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CCBE Proposals for reform of the ECHR machinery

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The regulation of the profession, the defence of the Rule of Law, human rights and democratic values are the most important missions of the CCBE. The CCBE cooperates with the Council of Europe in a number of areas, notably through its membership of the Conference of International Non-Governmental Organisations, its observer status at the Steering Committee on Human Rights (CDDH), European Commission for the Efficiency of Justice (CEPEJ) and the Consultative Council of European Judges (CCJE), as well as at a number of committees and drafting groups related to the future of the Convention, migration, and freedom of expression. The CCBE has also a close relation with the European Court of Human Rights which includes among other things the publication and regular updating of a practical guide for lawyers (The European Court of Human Rights - Questions & Answers for Lawyers – last updated in 2018) and annual bilateral meetings to discuss issues of particular importance for the legal profession.

CCBE Proposals

The CCBE

CONSIDERING the importance of the effective protection of human rights;

RECALLING that human rights protection is the responsibility of national authorities and courts, supplemented by the subsidiary, but essential, role of the European Court of Human Rights (the Court);

CONCERNED by the length of proceedings under the European Convention of Human Rights (ECHR), involving both the Court and the execution of the Court's judgments, supervised by the Committee of Ministers though its specialised human rights committee, the CMDH;

MINDFUL of:

- The particularly severe delays affecting the backlog of serious cases which have been pending before the Court for years but whose examination has scarcely been accelerated by the reforms undertaken to date (the backlog);
- The risk that even after judgments are given in these backlog cases, often seven and too frequently ten or more years after they were first lodged with the Court, the execution of those judgments will often take up to five further years;
- The necessity for reforms which can rapidly contribute to reducing these cumulative delays, in order to maintain the credibility and efficiency of the ECHR machinery;
- The desirability of reforms which can be implemented without delay and which do not require amendments to the ECHR or any additional Protocol;
- The opportunity to propose reforms provided by the debate in the Committee of Ministers in the tenth year of the Interlaken Process;

ALERT to the responsibility incumbent on lawyers, as representatives of applicants in domestic proceedings and before the Court, to contribute energetically to assisting the reforms, both through this debate and especially through the implementation of improvements in training of lawyers to ensure that submissions on ECHR points are effective in national courts and before the Court and the CMDH:

RECOMMENDS:

A. That the Court:

1. Improve its dialogue with senior national courts by developing a practice of endorsement of ECHR – related arguments in submissions by senior national courts, including an assessment of the national significance of the case, which would help the Court to identify cases meriting priority because of such significance ;
2. Improve transparency and effectiveness by judicialising the *triage* of newly lodged applications to the Court, incorporating immediate case management decisions where possible and informing the parties accordingly;
3. Adopt a simplified procedure for repetitive and manifestly well founded (WECL) cases, based on the immediate case management decisions at the *triage* stage, whereby WECL cases could be declared admissible, but not normally result in a judgment from the Court;
4. Enhance the use of the Committee formation (3 judges) to improve the effective use of judicial resources and reform the composition of the Grand Chamber to a fixed composition to improve consistency of interpretation of the ECHR;
5. Exploit the advantages of the immediate *triage* of newly lodged applications and the associated judicial case management decisions to create a Chamber for urgent cases and strengthen the authority of - and consistency of decisions on - provisional measures; and
6. Develop additional training to prepare and enable the secondment of lawyers from private practice to support and accelerate the work of the Court's Registry.

B. That the CMDH:

1. Increase the time available for adjudicating on the execution of judgments by extending the duration of its meetings, holding more meetings and progressively moving to 'permanent session';
2. Further improve the transparency of its handling of enhanced procedure (more serious) cases by involving applicants' representatives in the allocation of new judgments to lead cases, inviting Rule 9 submissions and giving notice of the cases proposed to be debated in advance of each CMDH meeting;
3. Study and develop:
    a. a new distinct procedure for assessing the compensation based on just satisfaction due in WECL (manifestly well-founded) cases;
    b. clear criteria for using Article 46(4) together with new rules governing the scrutiny of cases where the Court finds that Article 46(1) has been breached; and
    c. means for facilitating the enforcement of just satisfaction awards by national courts, including, but not limited to, those of the respondent State.
4. Develop, in conjunction with the CCBE and national and local bars and law societies, training to improve lawyers' submissions under Rule 9 and to enable the effective secondment of lawyers from private practice to support and accelerate the work of the Secretariat DG I.

C. That the CCBE and its constituent national and local bars and law societies:

1. Work with the senior national courts to introduce the practice of endorsement of ECHR arguments by senior national courts to ensure the clear presentation and analysis of ECHR arguments raised in domestic appeals and to help the Court to identify cases meriting priority because of their national significance ;

2. Enhance their efforts to provide training or information through the Guide for Practitioners to ensure the effective deployment of ECHR arguments in national appeals and in submissions to the Court; and

3. Support efforts to provide specific training by experienced practitioners to prepare and equip lawyers for effective secondment to the Court Registry and the Secretariat DG I to help to address the backlog.

Explanatory Memorandum

Background

1. Through the Interlaken Process the Committee of Ministers of the Council of Europe has developed initiatives to reform the machinery of the European Convention of Human Rights (ECHR) within the confines of its current structure. The reforms have addressed both the European Court of Human Rights (the Court) and the supervision of the execution of the Court's judgments by the expert committee of the Committee of Ministers, the CMDH.

2. The aim of the reforms has been to enable the Court to deal effectively with its heavy current workload and substantial backlog. Significant reforms have been achieved, including the entry into force of Protocol No 14, with the adoption of a single judge composition for inadmissibility decisions, and the reform of Article 47 of the Rules of the Court, imposing strict formal rules for applications. These measures have led to a remarkable reduction of the numerical docket of more than 150 000 pending applications in 2011/2012 to currently about 56 000. Protocol No 15, emphasising the subsidiarity of the Court's role and reducing the time limit for lodging applications, is poised to enter into force.

3. As the number and complexity of judgments from the Court has increased so too has the burden of supervising their execution. The CMDH is supported in this task by the Department for the Execution of Judgments (DG I). The CMDH has streamlined its work by dividing cases into standard and enhanced categories. Standard cases are rapidly resolved, largely by DG I, but those allocated to enhanced examination frequently involve long delays and repeated examination, because States are slow, or worse, to redress violations.

A large backlog of serious cases remains involving delays of over ten years

4. The reforms to date have stabilised the numerical situation, but done little to address the backlog of serious cases, which are a significant proportion of the Court's docket. On the most favourable analysis, ten thousand serious, novel, cases are pending before the Court, which are still awaiting their first judicial examination. Some have been waiting for more than ten years. Many of these cases will result in findings of violations, so urgent steps are needed to tackle the backlog if confidence is to be maintained in the ECHR machinery. Ignoring all other cases (which the Court cannot) the backlog represents between six and ten years' work at the current rate of judgments.

5. This difficult position is accentuated by delays in the execution of judgments in serious cases and the stubborn list of some 700 leading judgments which still await execution more than

five years after the judgment was given by the Court[1]. Across the board, in serious cases, the time from application to judgment is very rarely less than three years and usually more than six, frequently more than ten[2]. Adding the delays to execution means that in many cases where the ECHR has been violated redress takes ten to fifteen years. New thinking is needed.

CCBE input into the Interlaken Process

6. To date there has been little practitioner input in the Interlaken Process. Nevertheless lawyers have an obvious interest in effective remedies for ECHR violations, as well as involvement and familiarity with the application procedure. The CCBE believes that it is high time to contribute to the debate on the reform of the ECHR machinery, as well as helping to make those reforms a reality.

7. To this end the CCBE's Permanent Delegation to the Court (PD Stras), comprising experts nominated by their national Bars and Law Societies, has held two Round Tables with the participation of invited experts to review the prospects for the reform of the Court and the CMDH. It has now developed the following practical suggestions for discussion which it hopes may both contribute to finding solutions to the current problems and to encouraging practitioners to put their shoulders to the wheel to help to implement these practical reforms.

8. The CCBE invites discussion of these proposals as an element in the debate. It intends that they should contribute practical and immediate ways in which the current backlog can be addressed for which no amendment of the ECHR is required. They build on the recognition of the subsidiary role of the Court, the need to enhance national human rights protection, and to improve the transparency and effectiveness of the Court and the CMDH so that the vital work of protecting human rights in Europe can be advanced.

<u>Recommendations concerning the Court</u>

Endorsement of ECHR arguments by the senior national courts

9. The subsidiary role of the Court means that national courts have the primary task of human rights protection. The CCBE proposes that senior national courts could contribute immediately to reducing the Court's case burden by including in one place in their judgments a clear brief analysis of ECHR arguments made in appeals before them and an 'endorsement' of the strength and importance of those arguments.

10. This proposal encourages a practice by senior national courts to the effect that, in any judgment rejecting a claim based on the ECHR, the judgment should state in a defined part, and not spread out in different parts of the judgment, a succinct statement of the reasons for dismissing the ECHR claim. Courts should also be encouraged to make a statement of the significance of that claim.

11. The national courts are already required to apply the ECHR, so to that extent the proposal does not impose a new obligation. Lawyers would be encouraged to focus their ECHR submissions in national appeals, facilitating the national courts' role in providing the primary protection of human rights. The precise means of implementing the new rule or practice would vary with the relevant rules of the senior national courts, but its object would be to make clear that ECHR arguments had been raised and dealt with, why they had been rejected and whether the

[1] The number of judgments still awaiting execution after five years is static: 2015: 685; 2016; 719; 2017: 718

[2] No 35432/07 *Mammadov v Azerbaijan* involving violations of Arts 2 (substantive and procedural), 3 and 5, 11 years and No 19788/03 *Ionescu and others v Romania* concerning violations of A1P1, 15 years

arguments and the case in general was of importance in the national legal system. Each of these issues is one which the senior national courts are well placed to assess.

12. Where the rejected appeal gave rise to an application to the Court, the applicant could rely on the senior national court's 'endorsement', both to illustrate immediately that domestic remedies had been exhausted by reference to the ECHR, and as to the national court's view of the importance of the case in the national legal system. Relevant factors might be that the case represented one of many raising similar issues, or a unique factual situation, or that the case was a remnant of a former legal rule, since amended.

13. The value to the Court of such a national judicial 'endorsement', or its absence, would vary. An endorsement would identify the heart of the ECHR case as argued in the national courts, satisfying the exhaustion criterion and identifying the scope of the ECHR issues at once. If a case was one of many in the national legal system that might suggest that a pilot procedure would be appropriate. The Court would recognise that a clear endorsement by a senior national court would be a relevant factor in the priority of examining the case, especially as the Court's present priority category II covers cases having major implications for the national legal system.

14. Conversely, the absence of an 'endorsement' would require the Court to test, as currently, whether and how the ECHR had been deployed before the national courts. The terms of the endorsement might also show not merely that an ECHR argument had been dealt with, but that it had no merit.

15. The Court would retain, as now, control over its priority policy, including the option to prioritise a case which the national legal system had mis-evaluated, but national judicial endorsement would be a valuable aid to the rapid *triage* of newly lodged applications and a guide to their future handling. The endorsement proposal would contribute to the dialogue between the senior national courts and the Court, to the potential benefit of proceedings before both.

Judicialising the initial *triage* of new applications

16. At present the first assessment of new applications is undertaken by the Registry's Filtering Section. Vital though this is, the assessments made remain confidential, because they are non-judicial. As the current backlog illustrates, this may result in many years of silence from the Court as to the fate of large numbers of serious applications. The CCBE proposes that this initial task is expanded to include judicial involvement, enabling formal case management decisions to be taken as soon as possible and to be communicated to the parties.

17. The initial *triage* process has great significance for the later processing of cases. Judicial involvement would increase the range of decisions available, increase their authority and allow those decisions to be public, enhancing transparency. At least four tracks can be identified at once: high priority cases, WECL cases, potentially leading to an early decision on admissibility and prompt resolution (see below); serious cases such as those currently in the backlog and cases which do not merit prompt attention. The last category could include many cases which are currently streamlined for disposal by a single judge. The Court's concern with reducing the numerical docket may distract judicial resources from the urgent task of addressing more serious cases, including the backlog. If the initial *triage* is backed by a judicial assessment, applicants can and should be told whether their applications merit prompt attention or not, and when they may receive it.

18. Judicial recognition of, and engagement with, the backlog would be beneficial. For those jurisdictions where the number of cases make delays in examining all but the most urgent cases inevitable, the Court should acknowledge this fact to the parties and set public targets

for the management of the backlog accordingly. All the Court's users would better understand the difficulties and act appropriately to address or alleviate them.

Simplified procedure for repetitive and WECL cases

19. The Court's docket includes about ten thousand pending cases which are repetitive or WECL cases. A new, rapid, procedure is needed for acknowledging and resolving them without engaging excessive resources in the Court. The CCBE proposes that normally these cases should be resolved by a decision on admissibility only, followed by friendly settlement or a unilateral declaration as the respondent Governments concerned and their Agents are well familiar with the relevant case law. .

20. Guidance will be required as to the appropriate level of compensation due in these cases, but again the principles are well-established. Objectively, these 'simple' cases merit rapid treatment much more that the obviously inadmissible cases which are currently the focus of significant rapid judicial attention. Efforts should be made to specify appropriate just satisfaction in the operative part of any judgment in repetitive cases or cases of continuing violation.

Broaden the use of Committees and fix the composition of the Grand Chamber

21. Given the recognition of the extent of the Court's established case law, the Court should make more use of the Committee formation of three judges to give judgments. In comparison with the seven judge Chamber, a Committee obviously involves a much lower commitment of judicial resources, potentially doubling the available judicial capacity of the Court. Realistically, if the Court is to increase it rate of giving judgments without increased resources, relying on Committees rather than Chambers is the principal available means of doing so.

22. The Grand Chamber's task is to resolve inconsistencies in case law and decide the most complex cases. Its task of maintaining judicial consistency would be met more effectively if the Grand Chamber retained a fixed composition, rather than having a different composition in each case. That composition could involve the President, Vice President and all Presidents of Chambers except the Chamber which determined the case previously, with the balance made up of members and alternates nominated to serve for a fixed period of perhaps two years.

A Chamber for urgent cases and enhancing the authority of interim measures

23. A significant number of urgent cases, including those involving detainees and raising issues under Article 3 ECHR are not dealt with as urgently as would seem merited. As part of the judicialisation of the *triage* process the allocation of cases to greater and lesser priority should be public and judicially justified. Applicants currently suffer from a 'postcode lottery' whereby limited resources in the Registry condemn some urgent cases to significant delays, whereas cases against other respondent Governments are processed promptly.

24. A partial remedy would be the introduction of a Chamber of the Court for priority cases. This would improve specialisation and consistency as well as ensuring focused judicial resources for the most urgent cases. At the same time the effectiveness of interim measures should be enhanced by the amendment of Rule 39(2) of the Rule of Court to make the notification of the Committee of Ministers of the Council of Europe of the granting of interim measures immediate and automatic.

Secondment of lawyers to the Court Registry and the acceptance of external funding

25. For some years the Court has operated a system of secondment of judges and government lawyers to supplement the capacity of the Registry. The secondees have been paid by their governmental employers and so have not imposed on the Court's budget. The new initiative of the Secretary General of the Council of Europe in proposing that the organisation should amend its financing rules to permit it to receive grants and similar funding from non-governmental bodies, provides the opportunity for appropriately trained private lawyers to be seconded in a similar way, if suitable grant funding can be secured.

26. The need for additional resources in the Registry is clear, but to be useful secondees need to be well trained before their arrival and able to commit to a sufficient period in the Registry to make a worthwhile contribution. The CCBE commits to support the development of the national 'endorsement' proposal and initiatives to improve the level of ECHR pleading in national courts as well as before the Court and the CMDH. Such efforts would contribute to preparing lawyer secondees to assist the Registry effectively from the outset.

Recommendations concerning the CMDH

27. The recommendations above are directed at increasing the speed and efficiency of decision making in the Court and improving transparency. However, the CMDH is already struggling with its own backlog in the supervision of complex judgments. If the Court's speed of giving judgments rises, the burden on the CMDH will also increase automatically.

28. This is especially so in relation to the cases caught now in the Court's backlog, some of which have been awaiting their first judicial examination for ten years or more. Those which result in judgments will be older still by the time that those judgments require execution, making them more complex from a factual, evidential and legal perspective. The CMDH needs to accelerate its work rate now if the worst delays in the Court are not simply to be replicated later in the supervision of the execution of judgments by the CMDH.

Accelerating the CMDH's work rate

29. Currently the CMDH meets four times a year for three days each meeting. The most serious cases are debated, but only between 12 and 20 cases can be fitted in for debate per meeting. Some cases are re-listed for debate at successive meetings to increase pressure on respondent States to accelerate execution. As a result, only fifty cases or so can be debated each year, which is less than a tenth of the enhanced scrutiny cases which have been pending for five years or more and those old cases are not the only urgent ones. Further by convention, no respondent Government currently faces debates on more than four cases per meeting. This limit is intended to prevent any Government from feeling 'picked upon', but it is an obstacle to the proper supervision of execution.

30. The CCBE proposes that the CMDH should immediately extend each quarterly meeting by one day, dedicated to debating additional serious cases. This very modest step would already increase the number of cases which could be debated each year by a quarter. As a second step, the number of meetings should be increased progressively until they are held monthly. At that rate all the over five year old cases would be debated in alternate years.

31. This increased frequency of meetings would have resource implications for the officials attending the CMDH and more importantly for those dealing with the execution and implementation of judgments in the national administrations. However, the Member States of the Council of Europe have already repeatedly committed themselves to the prompt and effective execution of the Court's judgments, most recently in the Brussels and Copenhagen

Declarations. Corresponding substantial recruitment will be needed in the Secretariat DG I to prepare the additional case summaries, but seconded lawyers, trained by their local Bars and Law Societies could also contribute to this effort as proposed below.

Increasing transparency and the involvement of applicants' representatives

32. The present listing of cases for debate is unsystematic and secret. Neither position is efficient. Debated cases may range from disappearances to prison conditions to property cases. In 2018, for the first time, the CMDH grouped the review and debate of cases relating to Article 3 in one thematic meeting. More focused thematic meetings of this kind are needed and would be achievable with more frequent meetings as proposed above. Thematic meetings would also permit the CMDH to develop a coherent priority policy, as the Court has done.

33. The secrecy about which cases will be debated is outmoded and does not befit a quasi-judicial instance dealing with human rights judgments. Great strides have been made recently to reduce the earlier almost total secrecy of the CMDH's work, but transparency is still not achieved. Three simple reforms in enhanced procedure cases would make a marked improvement immediately:

    a. Transparency in the allocation of new judgments to groups of cases following a 'lead' judgment. At present the criteria are uncertain;

    b. A standard form letter should be sent to applicant's representatives informing them of the allocation of their client's case to enhanced examination, identifying the relevant lead case and inviting brief submissions under Rule 9 of the Rules;

    c. Identification of the cases proposed for debate at the next CMDH meeting.

34. Small scale practitioner training is already being undertaken in relation to drafting Rule 9 submissions. Local Bars and Law Societies should raise awareness on this. This may also help national human rights institutions to make more frequent submissions to the CMDH on systemic issues. Thematic CMDH meetings, focusing on judgments concerning a particular Article would facilitate this, but these national agencies are stretched and short of resources, which is why involving applicants' representatives is so necessary.

35. Collectively these measures of increasing the number of CMDH meetings, greatly increasing the time available to debate cases, improving the transparency of the system and involving practitioners in supporting it, both as representatives and through training and secondments, are cumulatively capable of enhancing the capacity and quality of the CMDH's work.

Further proposals merit study and development

36. Three further proposals merit scrutiny and development:

    a. The CMDH needs to develop a new streamlined procedure for supervising the award of compensation in WECL cases which are declared admissible but do not proceed to judgment (see paras 18 & 19 above).

    b. The CMDH must develop its criteria for using Article 46(4). The initial experience in *Mammadov* is an important first step, although the Court's slow response to this first reference is disappointing. The CMDH and the Secretary General have referred to the finding of a breach of Article 18 of the Convention as a relevant reason for deploying Article 46(4), but that cannot be the sole criterion. Article 46(4) applies on its terms to the failure to abide by a judgment and not to the breach of a particular Article. The

CMDH also needs to develop its response and procedure where the Court finds that Article 46(1) has not been complied with.

c. Article 46(1) of the Convention confers on the Committee of Ministers the task of *supervising* the execution of judgments, rather than actual execution. The Committee of Ministers should study the means for national courts to provide execution of financial awards of just satisfaction. Such obligations are unconditional and involve no choice as to the means of implementation. Execution of such precise monetary awards by national courts, whether of the respondent State, or another State, could be supervised by the CMDH and enforced in national legal systems. Such a complementary mechanism merits close consideration.

Training and secondment to support the work of DG I

37. As noted above (at paras 25 & 26) in relation to the possibility of training for and secondment to the Registry of the Court, the proposed reform of the financing of the Council of Europe would potentially facilitate the secondment of suitably trained lawyers to assist the work of DG I. In view of the increasing demands on DG I and the CMDH and the solutions proposed above, substantial additional resources will be needed to meet the Member States' ambitious commitments to the prompt and effective execution of the Court's judgments.

38. The CCBE and its constituent Bars and Law Societies will be ready to contribute to this major effort if the ECHR machinery is to retain its credibility.