup>38</sup> The Judicial Committee thus would process the mass of inadmissible<sup>39</sup> and repetitive cases<sup>40</sup> in particular which, under Protocol No. 14, would be assigned to single judges and committees of three judges.<sup>41</sup>

The GWP suggested that the new, full-time judges sitting on the Judicial Committee should be of high moral character and possess qualifications required for appointment to judicial office. They would enjoy full guarantees of independence

<sup>36</sup> Ibid., 46.

<sup>37</sup> For an overview see Frédéric Van n e s t e, A New Inadmissibility Ground, in: Paul Lemmens/Wouter Vandenhoe (eds.), Protocol No. 14 and the Reform of the European Court of Human Rights, Antwerpen/Oxford 2005, 69-88.

<sup>38</sup> See GWP Report, *supra* note 10, 55-56.

<sup>39</sup> In 2006, there were some 28,160 applications declared inadmissible or struck out of the list of cases by the Court; only 1,634 applications were considered admissible. See Survey of Activities, *supra* note 2, at 40.

<sup>40</sup> Some 60% of the admissible cases are so-called repetitive cases; they derive from the same structural cause as an earlier application leading to a judgment finding a breach of the Convention. See Explanatory Report, *supra* note 3, 7.

<sup>41</sup> Protocol No. 14, *supra* note 3, arts. 7, 8.

and be subject to the same requirements as the members of the Court with regard to impartiality. Candidates' professional qualifications and language skills should be evaluated by the Court in an opinion prior to their election by the Parliamentary Assembly.<sup>42</sup> The GWP also suggested that the number of judges sitting on the Judicial Committee should be smaller than the number of Convention member states. However, the Committee's composition should reflect a geographical balance as well as a harmonious gender balance and should be based on a system of rotation between member states.<sup>43</sup>

The Judicial Committee would come under the Court's authority. Consequently, the Chair of the Committee would be a member of the Court, appointed by the latter for a specified period.<sup>44</sup> The Judicial Committee could refer a case to the Court if the Committee found that it lacked jurisdiction or if it considered that the case raised issues warranting determination by the Court. In order to prevent the Court from being overburdened, no appeals should be allowed against the decisions of the Judicial Committee. However, the Court would have the competence to assume jurisdiction to review any decision adopted by the Committee.<sup>45</sup>

As a consequence of the proposal to introduce a Judicial Committee and according to the "logic underlying the new role proposed for the Court", the GWP suggested that the reform "should lead in due course to a reduction in the number of judges of the Court".<sup>46</sup> The GWP thus recommended limiting the number of members of the Court which, under the present system, equals the number of Convention member states. The Report, however, did not mention how many judges the Court should contain; it only referred to the fact that the International Court of Justice consists of 15 members and the Inter-American Court of Human Rights of seven members.<sup>47</sup> To ensure the presence of a national judge of the member state party to a dispute before the Court, the GWP suggested appointing an *ad hoc* judge.<sup>48</sup>

The establishment of a special "filtering" division was already contemplated in the drafting process of Protocol No. 14.<sup>49</sup> The Court always strongly supported this suggestion, stressing that "ultimately a separate filtering body will be required".<sup>50</sup> The proposal to introduce a special filtering division, however, was fi-

<sup>42</sup> See GWP Report, *supra* note 10, 54.

<sup>43</sup> *Ibid.*, 53.

<sup>44</sup> *Ibid.*, 57.

<sup>45</sup> *Ibid.*, 62-64.

<sup>46</sup> *Ibid.*, 120.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, 121.

<sup>49</sup> Evaluation Group, Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, 98, EG Court(2001)1 (Sept. 27, 2001), reprinted in: 22 HRLJ 308 (2001). See also Cohen-Jonathan, *supra* note 21, 46-51.

<sup>50</sup> Group on the Reinforcement of the Human Rights Protection Mechanism, Response of the European Court of Human Rights to the CDDH Interim Report Following the 46<sup>th</sup> Plenary Administrative Session on 2 February 2004, 7, CDDH-GDR(2204)001 (Feb. 10, 2004), available at: <<http://>



nally rejected in the earlier reform discussion, mainly because of the financial implications and concerns about creating “lower status” judges. In addition, the drafters of Protocol No. 14 were worried that the establishment of a separate filtering mechanism would be perceived as reverting to the two-tiered system, encompassing the European Commission and the European Court of Human Rights, which was abolished with Protocol No. 11<sup>51</sup> in 1998.<sup>52</sup>

It can be expected that the GWP’s proposal to establish a Judicial Committee will confront the same objections put forward in earlier reform discussions. These concerns should be taken seriously and the proposal modified accordingly. Instead of appointing new Committee judges, the members of the new filtering mechanism could be drawn from the existing roster of Court judges.<sup>53</sup> One could imagine that the Judicial Committee, composed of 38 judges of the existing Court, would deal with applications raising admissibility questions and with applications which could be decided based on well-established case-law. On the other hand, the Court, composed of nine judges, would deal with cases raising more complex issues.<sup>54</sup> The decisions of the Judicial Committee should, as envisioned under Protocol No. 14, be taken by a single judge or by benches of three judges. Undoubtedly, the Judicial Committee would have to rely on the support of a corps of rapporteurs, which would be introduced by Protocol No. 14, to increase its filtering capacity. It will be up to the Court to decide how many rapporteurs are needed, and how and for how long they will be appointed.<sup>55</sup>

The establishment of a specialised filtering mechanism along these lines would have several advantages and may prove an important additional long-term measure

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<sup>51</sup> On Protocol No. 11, see Rudolf Bernhardt, Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11, 89 Am. J. Int’l L. 145 (1995); Andrew Drzemczewski/Jens Meyer-Ladewig, Principal Characteristics of the new ECHR Control Mechanism, as Established by Protocol No. 11, signed on 11 May 1994, 15 HRLJ 81 (1994); Henry G. Schermers, Adoption of the 11th Protocol to the European Convention on Human Rights, 20 Eur. L. Rev. 559 (1995).

<sup>52</sup> See CDDH, Interim Report of the CDDH to the Committee of Ministers “Guaranteeing the Long-term Effectiveness of the European Court of Human Rights,” 23-31, CM(2002)146 (Oct. 18, 2002), available at: <[http://www.coe.int/t/f/droits\\_de\\_l%27homme/2002cm146.pdf](http://www.coe.int/t/f/droits_de_l%27homme/2002cm146.pdf)>. See also Lucius Cafilisch/Martina Keller, Le Protocole additionnel n° 15 à la Convention européenne des droits de l’homme, in: Lucius Cafilisch et al. (eds.), Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views, Kehl a. Rhein 2007, 107.

<sup>53</sup> See Wilhelmina Thomassen, Relations between the Court and States Parties to the Convention, in: Council of Europe, Future Developments of the European Court of Human Rights in the Light of the Wise Persons’ Report, Strasbourg 2007, 60, available at: <[http://www.coe.int/t/f/droits\\_de\\_l%27homme/San\\_Marino\\_Proceedings.pdf](http://www.coe.int/t/f/droits_de_l%27homme/San_Marino_Proceedings.pdf)>. For an earlier proposal in that direction see Flauss, *supra* note 20, 1643-1644.

<sup>54</sup> The new number of Court judges would of course require a rethinking of the composition of the Court’s Grand Chamber and the rehearing of cases before the Grand Chamber. For reform proposals regarding the Grand Chamber see Cafilisch, *supra* note 16, at 414-415; Cafilisch/Keller, *supra* note 52, at 108-110.

<sup>55</sup> See Explanatory Report, *supra* note 3, 59.

to process the mass of inadmissible and repetitive cases more effectively. First, the new filtering mechanism would be composed of existing judges, avoiding additional costs for newly appointed Committee judges. Second, the members of the Judicial Committee and the members of the Court would be elected according to the same rules, guaranteeing the same legitimacy. In order to ensure that all judges enjoy the same status regarding their jurisdiction, it would be equitable to assign the judges to the Committee or the Court on the basis of a system of rotation. Such a rotation system would facilitate the election of highly qualified judges, because it may be difficult to find enough competent judges for the Committee who would limit themselves to deciding issues of admissibility and well-established case-law.<sup>56</sup> Third, the fact that the members of the Committee and the Court enjoy the same judicial status and that the Committee is attached to the Court should resolve concerns that this new filtering mechanism amounts to a return to the two-tier system operating prior to Protocol No. 11. In addition, drawing the members of the Committee from the existing Court judges would guarantee that at least one judge from every member state is sitting either on the Committee or the Court. As a consequence, when the presence of a national judge in a case against a member state is required, it would not be necessary to appoint an *ad hoc* judge who had not been through the regular election process and approved by the Parliamentary Assembly.<sup>57</sup>

The idea behind the Judicial Committee is to separate the functions of filtering inadmissible and repetitive applications and adjudication of cases raising more complex issues under the Convention. This division of labour is intended to increase efficiency of output. However, as some participants of the Colloquy on the “Future Developments of the European Court of Human Rights in the Light of the Wise Persons’ Report” in March 2007 rightly stressed, it is still unclear whether the introduction of a new filtering body would make a significant difference in terms of the effectiveness of the Convention system.<sup>58</sup> It must be recalled that this proposal is based on the control mechanism as amended by Protocol No. 14. Without having observed the functioning of the single-judge formation and the expanded role for three-judge committees provided in Protocol No. 14, the addi-

<sup>56</sup> See Caflisch, *supra* note 16, at 414; Thomassen, *supra* note 53, at 60.

<sup>57</sup> Note that under the present rules of procedure, the practice has been for the President of the Court to invite the state to make the appointment of an *ad hoc* judge at the time that the case is announced. However, NGOs expressed concerns about the independence of *ad hoc* judges, and the Parliamentary Assembly was concerned because of the number of cases in which *ad hoc* judges were appointed who had never been through the process of Assembly approval, and for this reason, in their view, lacked legitimacy. Because of these concerns, Protocol No. 14 provides for a new system of appointment of *ad hoc* judges. Under the new rule, each member state is required to draw up a reserve list of *ad hoc* judges from which the President of the Court shall appoint someone when the need arises. See Explanatory Report, *supra* note 3, 64; Eaton/Schokkenbroek, *supra* note 5, at 11.

<sup>58</sup> See Maud de Boer-Buquicchio, Synthesis of the Colloquy, in: Council of Europe, Future Developments of the European Court of Human Rights in the Light of the Wise Persons’ Report, Strasbourg 2007, 91.

tional increase in case-processing capacity of the Judicial Committee is hard to assess.<sup>59</sup>

## 2. Relations Between the Court and the Member States

### 2.1. Enhancing the Authority of the Court's Case-law

The GWP stressed that the dissemination of the Court's case-law in the member states and recognition of its authority would undoubtedly enhance the effectiveness of the Convention's control mechanism. Therefore, national authorities should be able to have access to the Court's case-law in their respective language. The responsibility for translation, publication and dissemination of the case-law, however, lies with the member states.<sup>60</sup> The GWP also emphasised the responsibility of the Court to decide which judgments to publish in full as well as to ensure a structured presentation of cases. The Report considered a regular production of handbooks or other summaries in languages other than the Council of Europe official languages as useful means to enhance the case-law's dissemination in the member states.<sup>61</sup>

It is important to stress that a wider dissemination of the Court's case-law and recognition of its authority at national level will undoubtedly enhance the control mechanism's effectiveness. If domestic authorities are aware of and follow the Court's judgments which are relevant for the cases before them, the need to apply to the Court for redress could be reduced. Furthermore, a better dissemination of information about the Convention, in particular regarding the admissibility criteria, may reduce the number of inadmissible applications lodged with the Court. As the experiences from the Warsaw pilot project show, the establishment of an information office at the national level could support this goal.<sup>62</sup> In addition, the Commissioner for Human Rights, in cooperation with national human rights institutions, could play an important role in providing information on the Court's case-law.<sup>63</sup>

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<sup>59</sup> See also Opinion of the Court, *supra* note 30, at 2.

<sup>60</sup> See GWP Report, *supra* note 10, 72.

<sup>61</sup> *Ibid.*, 73-74.

<sup>62</sup> On the Warsaw Information Office Pilot Project see Lord Wolf et al., Review of the Working Methods of the European Court of Human Rights (Dec. 2005) [hereinafter Lord Wolf Report], reprinted in: 26 HRLJ 447, 453-454 (2005).

<sup>63</sup> See Thomas Hammarberg, Alternative or Complementary Means of Resolving Disputes, in: Council of Europe, Future Developments of the European Court of Human Rights in the Light of the Wise Persons' Report, Strasbourg 2007, 71.

## 2.2. Advisory Opinions

The GWP studied the possibility of intensifying the cooperation between the Court and the highest courts in the member states. The introduction of a mechanism for a preliminary ruling by the Court, comparable to the one provided in the European Union, was thought unsuitable in the Convention's context. The GWP considered it more useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to the interpretation of the Convention and the protocols thereto.<sup>64</sup> The request for an advisory opinion would be admissible under certain strict conditions: (1) only constitutional courts or courts of last instance should be able to submit a request for an opinion; (2) the opinions requested should only concern questions of principle or of general interest; (3) and the Court should have discretion to refuse to answer a request for an opinion.<sup>65</sup> As a rule, the advisory opinions given by the Court would not have any binding force.<sup>66</sup>

The GWP stressed that this proposal would "foster dialogue between courts and enhance the Court's 'constitutional' role".<sup>67</sup> However, it is questionable if these aims could be fulfilled with the proposed system under which the advisory opinions would have no binding force. There is a substantial risk that member states would not follow the Court's advisory opinions, thereby undermining a constructive dialogue and the Court's authority. The introduction of an advisory opinion system – even under the strict conditions set out in the GWP's Report – first of all would increase the already heavy workload of the Court. This position was also entertained by the Court stating that advisory jurisdiction would "entail more work for the Court" and should be "reserved for future consideration, when the current problems of the system will have been resolved (...)".<sup>68</sup> The workload problem would even be aggravated by the fact that all member states had the opportunity to submit observations to the Court on the legal issues involved.<sup>69</sup> In addition, – if the authority of the advisory opinion should be enhanced – the Court would have to give individuals involved in the case submitted for an advisory opinion as well as third parties, such as the Commissioner for Human Rights or NGOs, the opportunity to submit their comments and observations.<sup>70</sup>

<sup>64</sup> See GWP Report, *supra* note 10, 81.

<sup>65</sup> *Ibid.*, 86.

<sup>66</sup> *Ibid.*, 82.

<sup>67</sup> *Ibid.*, 81.

<sup>68</sup> Opinion of the Court, *supra* note 30, at 3.

<sup>69</sup> GWP Report, *supra* note 10, 84.

<sup>70</sup> See Thomassen, *supra* note 53, at 62-63; see also Amnesty International, Council of Europe: Ensuring the Long-term Effectiveness of the European Court of Human Rights – NGO Comments on the Group of Wise Persons' Report, 40, AI Index IOR 61/002/2007 (Jan. 16, 2007) [hereinafter NGO Comments], available at: <<http://web.amnesty.org/library/index/engior610022007>>.

### 2.3. Improvement of Domestic Remedies

The GWP stressed that the domestic remedies for redressing violations of Convention guarantees should be improved. The need for such an improvement was exemplified by the mass of complaints about the unreasonable length of domestic proceedings. According to Registry statistics, this category of cases accounted for 25 % of all judgments delivered in 2005.<sup>71</sup> Therefore, the GWP proposed drafting a “Convention text”<sup>72</sup> placing an explicit obligation on the member states to introduce domestic legal mechanisms consistent with the criteria set out in *Scordino v. Italy*<sup>73</sup> to redress the damage resulting from any Convention violation.<sup>74</sup>

The idea behind this proposal is to enhance the subsidiary nature of the Convention’s control mechanism<sup>75</sup> by giving potential applicants judicial relief at the domestic level before they submit an application to the Court.<sup>76</sup> The guarantee of effective domestic remedies for redressing violations of Convention rights – in particular where the excessive length of proceedings is concerned – would indeed relieve the Court of a considerable number of applications. However, the improvement of this situation implies reform measures addressing underlying structural problems in the member states. As the Court stressed, domestic progress in this area “is largely dependent upon political will and capacity for reform”.<sup>77</sup> It is therefore questionable if another Convention text would be an effective way to improve the domestic judicial protection of the Convention rights. As a matter of fact, member states already are obligated under the Convention to ensure effective, accessible domestic remedies in the event of Convention violations.<sup>78</sup> The improvement of domestic remedies, however, could be enhanced with the valuable support of other Council of Europe bodies, such as the Commissioner for Human Rights or the European Commission for Democracy through Law (Venice Commission), in cooperation with domestic human rights institutions. In connection with the mass of applications stemming from the allegedly unreasonable length of legal proceedings, a case can be made for the introduction of a European Fair Trials Commission. This Commission could serve several functions (comparable to those of

<sup>71</sup> GWP Report, *supra* note 10, 88.

<sup>72</sup> *Ibid.*, 93.

<sup>73</sup> *Scordino v. Italy* (No. 1), Eur. Ct. H.R., App. No. 36813/97, March 29, 2006, available at: <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>>.

<sup>74</sup> GWP Report, *supra* note 10, 93.

<sup>75</sup> See generally Herbert Petzold, The Convention and the Principle of Subsidiarity, in: Ronald St. J. Macdonald/Franz Matscher/Herbert Petzold (eds.), *The European System for the Protection of Human Rights*, Dordrecht/Boston/London 1993, 41-62.

<sup>76</sup> GWP Report, *supra* note 10, 90.

<sup>77</sup> Opinion of the Court, *supra* note 30, at 4.

<sup>78</sup> See, e.g. *Z. a. o. v. the United Kingdom*, Eur. Ct. H.R., App. No. 29392/95, 2001-V, 103; *Kudla v. Poland*, Eur. Ct. H.R., App. No. 30210/96, 2000-XI, 152.

the Venice Commission) such as researching and promoting fair trial issues in the member states, in particular regarding the length of proceedings.<sup>79</sup>

#### 2.4. The Award of Just Satisfaction

The GWP's Report considered that where the Court, or the Judicial Committee, under Article 41 of the ECHR holds that the victim must be awarded compensation, the decision on the precise amount of compensation should be referred to the member state concerned.<sup>80</sup> The Court and the Judicial Committee would have the power to depart from this general rule and give their own decision on just satisfaction where such a decision is necessary to ensure effective protection of the victim and especially where it is a matter of particular urgency.<sup>81</sup> According to the GWP, each member state would have to designate a national judicial body responsible for the determination of just compensation. The domestic determination of compensation should follow the criteria developed in the Court's case-law and avoid unnecessary formalities and unreasonable costs.<sup>82</sup> Furthermore, victims would be able to apply to the Court or the Judicial Committee where the national judicial body failed to comply with the Court's case-law or deadlines set for resolving the compensation issue.<sup>83</sup>

The GWP stressed that the Court and the Judicial Committee should be relieved of tasks which could be carried out "more effectively by national bodies".<sup>84</sup> However, it is doubtful whether – as a general rule – national bodies would handle more effectively the determination of just satisfaction.<sup>85</sup> On the one hand, some states would first have to introduce fair, efficient and readily accessible procedures which would grant national courts jurisdiction to consider such cases.<sup>86</sup> On the other hand, some states allow applicants to claim damages in domestic courts following Court findings of violations and even to appeal these decisions. The GWP's proposal thus could be incompatible with some national systems and impose restrictions on existing domestic remedies.<sup>87</sup> Furthermore, given the frequently differing views of successful applicants and respondent member states as to the appropriate amount of compensation, it seems likely that many national just satisfaction de-

<sup>79</sup> See Greer, *supra* note 16, 282-289.

<sup>80</sup> GWP Report, *supra* note 10, 94. This position was also entertained by Paul Mahoney, Thinking a Small Unthinkable: Repatriating Reparation from the European Court of Human Rights to the National Legal Order, in: Cafilisch et al., *supra* note 52, 263-283.

<sup>81</sup> Ibid., 96.

<sup>82</sup> Ibid., 98.

<sup>83</sup> Ibid., 99.

<sup>84</sup> Ibid., 94.

<sup>85</sup> See also Opinion of the Court, *supra* note 30, at 4; de Boer-Buquicchio, *supra* note 58, at 90-91.

<sup>86</sup> See Alastair Mowbray, Beyond Protocol 14, 6 Hum. Rts. L. Rev. 578, 584 (2006); see also NGO Comments, *supra* note 70, 38.

<sup>87</sup> See Thomassen, *supra* note 53, at 64.

terminations would be challenged before the Court or the Judicial Committee.<sup>88</sup> Therefore, it is questionable whether this proposal would substantially reduce the Strasbourg institutions' workload. Against this background, the introduction of a specialised just satisfaction division within the Registry at the end of 2006 – as proposed by Lord Woolf's Report<sup>89</sup> – seems a better option to assist the Court in determining just compensation issues.

## 2.5. The “Pilot Judgment” Procedure

The GWP endorsed the Court's adoption of the “pilot judgment procedure” as an effective means to deal with numerous applications concerning a “systemic defect”<sup>90</sup> in a particular state's legal order. The *Broniowski* judgment<sup>91</sup> defines such a systemic problem as a case where the facts “disclose the existence, within the [relevant] legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied [their Convention rights]” and where “the deficiencies in national law and practice identified (...) may give rise to numerous subsequent well-founded applications”.<sup>92</sup> The Court expressly stated that, although it is in principle the respondent state, not the Court, which determines the measures needed to execute a Court's judgment, general legislative and administrative measures at the national level have to be taken – measures which should provide redress for the Convention violation identified in the judgment to all individuals who are in a situation comparable to that of the successful applicant.<sup>93</sup> All similar applications before the Court were adjourned, pending the implementation of the relevant general measures asked for in the “pilot judgment”.<sup>94</sup>

Regarding this procedure, the GWP raised the question of whether the existing judicial machinery, including the Court's rule of procedure, will suffice or whether a reform of the Convention should be contemplated in order to achieve the desired

<sup>88</sup> See also Alastair Mowbray, *Faltering Steps on the Path to Reform of the Strasbourg Enforcement System*, 7 Hum. Rts. L. Rev. 609, 616 (2007); Thomassen, *supra* note 53, at 64.

<sup>89</sup> See Lord Woolf Report, *supra* note 62, at 457.

<sup>90</sup> *Broniowski v. Poland*, Eur. Ct. H.R., App. No. 31443/96, 2004-V, 193.

<sup>91</sup> In *Broniowski v. Poland*, the Court found a violation of Article 1 of Protocol No. 1 to the Convention (right to property). This violation had originated in a systemic problem caused by the Polish authorities' failure to implement an effective mechanism to compensate persons for the property abandoned in the territories beyond the Bug River as a result of boundary changes following the Second World War. On that judgment see Lech Galiński, *Broniowski and After: On the Dual Nature of “Pilot Judgments”*, in: Cafilisch et al., *supra* note 52, 177-192.

<sup>92</sup> *Broniowski v. Poland*, Eur. Ct. H.R., App. No. 31443/96, 2004-V, 189.

<sup>93</sup> *Ibid.*, 193.

<sup>94</sup> See Pierre-Henri Imbert, *Follow-up to the Committee of Ministers' Recommendations on the Implementation of the Convention at the Domestic Level and the Declaration on “Ensuring the Effectiveness of the Implementation of the European Convention on Human Rights at National and European Levels”*, in: Council of Europe, *Reform of the European Human Rights System: Proceedings of the High-level Seminar, Oslo, 18 October 2004, Strasbourg 2004*, 40.

results.<sup>95</sup> However, as the GWP itself stressed, this question must be considered “in the light of practical experience”.<sup>96</sup> Given that the pilot judgment procedure involves sensitive and yet unresolved issues, the Court should be allowed more time to refine its strategy.<sup>97</sup> This position was also entertained by the Court itself who stressed that further experience with the pilot judgment procedure is required, along with an assessment of its success in assisting states confronted with systemic problems, before the procedure could be incorporated in a Convention amendment.<sup>98</sup>

### 3. Alternative or Complementary Means of Dispute Resolution

#### 3.1. Friendly Settlements and Mediation

Protocol No. 14 is intended to enhance the Court’s important friendly settlement practice.<sup>99</sup> Under new Article 39 of the ECHR, every stage of the application procedure allows for the possibility of negotiating a friendly settlement. In addition, Protocol No. 14 would enable the Committee of Ministers to supervise the execution of the Court’s decision endorsing the terms of the friendly settlement.<sup>100</sup> In order to reduce the Court’s workload and to assist both victims and member states, the GWP stressed that friendly settlement procedures at national or Council of Europe level should be encouraged where the Court, or the Judicial Committee, considers that an admissible case lends itself to such a solution.<sup>101</sup>

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<sup>95</sup> GWP Report, *supra* note 10, 105. In the reform discussions leading to Protocol No. 14, the Court already suggested to introduce a Convention provision establishing a “pilot judgment procedure”. This proposal, however, was rejected by the Government experts noting that such a procedure “could be followed without there being a need to amend the Convention”. See CDDH, Interim Activity Report, 21, CDDH(2003)026 Addendum I Final (Nov. 26, 2003), available at: <[http://www.coe.int/t/t/droits\\_de\\_l%27homme/CDDH\(2003\)026\\_%20E%20Interim.asp#TopOfPage](http://www.coe.int/t/t/droits_de_l%27homme/CDDH(2003)026_%20E%20Interim.asp#TopOfPage)>.

<sup>96</sup> GWP Report, *supra* note 10, 105.

<sup>97</sup> On some of the issues raised by the pilot judgment procedure see Andrea Gattini, Mass Claims at the European Court of Human Rights, in: Stephan Breitenmoser et al. (eds.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, Zürich/St. Gallen 2007, 271-294; Jochen Abr. Frowein, The Binding Force of ECHR Judgments and Its Limits, in: Breitenmoser et al., *ibid.*, 261-269; Vladimiro Zagrebelsky, Questions autour de Broniowski, in: Cafilisch et al., *supra* note 52, 521-535.

<sup>98</sup> Opinion of the Court, *supra* note 30, at 5; see also NGO Comments, *supra* note 70, 34-35; Bemelmans-Vidéc, *supra* note 33, 48.

<sup>99</sup> On that practice see Hans C. Krüger/Carl A. Nørgaard, Reflections Concerning Friendly Settlement under the European Convention on Human Rights, in: Franz Matscher/Herbert Petzold (Hrsg.), *Protecting Human Rights: The European Dimension*, Studies in Honour of Gérard J. Wiarda, Köln etc. 1988, 334. See also Committee of Ministers, Resolution Res(2002)59 Concerning the Practice in Respect of Friendly Settlements (Dec. 18, 2002), available at: <<https://wcm.coe.int/ViewDoc.jsp?id=331569&Lang=en>>.

<sup>100</sup> Protocol No. 14, *supra* note 3, art. 15(1), (4).

<sup>101</sup> GWP Report, *supra* note 10, 108.



Friendly settlements may provide a fast and effective way of redressing individual grievances; they may also be attractive to the applicant, the respondent state, and the Court alike. Due to their individualistic nature, friendly settlements will prove particularly useful in cases where questions of principle or changes in domestic law are not involved.<sup>102</sup> As for repetitive cases, a friendly settlement might even be an opportunity for the state to globally settle the matter for the future.<sup>103</sup>

### 3.2. Extension of the Duties of the Commissioner for Human Rights

The GWP envisaged a more active role for the Council of Europe's Commissioner for Human Rights in the Court's control system.<sup>104</sup> In order to fulfil his mandate, the Commissioner works together with European and national human rights institutions, thereby building up an active network. The GWP stressed that the Commissioner, with the support of this network, could help to reduce the Court's workload. In particular, the Commissioner could identify shortcomings in the legal system of a member state likely to trigger a large number of applications to the Court; hence, systemic defects. The Commissioner, in conjunction with national human rights institutions, could also provide advice and information to find a solution to such a systemic problem at the national level.<sup>105</sup> In addition, the Commissioner should respond actively to Court decisions finding serious violations of human rights and help to disseminate information on the Convention.<sup>106</sup>

The Commissioner has the potential to play a significant role in promoting and strengthening Convention rights at the national and European level. First, if the Commissioner could identify systemic problems in member states and secure redress at the domestic level with the support of his network, there would be no need for individuals to take their cases to the Court. Second, as the Commissioner himself stressed, he could assist the Court in identifying applications that should give rise to a pilot judgment, in determining the general measures required by the execution of such a pilot judgment and in understanding the problems preventing national authorities from taking such measures.<sup>107</sup> Supported by national human rights institutions, the Commissioner is very well placed to provide the Strasbourg bodies with reliable and comprehensive information about key issues regarding

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<sup>102</sup> For critical remarks, however, see Fiona Ang/Eva Berghmans, Friendly Settlements and Striking out of Applications, in: Paul Lemmens/Wouter Vandenhole (eds.), Protocol No. 14 and the Reform of the European Court of Human Rights, Antwerpen/Oxford 2005, 94-97.

<sup>103</sup> See Gattini, *supra* note 97, at 278-279.

<sup>104</sup> The Office of the Commissioner for Human Rights was established by the Committee of Ministers of the Council of Europe in 1999 as an independent institution within the Council of Europe. See Committee of Ministers, Resolution (99)50 on the Council of Europe Commissioner for Human Rights (May 7, 1999), available at: <<https://wcd.coe.int/ViewDoc.jsp?id=458513&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>>.

<sup>105</sup> GWP Report, *supra* note 10, 113.

<sup>106</sup> *Ibid.*, 110, 112-113.

<sup>107</sup> Hammarberg, *supra* note 63, 70.

systemic failures in a state's legal system and the adequate remedies required to address such failures. However, full respect for the respective independence of the Commissioner and his partners on the international and national level is "the cornerstone of an enhanced cooperation".<sup>108</sup> In addition, adequate resources are vital for the effective extension of the Commissioner's role.<sup>109</sup>

#### 4. The Institutional Dimension of the Control Mechanism

Finally, the GWP considered a number of institutional issues. It stressed the importance of introducing a social security scheme for the Court judges.<sup>110</sup> In addition, the GWP opined that the professional qualifications and knowledge of languages of candidates for the post of a judge should be carefully examined and proposed the establishment of a committee of prominent persons which should give an opinion on the suitability of the candidates before the Parliamentary Assembly discusses the candidatures.<sup>111</sup> Furthermore, the GWP emphasised that the Court should be granted 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.<sup>112</sup>

All these institutional measures aim for the reinforcement of the Court's independence and impartiality as fundamental requirements of the rule of law. They are important steps to enhance the Court's authority which, in turn, may contribute to a more effective execution of the Court's judgments. The introduction of individual and particularly general measures to implement the Court's judgments, capable of providing redress to both current and future applicants, will help to ease the caseload pressure of the Court.

## V. Conclusions

The GWP's Report stressed that it takes Protocol No. 14 "as a starting point".<sup>113</sup> It is therefore clear that the Report's proposals cannot be understood as alternatives to Protocol No. 14. However, given the continuing uncertainty over the time the Russian Federation will take to ratify Protocol No. 14,<sup>114</sup> it is important to dis-

<sup>108</sup> Ibid., at 72.

<sup>109</sup> GWP Report, *supra* note 10, 110.

<sup>110</sup> Ibid., 116.

<sup>111</sup> Ibid., 118. See also *Bemelmans-Vidéc*, *supra* note 33, 51.

<sup>112</sup> GWP Report, *supra* note 10, 124. For the discussion of these institutional issues in the drafting process of Protocol No. 14 see Norbert Paul Engel, Status, Ausstattung und Personalhoheit des Inter-Amerikanischen und des Europäischen Gerichtshofs für Menschenrechte, EuGRZ 122, 131-133 (2003).

<sup>113</sup> GWP Report, *supra* note 10, 33.

<sup>114</sup> See *Mowbray*, *supra* note 88, at 609-611.

cuss the GWP's recommendations and to reflect on the follow-up to the Report independently of the Protocol.

Several proposals put forward by the GWP could be implemented immediately without amending the Convention. These are: the measures enhancing the authority of the Court's case-law in the member states; the encouragement of the Court's developing practice of adopting pilot judgments; the use of friendly settlements; and the extension of the duties of the Commissioner for Human Rights. Some other recommendations would require amendments to the Convention or a separate legal instrument from the Council of Europe. These long-term measures would take considerable time to debate in detail and even more time to implement. Regarding the Convention's control mechanism, one important step is to create additional tools to improve the filtering of inadmissible cases and the processing of repetitive cases. Thus, the proposal to establish a specialised Judicial Committee along the lines developed above deserves further consideration. In addition, the Convention's amendment authorising the Committee of Ministers to make certain reforms through unanimously adopted resolutions as well as the improvements of the institutional dimension of the control mechanism should be examined in greater detail. However, it is clear that only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the present challenges of the Convention's control mechanism, thereby ensuring its long-term effectiveness.

ZaöRV 68 (2008)

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