


Opinion

On Reform of the European Court of Human Rights

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 European Court of Human Rights

This opinion piece is written on the eve of the forthcoming Interlaken Conference, where Council of Europe states and officials will convene to affirm their commitment to human rights and debate the future of the European Court of Human Rights. The author offers an insightful, in-depth appraisal of some of the proposals that have been put forward to address the problems faced by the Strasbourg Court, as well as critiquing the process that has led to those proposals being made. The article addresses two of the major difficulties encountered by the Court; firstly, how to handle the sheer number of applications it receives given that around 90 per cent of them are inadmissible and secondly, how to address the fact that a majority of the judgments that find a breach are so-called repetitive or clone cases. The author offers pragmatic considerations based on the principle of prioritisation, the need for sanctions for non-compliance and the importance of transparency and fairness in the judicial selection process. The article also discusses the potential role for advisory opinions as well as the need to expand Strasbourg's jurisdiction to ensure proper enforcement of its judgments on a national level. The author concludes that as it stands, the system betrays European citizens who suffer human rights abuses and he calls for participants in the Interlaken conference to muster the necessary political will to develop reforms that affect far-reaching change.

Here we go again. The venue for the latest attempt to solve the crisis at the European Court of Human Rights will be Interlaken, Switzerland, where Council of Europe states and officials will convene in February next year. The Court's President, Jean-Paul Costa, rightly has a bold vision for the conference: "to reaffirm the commitment of the States to the protection of human rights in Europe" and "to build for the future and to establish

* <http://www.londonmet.ac.uk/ehrac>. The views expressed in this Opinion piece are personal.

a roadmap for the evolution of the European Court".¹ He wants to see the necessary changes introduced by 2019. Heavy emphasis is laid on the need for the 47 Convention states to do much more at the national level to ensure compliance with the European Convention on Human Rights.

The story of the Court's development over the past 50 years is largely a very successful one: its normative standards have been broadened; state involvement has expanded almost five-fold; its judgments have led to numerous changes in law or practice at the national level. Yet it is also a story, latterly, of substantially delayed justice, with the Court struggling, and failing, to keep up with the vast numbers of cases which are being submitted to it, largely because of European states' failure to resolve wide-scale endemic or systemic human rights violations. The more recent troubles and travails of the Court—stretching back over 15 years, and longer—are well known and have been well documented. By October 2009 the number of pending cases had risen to 114,550. Faced with this torrent of litigation, it seems as if there has been a constant outpouring of reports (by the Evaluation Group,² Lord Woolf,³ the Group of Wise Persons⁴ and the Court⁵), declarations, recommendations and resolutions (from the Committee of Ministers) and even a Protocol or two. What is more, Interlaken will not be the first reform-minded conference held under Council of Europe auspices; there have been convocations in Rome, San Marino, Stockholm and, most recently, Warsaw, Madrid and Bled. This activity has undoubtedly been productive and has led to some important reforms. However, it has clearly not been sufficient to stem the tide of cases washing over the Court or to establish a viable Court capable of responding to human rights violations in the European continent over the next 50 years.

If the participants in Interlaken are going to be drinking in the last chance saloon of European Court regeneration then every possible effort must be made to ensure that those who succumb to future human rights abuses in Europe are not the ones to suffer the hangover. In this Opinion piece I would like, rather presumptuously, to put forward some thoughts on various proposals, in the hope that they might make a contribution to the debate.

But a few words on process to begin with. First, it is pertinent to question whether the set-piece conference model, with a small number of speakers delivering papers on pre-determined topics, with only minimal time for discussion amongst the other participants, is the most productive way of debating reform. Much better, surely, to have smaller groups meeting to consider and thrash out particular ideas and proposals, over time if necessary. Secondly, a significant flaw in the reform debates to date has been

¹ See *Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference* (July 3, 2009), http://www.echr.coe.int/NR/rdonlyres/2170AAEC-85B7-4D30-A3E7-D76E8BF25C24/2792/03072009_Memo_Interlaken_anglais.pdf [Accessed October 31, 2009].

² J. Harman, L. Wildhaber and H.C. Kruger, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights* (September 27, 2001).

³ Lord Woolf et al., *Review of the Working Methods of the European Court of Human Rights* (December 2005).

⁴ *Report of the Group of Wise Persons to the Committee of Ministers* (Strasbourg: Council of Europe, November 2006).

⁵ *Opinion of the Court on the Wise Persons' Report* (April 2, 2007).

the failure to engage, in any truly meaningful way, the “users” of the Court system: either the applicants themselves or those who represent them. Governments seem to be extremely wary of real civil society involvement in the business of mulling over reform proposals. It is not enough to allow a handful of non-governmental organisations (NGOs) observer status at inter-governmental meetings, or even to host seminars aimed specifically at civil society organisations. NGOs have become wary of the empty ritual of consultation. Important as those initiatives sometimes can be, they do not actually ensure that civil society is adequately and meaningfully engaged in the process. Rather than have more set-piece speeches at Interlaken, what would happen if you brought together knowledgeable and experienced representatives from civil society, national human rights institutions, bar councils and academics, to meet with government and Council of Europe officials? Create several not-too-large groups, give each one an area of responsibility, and put them together in a room over a few days to hammer things out.

Finally on process, there needs to be an evidence-based approach to considering and seeking to solve the problems faced by the Court. It has not always been apparent that the reform debate in recent years has been founded on objectively established evidence, rather than subjective opinion. For example, President Costa has recently called for an analysis of why such a very high proportion (90 per cent—see below) of cases lodged with the Court are inadmissible.⁶ He is absolutely right to do so, and it is remarkable that such an analysis was not undertaken years ago. The emphasis should be on those states which are the sources of large numbers of applications—the five states against whom 60 per cent of the Court’s pending cases (69,100 applications) have been brought: Russia, Turkey, Ukraine, Romania and Italy.⁷ Or, alternatively, focus on the 10 states which are “responsible” for more than three quarters of the pending cases—the next five being Poland, Georgia, Slovenia, Moldova and Serbia. It may well also be productive to open new Council of Europe offices in some of these states, with a mission similar to that of the Warsaw office.

Back to the substance of the reforms. It does seem clear that the two greatest challenges faced by the Court are, first, how to handle received applications, given that a very high proportion of them (around 90 per cent) are inadmissible under the current criteria, and secondly, how to address the fact that such a high proportion of judgments in which the Court finds a breach of the Convention are repetitive or clone cases (70 per cent of the Court’s judgments in 2008). It would be interesting to see what suggestions would emerge from the groupings suggested above, if asked to tackle these key problems. It seems highly likely that we will need to return to a process of filtering, possibly akin to the role played by the European Commission of Human Rights prior to the Protocol No.11 changes in 1998. Any such filtering role will have to be efficient for the Court to manage, but also for the sake of the parties it will need to be fair, consistent and transparent.

In his Interlaken Memorandum, Jean-Paul Costa has reassuringly confirmed that “the right of individual petition lies at the heart of the Convention mechanism and the Court

⁶ *Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference* (July 3, 2009), p.2.

⁷ See the statistics on the Court’s website: http://www.echr.coe.int/NR/rdonlyres/BBFE7733-3122-40F5-AACA-9B16827B74C2/0/Pending_applications_chart.pdf [Accessed October 31, 2009].

is of the firm opinion that it must be preserved in principle".⁸ Important principles aside, we all know where the devil lies. The debate about handling in-coming applications has hitherto focused principally on narrowing the admissibility criteria. As is well known, if it is ever brought into force, Protocol No.14 will allow the Court to declare inadmissible a case brought by an applicant who "has not suffered a significant disadvantage".⁹ In the meantime, Protocol No.14 *bis*, which entered into force in October 2009 for those states which have ratified it, will speed up the Court's operations by allowing single judges to adjudicate on clearly inadmissible cases, and by enabling committees of three judges to declare applications admissible, and issue judgments on the merits, where there is "well-established case-law" on point. In addition, a number of states (including the United Kingdom) have made a declaration accepting that the Protocol No.14 *bis* procedures can be provisionally applied in applications against them. It is too early yet to tell what impact the Protocol No.14 *bis* reforms will have. Other proposals recently mooted include the suggestion that a court fee be introduced. It might seem difficult in principle to question the introduction of a fee, given that domestic courts often require a fee of some description. However, as the Court may represent a last chance for justice for victims of some of the gravest human rights violations across the continent, in situations where the domestic authorities have failed them badly (think, for example, of the Kurds in Turkey or the Chechens in Russia), is there not a real danger that imposing a fee would close the doors of the Court to some of the most vulnerable people?

In relation to applications which overcome the admissibility hurdle, there are practices which the Court could introduce in order both to speed things up and to instil greater rigour where states play hard to get. First, use the tool of prioritisation more creatively.¹⁰ Granting cases priority treatment should be much more meaningful than it is at present. For example, the Chechen cases have routinely been granted priority status, but it is questionable what this has meant in practice—no apparent shortening of the time taken to process the cases, which is still several years. So, push the most important cases through in a matter of months—we know this is possible from examples such as *Pretty v United Kingdom* which was, exceptionally, processed in under four months.¹¹ Select such cases on the basis of transparent criteria, which might include the following: an application which is likely to establish an important legal precedent; the lead case (or cases) highlighting a particularly serious problem in a country or region; a case selected to "represent" a large group of cases relating to endemic violations; and a case concerning an infringement which is systemic.

Secondly, where states prove unwilling to give full co-operation to the Court, tougher sanctions should be imposed. So, for example, the failure to provide direct answers to the Court's questions, missing Court deadlines for the submission of observations and the non-disclosure of relevant domestic documents should all have meaningful

⁸ Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference (July 3, 2009), p.4.

⁹ Protocol No.14 art.12, amending art.35(3) ECHR.

¹⁰ This issue was highlighted by Lord Woolf, and has led to the introduction of a weighting system relating to the processing of cases within the Court Registry: Lord Woolf et al., *Review of the Working Methods of the European Court of Human Rights* (December 2005), p.55.

¹¹ *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1 ECtHR.

consequences. The repetition of such infringements should mean a ratcheting up of the pressure. What consequences should follow? If the effect of a state's non-disclosure is to prevent the Court from getting at the truth, then the Court must be more nimble on its feet and be ready to instigate a fact-finding mission. Where the Court finds a separate violation of the Convention—for failing “to furnish all necessary facilities” under art.38(1)(a)—certainly a financial levy is justifiable, with monies going to offset the Court's costs. If warranted in a particular case, aggravated damages should be awarded to the applicants.

The potential for the Court to issue Advisory Opinions, at the request of national courts, has in the past been considered and rejected. This should be looked at again,¹² as such Advisory Opinions could genuinely assist national courts in applying the Convention more faithfully at the national level (and thus reduce the number of cases going on to Strasbourg). What is more, why should such an Advisory Opinion not have some form of erga omnes effect?

The authority of the Court continues to be undermined to a certain extent by concerns about the process for the nomination and appointment of its judges, the problem being that not all states are putting forward suitably experienced candidates or they are failing to ensure a gender balance.¹³ More emphasis is now being placed on the need for prior “hands-on” judicial experience (accepting, however, that the Court benefits from having judges with a range of backgrounds, including academia, legal practice and civil society), and a working knowledge of both English and French. There are also legitimate concerns about the fairness, transparency and consistency of national selection procedures. Such problems occur in only a small minority of cases, and the appointment process is being made more rigorous by the Parliamentary Assembly,¹⁴ which will, if necessary, reject a state's list of candidates, and call for a new list.¹⁵ This situation will be ameliorated by the proposed future appointment of judges for a single, nine-year term,¹⁶ but vigilant monitoring from the Parliamentary Assembly, and civil society, will still be needed on this issue.

Given the prevalence in the Strasbourg system of repetitive violations, the remainder of this piece will focus on issues of redress, including the nature of Court judgments and the well-known problems related to the implementation of judgments. The Court, and the Council of Europe more broadly, are becoming more and more intolerant of repeat

¹² See *Report of the Group of Wise Persons to the Committee of Ministers* (Strasbourg: Council of Europe, November 2006), paras 81–86; Report of the 4th meeting of the Reflection Group Dh-S-GDR(2009)00, paras 20–26. President Costa's Interlaken Memorandum refers also to a “preliminary reference mechanism” (p.5).

¹³ See Parliamentary Assembly Resolution 1646 (2009), *Nomination of candidates and election of judges to the European Court of Human Rights* (January 17, 2009).

¹⁴ Through its Sub-Committee on the Election of Judges to the European Court of Human Rights. See, e.g. its information document: *Procedure for electing judges to the European Court of Human Rights*, AS/Jur/Cdh (2008)05 (May 5, 2008).

¹⁵ This has recently occurred with respect to lists submitted by Azerbaijan, Bulgaria, Cyprus, Luxembourg, Moldova, San Marino and Turkey. See Parliamentary Assembly Document 11767, *Nomination of candidates and election of judges to the European Court of Human Rights* (Committee on Legal Affairs and Human Rights: Rapporteur Mr Christopher Chope, December 1, 2008), para.8.

¹⁶ Protocol No.14 art.13 (at present judges are elected for a renewable six-year term).

offenders. This is entirely warranted; a more radical approach is needed to stop further years of clone litigation at the European level. This will necessitate a more incisive and, yes, interventionist stance. As Anthony Lester has recently reminded us, writing in these pages,

“the master builders of the Convention were determined . . . never again to allow governments to shelter behind the argument that what a state does to its own citizens or to the stateless is within its exclusive jurisdiction and beyond the reach of the international community”.¹⁷

In recent years the Court has been gradually developing and expanding its approach to the question of redress, bringing into play art.46 to supplement its art.41 powers.¹⁸ An important facet of this has been the development of the Court’s “pilot judgment procedure”, which has a significant potential to encourage (or, if necessary, force) states to resolve human rights violations which arise from systemic problems. Pilot judgments are here to stay, as the Court has already signalled.¹⁹ In these relatively early days for the pilot judgment procedure, it will be critical that both the Court and the Committee of Ministers ensure that states take the requisite steps to solve systemic issues and provide adequate redress. This must mean an effective evaluation of the implementation *in practice* of a new system (legislative, or otherwise) purportedly providing redress at the national level.

Concerns have been expressed as to the competence of the Court as regards the evaluation of compliance with pilot judgments at the national level, and about lack of clarity in the respective roles of the Court and the Committee of Ministers.²⁰ Consideration therefore needs to be given to establishing appropriate rules and

¹⁷ A. Lester, “The European Court of Human Rights after 50 Years” [2009] E.H.R.L.R. 461, 463.

¹⁸ Consider, e.g. ordering the return of property formerly nationalised (e.g. *Brumarescu v Romania* (2001) 33 E.H.R.R. 36 ECtHR); requiring the release of individuals unlawfully detained (*Assanidze v Georgia* (2004) 39 E.H.R.R. 32 ECtHR and *Ilaşcu v Moldova and Russia* (2004) 40 E.H.R.R. 46 ECtHR); and even requiring states to amend legislation (e.g. *L v Lithuania* (2007) 46 E.H.R.R. 22 ECtHR—adoption of legislation to allow gender reassignment surgery; *Zengin v Turkey* (2007) 46 E.H.R.R. 44 ECtHR—bringing legislation relating to religious education into conformity with the Convention). The Court has, as yet, stopped short of ordering the authorities to carry out an investigation into an unresolved enforced “disappearance” case, but see the three dissenting opinions in *Varnava v Turkey* [GC] (App. No.16064/90), judgment of September 18, 2009 ECtHR and A. Cassese, *How to Ensure that the Authors of Gross and Large-Scale Violations of Human Rights are Brought to Book*, Session of the Parliamentary Assembly, June 22–26, 2009, http://www.coe.int/t/dc/files/pa_session/June_2009/20090624_disc_Cassese_en.asp [Accessed November 4, 2009].

¹⁹ *The Pilot Judgment Procedure—Memorandum prepared by the Registry of the Court*, DH-S-GDR(2009)010, February 24, 2009, p.2. The Human Rights and Social Justice Research Institute at London Metropolitan University (of which the author is Director) is currently carrying out a research project on pilot judgments, funded by the Leverhulme Trust. A seminar to disseminate and discuss the findings of the research will be held in Strasbourg in 2010 (supported by the Ministry of Justice).

²⁰ See, e.g. the separate opinions of Judges Zagrebelsky, Jaeger and Ziemele in the Court’s second pilot judgment, *Hutten-Czapska v Poland* (App. No.35014/97), judgment of April 28, 2008 ECtHR.

procedures²¹ so that there is much greater clarity as to their respective roles, and so that, as a result of their combined efforts, effective evaluations are carried out.

In the pilot judgment of *Burdov v Russia (No.2)*²² the Court laid down a specific timetable for the implementation of various steps by the Russian Federation: a period of six months to establish an effective domestic remedy providing sufficient redress for non-enforcement (or delayed enforcement) of domestic judgments; and a period of one year to grant redress to all victims of non-payment of a judgment debt.²³ This is perhaps one example of what President Costa meant when he recently advocated, “adopting a judicial policy giving more extensive effect to Article 13”.²⁴ Such developments are to be welcomed: the imposition of specific time periods is a very important aspect of the pilot judgment procedure, and it is critical that both the Committee of Ministers and the Court should take adequate steps to enforce such deadlines. Furthermore, in view of the potential contribution to be made by the pilot judgment procedure to resolving systemic violations, it is also vital, especially in the period while the process is bedding in, that there is comprehensive monitoring of the adequacy and timeliness of compliance with pilot judgments.²⁵

Linked to the development of the pilot judgment procedure is the suggestion by President Costa that consideration be given to introducing “class actions” and “collective applications” into the Strasbourg armoury.²⁶ Neither term has yet been defined, and clearly further research needs to be done into their potential efficacy at the international level. In some ways, the *Burdov* case (referred to above) could be considered a form of class action; the consequence of the judgment has been to establish an obligation on the respondent state to provide redress to a large class of people similarly affected.

After 50 years of the European Court is it not also time to take further steps to expound the interpretative authority of the Court’s case law? This should cajole states into reacting as swiftly as practicable to a judgment finding a violation by another state when the same, or similar, problem exists in their own legal system. In order to achieve erga omnes effects, and to bring about some of the other outcomes discussed above, it may well be necessary to amend the terms of art.41 (and art.46), to give the Court wider powers and a broader discretion concerning matters of redress.

²¹ See, e.g. *Report of the Group of Wise Persons to the Committee of Ministers* (November 2006), para.105.

²² *Burdov v Russia (No.2)* (2009) 49 E.H.R.R. 2 ECtHR. Similar time limits have also been imposed in subsequent pilot judgments concerning the non-implementation of domestic court decisions in Moldova and Ukraine. See: *Olaru v Moldova* App. Nos 476/07, 22539/05, 17911/08 & 13136/07, July 28, 2009; *Yuriy Nikolayevich Ivanov v Ukraine* App. No.40450/04, October 15, 2009.

²³ This latter provision was limited to those who had lodged their applications with the Court before the delivery of the *Burdov (No.2)* judgment and whose applications were communicated to the Government.

²⁴ *Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference* (July 3, 2009), p.6.

²⁵ See also *The Pilot Judgment Procedure* (February 24, 2009), p.5.

²⁶ *Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference* (July 3, 2009), p.8.

We need of course to look again at implementation, and in particular the role still retained by the Committee of Ministers in supervising the enforcement of Court judgments (under art.46(2)). In the face of criticism about the lack of access to, and transparency of, the process, great strides have been made in recent years. There is, though, a lack of clarity, fundamentally about the nature of the supervision process itself, which may explain the problems around access and transparency. It is a *legal* mechanism (relating to the enforcement of a legally binding judgment), although government representatives frequently say that it is political. It is not an adversarial procedure, and the Committee of Ministers has said that it is “paramount that supervision of execution is treated as a co-operative task and not an inquisitorial one”.²⁷ The Committee of Ministers’ Rules were amended in 2006 to provide an express discretion for the Committee to consider submissions from NGOs or national human rights institutions on the execution of judgments (r.9(2)). This is a provision merely enabling the Committee to *consider* such submissions—nothing more—and yet there was still a good deal of nervousness expressed by governments when debating this change.

The transparency of the supervision system has been improved. There is a very useful website on the execution of judgments,²⁸ very detailed annual reports have been published since 2007²⁹ and helpful explanatory guides have also been made available.³⁰

The Department for the Execution of Judgments carries out extensive follow-up work with governments, and the highly detailed memoranda which the secretariat publishes on individual cases are testament to the extent to which it attempts to call governments to account. The memoranda will credit governments for those steps which have been taken, but call for further reform where appropriate. However, too frequently the *information* which governments provide is incomplete or is unclear, and the delays are truly lamentable. The Department for the Execution of Judgments needs civil society assistance in order to bring governments to task, by providing the basis, where appropriate, for challenging what governments say, which is why the 2006 rule change was important. However, NGOs and national human rights institutions across Europe are not fully aware of the possibilities, nor of the mechanics, of engaging in this process, and so the Council of Europe could very usefully hold workshops or seminars to facilitate civil society engagement specifically in the implementation process (with a focus on states where there is less civil society activity and on states with the most serious, or most numerous, violations).

Backlogs and delays also abound within the supervision stage before the Committee of Ministers—there were 6,614 cases pending before the Committee in 2008. However, most fundamentally, the supervision system simply does not exert enough pressure

²⁷ *Human rights working methods—Improved effectiveness of the Committee of Ministers’ supervision of execution of judgments*, CM/Inf(2004)8 Final (April 7, 2004), para.1.3

²⁸ http://www.coe.int/t/dghl/monitoring/execution/default_en.asp [Accessed November 4, 2009].

²⁹ Annual Report 2008, http://www.coe.int/t/DGHL/MONITORING/EXECUTION/Source/Publications/CM_annreport2008_en.pdf [Accessed November 4, 2009].

³⁰ See, e.g. *Monitoring of the payment of sums awarded by way of just satisfaction: an overview of the Committee of Ministers’ present practice*, CM/Inf/DH(2008)7 final (January 15, 2009), [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH\(2008\)7&Language=lanEnglish&Ver=final](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH(2008)7&Language=lanEnglish&Ver=final) [Accessed November 4, 2009].

on states.³¹ This is a failure of the collective role of Council of Europe states. As the Venice Commission has reminded us, “the execution of a particular judgment is not only the legal obligation of the State concerned, but a common concern”.³² At the Bled Roundtable in Slovenia in September 2009, the Court Registrar Erik Fribergh validly argued that:

“the political weight and expertise of the Committee of Ministers must rise to the vital task the Convention confers upon it, namely to ensure the enforcement of the Court’s decisions. I take this opportunity to stress, once again, the need for a more effective—that is to say a more determined—supervision of the execution of judgments. This is, in my opinion, the key to eliminating repetitive cases. There must be a climate of true political accountability of States to their peers when it comes to remedying the causes of repetitive applications.”³³

For the most recalcitrant states, the capability of the Committee of Ministers to bring “infringement proceedings” (to refer a case back to the Court where a state refuses to comply with a judgment)—which was included in Protocol No.14—should be resurrected. The provision included in Protocol No.14 did not expressly stipulate any sanction, but second time around it should be given more teeth: a financial levy (paid into the Court’s coffers) is one possibility, but there may also be other appropriate (non-financial) sanctions.

One way forward, achievable in the short term, would be to put even greater emphasis on selecting cases to prioritise, and then pushing those cases through in as short a time as is practicable. Which cases should be the focus? As discussed above in relation to the Court process, they might include “serious”, endemic and systemic cases and those that represent new legal precedents. We should not be coy in conferring paramouncy, in this respect, on particular states, because of the number, or nature, of Convention violations. If we look at the numbers, for example, in 2008 86 per cent of the Court’s judgments (1,543 in total) related to just 12 states: Turkey, Russia, Romania, Poland, Ukraine, Italy, Greece, Bulgaria, Hungary, the United Kingdom, France and Moldova.³⁴

At the Council of Europe Stockholm Colloquy in June 2008, Erik Fribergh placed particular emphasis on the need for the judicialisation of the enforcement process. He argued that:

“Enforcement issues are becoming more and more judicial and it would seem to me that in the future reform work, one issue that could be taken up is whether the enforcement issues should not be entrusted to a more quasi-judicial organ. This could be a separate body, or one operating under the auspices of the CM. I think a

³¹ See, e.g. PACE Resolution 1226 (2000) (September 28, 2000).

³² *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, European Commission for Democracy Through Law (Venice Commission) (Jan Helgesen, Giorgio Malinverni, Franz Matscher and Pieter van Dijk), Opinion No.209/2002, CDL-AD (2002)34 (December 18, 2002), para.41.

³³ E. Fribergh, *Bringing Rights Home or How to deal with repetitive applications in the future*, Seminar in Bled, Slovenia, September 21–22, 2009, para.37.

³⁴ European Court of Human Rights, Annual Report 2008, p.12.

lot could be achieved to solve many enforcement issues if for instance a Panel of five to seven legal/judicial experts were entrusted with that duty.”³⁵

If the current system reliant upon peer pressure is failing us, then we do need to look carefully at entrusting the process to a “quasi-judicial” body (which might operate under the auspices of the Committee of Ministers). Fribergh’s is an interesting proposal which needs fleshing out. It is not yet clear, for example, how such a quasi-judicial organ would supplement the work currently being done by the Department for the Execution of Judgments. Perhaps the added value of such a body would be the additional focus and pressure exerted in key problem areas? In any event, our collective efforts need to be expressly concentrated on the “big hitters” identified above—starting with Turkey, Russia, Romania, Poland, Ukraine and Italy.

The implementation work being carried out by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (CLAHR)³⁶ is to be applauded and should indeed be developed. The CLAHR focuses on judgments not fully implemented after five years, the most urgent and important cases, and those which raise important implementation issues. It has published six reports on the implementation of judgments since 2000. A seventh report is due in June 2010, focusing on judgments raising important implementation issues, and judgments concerning violations “of a serious nature”. Being a committee of the Parliamentary Assembly, the emphasis of the CLAHR has been to take advantage of the possibilities for dialogue with national legislators. It also undertakes country visits (in 2009–10 to Bulgaria, Ukraine, Greece, Italy, Moldova, Romania, Russia and Turkey). The involvement of national parliaments in the implementation of European Court judgments is certainly under-utilised. There are important precedents, such as the rigorous work carried out by the Joint Committee on Human Rights in the United Kingdom. The Dutch Government’s Strasbourg agent presents an annual report to Parliament on implementation—not confined to consideration of cases against the Netherlands. However, as has become evident in the course of a current research project on pilot judgments, parliamentary engagement is often minimal or even non-existent.³⁷ Should it not be a “given” that national parliaments should actively participate in considering and formulating a state’s response to a European Court judgment? Should not parliaments be involved in reviewing government “action plans”? At present, how often are parliaments given the opportunity to analyse government submissions to the Committee of Ministers, and indeed to question Ministers and officials about the many lacunae in them?

In general, states do not have systems or processes for responding to a Strasbourg judgment. Whilst having a “system” will not of course solve the problem of non-implementation, being clear about what should be “best practice”, and indeed

³⁵ E. Fribergh, *Pilot Judgments from the Court’s perspective*, Stockholm Colloquy, June 9–10, 2008.

³⁶ See, most recently, *Implementation of judgments of the European Court of Human Rights—Progress Report (Rapporteur: Mr Christos Pourgourides)*, Committee on Legal Affairs and Human Rights, AS/Jur (2009)36 (August 31, 2009).

³⁷ Research being conducted by the Human Rights and Social Justice Research Institute at London Metropolitan University. See <http://www.londonmet.ac.uk/research-units/hrsj/research-projects/pilot-judgments.cfm> [Accessed November 4, 2009].

introducing a degree of public transparency, ought to bring about improvements. There are precedents, such as the Ukrainian law introduced in 2006, which imposes obligations on the Office of the Government Agent to propose the necessary “general measures” to the Cabinet of Ministers (within a month of a judgment becoming final), and also to submit information for review by the Supreme Court and the Parliament.³⁸ One important priority area for the Council of Europe (possibly under the auspices of the Commissioner for Human Rights, Thomas Hammarberg?) could therefore be the sharing between states of examples of “best practice” as to how to respond to Court judgments.

None of us wants still to be debating the same issues in another 5, 10 or 15 years’ time. Rather more importantly, those who experience human rights abuses in Europe are being let down by the system as it is. This represents a collective, grievous failure of political will by the Member States of the Council of Europe. Let us hope for some clear thinking leading up to, and at, Interlaken, so that the participants can make the bold and astute decisions that are needed.

³⁸ Law on the Enforcement of Judgments and the Application of the Case-law of the European Court of Human Rights, Law No.3477 of February 23, 2006. An unofficial English translation of the law is included in the appendix to Committee on Legal Affairs and Human Rights, Mr Erik Jurgens, *Implementation of judgments of the European Court of Human Rights* (Doc.11020, September 18, 2006).