The Relationship Between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights

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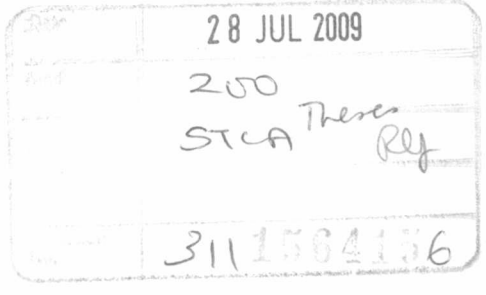
A thesis submitted in partial fulfilment of the requirements of
London Metropolitan University
For the degree of
Doctor of Philosophy

April 2009

DECLARATION

I declare that this thesis is all my work and has not been previously submitted for an academic award in this or another university.



ACKNOWLEDGMENTS

First and foremost, I owe a special dept to my supervisors Professor Philip Leach (Director, Human Rights and Social Justice Research Institute, London Metropolitan University, Solicitor) and Professor Bill Bowring (Professor of Law, School of Law, Birkbeck College, University of London, Barrister) whose advice, help and encouragement ensured that this thesis saw the light of day. They have been generous with many valuable comments on various Chapters, with their tireless enthusiasm, their endless patience and constructive criticisms all of which have contributed enormously to the final product.

I would also like to thank all those at the Human Rights & Social Justice Research Institute who have made the completion of this thesis possible. The Institute provides a unique environment in which to carry out research and I have greatly profited from the encouragement and assistance of researchers, academic staff, and members of the administration.

For their generosity and forbearance, I wish to thank all of those who agreed to be interviewed for this research. I would also like to thank Theodora Christou, Korinna Georghiades, Hasan Bakirci, Uğur Erdal, Nikolaos Sitaropoulos, Alexander Sicilianos, Ian Waller and Gordana Uzelac; for his patient support and for never failing to inquire whether I was finally nearing completion, Achilleas Demetriades; for his unstinting interest in every way, I am deeply grateful to Andrew Drzemczewski.

Last but not least, I must say a special thank you to Eleni Meleagrou for her guidance, her thorough critique of my work, and her always pertinent comments.

Abstract

The ECtHR has become a "victim of ongoing reforms", since the constant efforts to streamline and reinforce the system proved to be inadequate in managing the challenge of its ever-increasing caseload. There has been widespread agreement that further reforms to the ECHR mechanism are required in order to cope with the serious influx of cases from the 47 member states of the CoE. However, the success of any proposed reform does not depend only on the ECtHR itself but also on the clear willingness of member states to comply with their obligations under the ECHR.

This thesis analyses the set of the five Recommendations referred to in the 2004 Declaration of the Committee of Ministers of the Council of Europe in order to encourage member states to take effective domestic steps to ensure appropriate protection of the ECHR rights at the domestic level, in full conformity with the principle of subsidiarity and the obligations of member states under Article 1 of the ECHR. The five recommendations aim at improving the quality of national laws, the effectiveness of remedies, including the reopening of domestic procedures to give effect to the ECtHR judgments, and the awareness of the requirements of the ECHR, including those ensuing from the judgments of the ECtHR, by measures in the fields of publication, dissemination, education and training.

This thesis argues that the struggle for ensuring the survival and effective operation of the ECtHR should triumph at the national level. Consequently it could be said that the heavy burden for compliance falls to member states. The 2004 Recommendations target the root of the problem and they are appropriate prescriptions for a healthy future.

The central finding of this thesis is that the 2004 Recommendations are a technical vehicle for implementing the ECHR in the domestic legal orders of member states. They are wise guidelines stemming directly from the ECHR to assist member states in their efforts to improve the protection of human rights in their domestic legal order. The Recommendations require member states to act preventatively to ensure that the right systems are in place rather than seeking to take action after violations have occurred.

List of Abbreviations

Committee of Experts for the Improvement of Procedures for the Protection of Human Rights	DH-PR
Committee of Ministers	CoM
Commission of the European Communities	CommEC
Steering Committee for Human Rights	CDDH
Council of Europe	CoE
European Commission of Human Rights:	ECommHR
European Court of Human Rights:	ECtHR
European Convention on Human Rights:	ECHR
Non-Governmental Organisations	NGOs
Parliamentary Assembly	PACE

Contents

INTRODUCTION

"If I have seen further it is by standing on the shoulders of giants".

Isaac Newton

1.1 European Convention on Human Rights: Origins and evolution

The European Convention for Protection of Human Rights and Fundamental Freedoms (ECHR)[1] is often portrayed as one of the most successful regimes for protection of human rights in the world today, and at the same time its judicial body the European Court of Human Rights (ECtHR) has also established itself as the most effective human rights mechanism in Europe, and, arguably, in the world.

The ECHR was a reaction to the past terrible experiences of World War II. When it was drafted the memories of the horrors and the atrocities committed during the war were still embedded in the minds of Europeans. It has been argued that Europe had been the theatre of the greatest atrocities of World War II and felt compelled to press for international human rights guarantees as part of its reconstruction.[2] The ECHR was adopted under the auspices of the Council of Europe (CoE), an institutional environment that has always been entirely focused on the preservation of democracy and human rights. It could be said that both the CoE and the ECHR itself were developments in reaction on the one hand to the past awful experiences of the World War II and on the other hand were an attempt to prevent any future spectre of totalitarianism in Western Europe.

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[1] The ECHR was opened for signature in Rome on 4th November 1950 and entered into force in September 1953.

[2] Shelton, D., "The Boundaries of Human Rights Jurisdiction in Europe", Vol.13, Issue No. 4, *Duke Journal of International and Comparative Law*, 2003, p.96.

The ECHR established a mechanism whose mandate was "to ensure the observance of the engagements undertaken by the High Contracting Parties".[3] Three institutions were entrusted with this responsibility in the early years: the ECommHR (set up in 1954), the ECtHR (set up in 1959) and the Committee of Ministers (CoM) of the CoE. The former Commission (ECommHR) and Court were replaced in 1998, with the entry into force of Protocol No. 11[4]and the inauguration of a new full-time Court.

The ECHR has acquired such an established and fundamental place in the European legal order that it has appropriately been described as "a constitutional instrument of European public order".[5] As Rolv Ryssdal, former president of the ECtHR has put it: "As far as the democratic protection of individuals and institutions is concerned, the ECHR has become the single most important legal and political denominator of the states of the continent of Europe in the widest geographical area".[6]

Under the ECHR, states as well as individuals can take proceedings for alleged violations of the ECHR standards by a Contracting State. The right of individual application, which was optional before the entry into force of Protocol No. 11 to the ECHR, now lies at the heart of the ECHR system and has played a fundamental role in its evolution. The importance of this right does not need to be emphasised; for the first time in history, an international treaty granted individuals not only substantive human rights, but also the procedural entitlement to institute international proceedings against a state for allegedly violating such rights.[7] As a result, detailed provisions concerning the protection of the fundamental rights of the individual could be monitored in a way that would be internationally binding.[8]

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[3] Article 19 of the ECHR.
[4] Protocol No. 11 to the ECHR, 11th May 1994, entered into force 1st November 1998.
[5] *Loizidou v. Turkey*, No. 15318/89 (prel. Obj.), 23/03/1995, para.75.
[6] Ryssdal, R., "The Coming of Age of the ECHR", Vol.1, *European Human Rights Law Review*, 1996, p.22.
[7] Sardaro, P., "Individuals Complaints", in P. Lemmens & W. Vandenhole (eds), "*Protocol No. 14 and the Reform of the ECtHR*", Intersentia, 2005, p.47.
[8] De Vey Mestdagh, K., "Reform of the ECHR in a Changing Europe", R. Lawson & M. de Blois (eds), "*The Dynamics of the Protection of Human Rights in Europe, Essays in Honour of Henry G. Shermers, Volume III*", Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1994, p.338.

However, the ECtHR did not become an effective legal mechanism easily; its early life was difficult and for many years its role and future were uncertain.[9] Former judge Henri Rolin writing in 1965 noted "(...) my public confession is that I hesitate as to whether I deserve the name or the title of judge (...) I could give you a very interesting lecture about rules of procedure, their only weakness is that we have no opportunity to use them. If in the Yearbook on the Protection of Human Rights you look for the Court decisions in '61 you will find one, '62 also, '63 none, '64 none, '65 either. There will be no decision this year. We have no case pending, nothing".[10] Although the ECHR entered into force in 1953, for 20 years it was, in the words of Jochen Frowein,[11] "a sleeping beauty frequently referred to without much impact".[12]

Nevertheless, since its first judgment in *Lawless*[13] (1961), the ECtHR has grown from a somewhat obscure organisation, making only a handful of decisions each year, to a significant political force in the advancement and defense of human rights in Europe, and a model for similar institutions worldwide.[14] There is no doubt that the ECtHR plays a unique and central role in upholding human rights and it is described in the literature as the most effective supervisory machine in Europe.[15] In addition, the ECHR served as a model for the American Convention on Human Rights and in certain respects also for the African Charter on Human and Peoples' Rights.[16]

The ECtHR has thus become the nerve centre of a system of human rights protection which radiates throughout the domestic legal orders of virtually all European States[17] and its achievements are without parallel. The Strasbourg case-law has certainly had highly positive effects on the legal systems and the social order of the member

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[9] See Rolin, H., "Has the ECtHR a future?", *Howard Law Journal*, Vol. 11, 1965, pp.442-451.
[10] Ibid, p.442.
[11] A vice president of the ECommHR.
[12] Janis, W., M., & Kay, S., R., & Bradley, W., A., "European Human Rights Law, Text and Materials", Oxford University Press, 2000, Second Edition, p.69.
[13] *Lawless v. Ireland*, No. 332/57, 01/07/1961.
[14] Blackburn, R., "The Institutions and Processes of the Convention", in Blackburn, R., & Polakiewicz, J.,"Fundamental Rights in Europe: The ECHR and its Member States 1950-2000", 2000, pp.6-8
[15] See Steiner, H., & Alston, Ph., "International Human Rights in Context: Law, Politics, Moral", 2nd Edition, 2000, p.801, 807; Helfer, L., & Slaughter, A.-M., "Toward a Theory of Effective Supranational Litigation", 107 *Yale Law Journal*, 273, 1997, p.296.
[16] Ryssdal, R., "On the Road to a European Constitutional Court", Winston Churchill Lecture, Florence, 21st June 1991.
[17] Evaluation Group Report to the CoM on the ECtHR, 29 September 2001, Preface , available at : http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm

states.[18] The judgments of the ECtHR have made a real difference, improving the everyday lives of almost all Europeans and setting jurisprudential standards for the whole world. Nonetheless at the time of writing, when the CoE comprises 47 member states, when 800 million individuals living in Europe have the right of individual petition, and when applications to the ECtHR range from allegations of torture to complaints about the length of domestic proceedings, it appears that the ECHR system is in crisis.[19] It has experienced a huge increase in its workload in recent years. Hence, in order to ensure its long-term effectiveness in view of the increasing numbers of applications submitted, radical reforms of the ECtHR are urgently required.

From the 1980's onwards, there has been a steady increase in the number of applications brought before the former European Commission and Court of Human Rights. The exponential growth in the number of individual applications did and continues to pose a serious threat to the effectiveness of the ECHR system and it could be argued that it is the biggest challenge the ECtHR has faced in its history. Consequently a major problem that the ECtHR is currently experiencing is its effectiveness in dealing with applications within a reasonable time. The ECtHR in 2009 is continuing to struggle under the weight of an excessive backlog of cases (more than 102,000 pending cases).[20] The ECtHR's success is creating its own problems and the ECtHR gradually has become a "victim of its own success".[21] Despite the substantial increase in its productivity and output in general, the caseload continues to rise considerably and this undoubtedly puts the effectiveness and credibility of the ECHR system in serious danger.

Moreover, it is suggested that the ECtHR is also a "victim of ongoing reforms", since the constant efforts to streamline and reinforce the system proved to be inadequate in managing the challenge of the ever-increasing caseload before the ECtHR. The majority of past and present initiatives were introduced with the intention of revising

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[18] See for example: *Practical Impact of the CoE human rights mechanisms in improving respect for human rights in member states*, Directorate General of Human Rights, CoE, H/Inf(2007) 2, April 2007.
[19] "Review of the Working Methods of the ECtHR", The Right Honourable The Lord Woolf, p.7, available at: http://www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORDWOOLFREVIEWONWORKINGMETHODS.pdf
[20] ECtHR, Statistics, 28/02/2009, available at: http://www.echr.coe.int/NR/rdonlyres/C28DF50A-BDB7-4DB7-867F-1A0B0512FC19/0/Statistics2009.pdf
[21] See among others Turnbull, L., "A victim of its Own Success: The Reform of the ECtHR", *European Public Law*, Vol. 1, No. 2, 1995, pp.215-225.

the mechanisms and procedures of the ECHR system in order to adapt them to the new needs. In 1998 Protocol No. 11 to the ECHR abolished the former European Commission and Court of Human Rights, creating in their place a new permanent institution, the ECtHR. In spite of the drastic reform introduced by Protocol No. 11 in 1998 its caseload continued to rise sharply; the need for a second major reform became apparent only a few years after the reform of 1998. There have been various efforts to make the ECtHR more effective and accessible, which have led to the 2004 "reform package" of measures that address the issue of the ECtHR's excessive caseload, including Protocol No. 14 to the ECHR.

The 2004 ECHR reforms constitute a package of measures to address the problem of the ECtHR's increasing workload at three levels: i) upstream: measures to be taken at national level to enhance the implementation of the ECHR and reduce the pressure on the ECtHR caused by the high numbers of incoming cases; ii) midstream: measures to enhance the ECtHR's filtering and case-processing capacity; iii) downstream: measures to improve and accelerate the execution of the ECtHR's judgments which should, in turn, contribute to reducing the pressure "upstream".[22]

1.2 Subject and aim of thesis

This thesis deals primarily with the adopted measures targeting the upstream level. The CoM at the 114th Ministerial Session in May 2004 adopted a Declaration on "Ensuring the effective implementation of the ECHR at national and European level". The Declaration of the CoM contains the key Recommendations that should be implemented by member states, namely:

I. Recommendation Rec (2004) 4 on the ECHR in the university education and professional training;[23]
II. Recommendation Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR;[24]

[22] CM(2006)39 final, 116th Session of the CoM (Strasbourg, 18-19 May 2006), Ensuring the continued effectiveness of the ECHR- The implementation of the reform measures adopted by the CoM as its 114th Session (12 May 2004).
[23] See Appendix 1.

III. Recommendation Rec (2004) 6 on the improvement of domestic remedies.[25]

In addition to these three Recommendations a number of further Recommendations adopted by the CoM at an earlier stage, were also regarded as measures that aim to prevent human rights violations at national level and were referred to in the Declaration:

I. Recommendation Rec (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the ECHR;[26]
II. Recommendation Rec (2002) 13 on the publication and dissemination in the member states of the text of the ECHR and of the case-law of the ECtHR.[27]

Hence, the central aim of this thesis is to analyse the set of these five Recommendations referred to in the 2004 Declaration of the CoM concerning various measures to be taken at the national level. More specifically, this thesis concentrates on evaluating the effectiveness of these Recommendations whose principal aim is to strengthen the implementation of ECHR at national level, and to critically assess their implementation at national level. These Recommendations endeavour to prevent violations at the national level and improve domestic remedies, including, requiring states to ensure continuous screening of draft and existing legislation and practice in light of the ECHR and the ECtHR case-law; and also by requiring states to increase provision of information, awareness-raising, training and education in the field of human rights.

The principle of subsidiarity underpins these Recommendations. According to Article 1 of the ECHR, it is with the High Contracting Parties that the obligation lies to "secure to everyone within their jurisdiction the rights and freedoms" set out in the ECHR, whereas the role of the ECtHR, according to Article 19 of the ECHR, is to "ensure the observance of the engagements taken by the High Contracting Parties". Consequently, it is the primary responsibility of member states to secure the rights and freedoms; the ECtHR's role is subsidiary.

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[24] See Appendix 2.
[25] See Appendix 3.
[26] See Appendix 4.
[27] See Appendix 5.

Nonetheless, the protection of the ECHR rights and freedoms is often inadequate resulting in a high number of cases being brought before the ECtHR. Member states should take practical measures in order to ascertain that effective domestic remedies exist and are available to any person alleging that there has been a violation of the ECHR. It is only when and to the extent that national authorities, including domestic courts[28] fail to fulfil their primary responsibility for the protection of the rights and freedoms laid down in the ECHR, that there is access to the mechanism provided for in the ECHR.[29]

On the other hand, the interpretation of the provisions of the ECHR ultimately rests with the ECtHR.[30] Although Contracting States are primarily under the obligation to execute the judgments of the ECtHR pronounced in cases to which they are a party, they also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice.[31] Only thus can they fully discharge their primary responsibility, under Article 1 of the ECHR, to ensure the rights and freedoms of the ECHR as interpreted by the ECtHR.

It is evident that a more effective implementation of the ECHR within the domestic legal order of member states of the CoE can reduce the number of applicants seeking redress before the ECtHR, and hence its workload. The system of protection of human rights under the ECHR can only operate effectively on the basis of constructive co-operation and interaction between Strasbourg and domestic institutions. If the Strasbourg machinery is not to collapse, improved prevention of violations and greater emphasis on effective domestic legal protection is of paramount significance. Consequently the main objective of the ongoing reforms of the ECtHR, should be to improve and reinforce the implementation of the ECHR in the domestic legal order of the member states. Hence, this thesis argues that the Recommendations of 2004 constitute a critical factor in the ongoing attempts to strengthen the effectiveness of the ECHR system.

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[28] See Article 1 of the ECHR.
[29] See Article 35 (1) of the ECHR: exhaustion of local remedies as an admissibility requirement.
[30] See Article 19 juncto Article 44 of the ECHR.
[31] See Doc. 8808, Committee on Legal Affairs and Human Rights, "Execution of judgments of the ECtHR", Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group, 12 July 2000.

This thesis also considers the establishment of what has become known as the "pilot judgment procedure". This procedure is a result of the 2004 "reform package" and an attempt to tackle the phenomenon of "repetitive" or "clone" cases. These cases have their origin in a structural or systemic situation in the respondent member state, which generate large numbers of, by definition, well-founded cases. As part of the reform measures, in order to improve the execution of the ECtHR judgments, the CoM adopted a resolution calling on the ECtHR to identify in its judgments any underlying systemic problems in the CoE member states, and the sources of any such problems.[32]

The purpose of designating a case for the "pilot-judgment procedure" is to process cases that violate the ECHR promptly and effectively. This procedure is both a means of tackling systemic violation cases and an important element in reducing the caseload of the ECtHR. It is undoubtedly a significant development for the ECHR system, which lies at the very heart of the relationship between the ongoing reforms of the ECtHR and the domestic implementation of the ECHR. This thesis attempts to identify the main characteristics and elements of this procedure and the principles applied by the ECtHR when delivering "pilot" judgments. Furthermore, it will discuss the application of this approach to various situations revealing systemic problems. Moreover, this thesis critically evaluates the effectiveness, the weaknesses, and the prospects of this procedure which it is still in its early stages.

The recommended measures targeting the upstream level seek to stress the responsibility of national authorities and to reinforce the capabilities of the national legal systems to prevent or at least remedy violations of the ECHR rights at the national level. It is suggested that if fully applied, these measures will relieve the pressure on the ECtHR in various ways: they should reduce the number of individual applications where a possible incompatibility of national law with the ECHR has been avoided, or where the alleged violation has been remedied at the national level, but

[32] Resolution Res(2004)3 on judgments revealing an underlying systemic problem, CoM, 12 May 2004.

also because the workload of the ECtHR will be reduced if the case has been the subject of a well reasoned decision at the national level.[33]

More effective implementation of the ECHR at national level is central to the aim of guaranteeing the long-term effectiveness of the ECHR system, through reducing the number of applications that must be dealt with by the ECtHR. The Explanatory Report on Protocol No. 14 states: "Only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the ECtHR's present overload".[34]

1.3 Literature Review

While there is a wide and varied body of literature on the application and interpretation of the ECHR, there are specific areas that are not addressed in a comprehensive manner. This study will look at one such area, which the author and those interviewed by the author consider to be significant. This thesis is not directly concerned either with the case-law of the ECtHR or with the mechanics of taking a case to Strasbourg. Both these subjects are already dealt with extensively in the literature.[35] The issue explored here is, instead, the relationship between the reforms of the ECtHR and the implementation of the ECHR in the domestic legal orders of member states of the CoE.

The central aim of the system set up by the ECHR is to establish a situation in which in each and every Contracting State the rights and freedoms under the ECHR are effectively protected. Luzius Wildhaber (former President of the ECtHR) suggested that this means primarily that the relevant structures and procedures are in place to allow individuals to vindicate those rights and to assert those freedoms in national

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[33] CDDH(2003)006 Addendum final, Guaranteeing the long-term effectiveness of the control system of the ECHR, Addendum to the final report containing CDDH proposals (long version), Strasbourg, 9 April 2003, para.5.

[34] Explanatory Report to Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 14.

[35] See for example, Mowbray, A., "Cases and Materials on the ECtHR", Oxford University Press, Second Edition, 2007; Jacobs, O., & White, R., "The ECHR", Oxford University Press, Fourth Edition, 2006; Van Dijk, P., & Van Hoof, G.J.H., "Theory and Practice of the ECHR", Intersentia, Fourth Edition, 2006; Leach, Ph. "Taking a case to the ECtHR", Oxford University Press, Second Edition, 2005.

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[33] CDDH(2003)006 Addendum final, Guaranteeing the long-term effectiveness of the control system of the ECHR, Addendum to the final report containing CDDH proposals (long version), Strasbourg, 9 April 2003, para.5.

[34] Explanatory Report to Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 14.

[35] See for example, Mowbray, A., "Cases and Materials on the ECtHR", Oxford University Press, Second Edition, 2007; Jacobs, O., & White, R., "The ECHR", Oxford University Press, Fourth Edition, 2006; Van Dijk, P., & Van Hoof, G.J.H., "Theory and Practice of the ECHR", Intersentia, Fourth Edition, 2006; Leach, Ph. "Taking a case to the ECtHR", Oxford University Press, Second Edition, 2005.

courts.[36] The intention of the ECHR was not to substitute the national organs of the Contracting Parties with the ECtHR, the primary task for the enforcement of the human rights protected by the ECHR was left to the national state organs. Leo Zwaak has argued that the ECtHR "is not a victim of its own success, but a victim of a general reluctance of the member states, to take the ECHR seriously. Human rights violations first of all should be redressed at the domestic level and the Strasbourg Court should only be used as an *ultimum remedium*".[37]

John Wadham and Tazeen Said have argued that any strengthening of human rights and reduction of the number of violations and thus of applications reaching the ECtHR, must primarily be aimed at domestic bodies.[38] The Evaluation Group[39] underscored that: "the primary duty to protect fundamental rights and freedoms lies with the national courts and authorities and it is at that level that protection can be secured most effectively".[40] The Group of Wise Persons[41] stated that the remedies available at national level "constitute the first line of defence of the rule of law and human rights. Initially, it is for the national courts to protect human rights within their domestic legal systems and to ensure respect for the rights safeguarded by the ECHR".[42]

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[36] Wildhaber, L., "The ECtHR in Action", *Ritsumeikan Law Review*, No. 21, 2004, p.83.

[37] Zwaak, L., 'Overview of the European Experience in Giving Effect to the Protections in European Human Rights Instruments', Working Session on the Implementation of International Human Rights Protections, available at: http://www.internationaljusticeproject.org/pdfs/Zwaak-speech.pdf., p.14.

[38] Wadham, J., & Said, T., "What price the right of individual petition: Report of the Evaluation Group to the CoM on the ECtHR", European Human Rights Law Review, 2002, pp.169-174.

[39] The Evaluation Group on the ECtHR was established by the CoE's CoM on 7 February 2001 with the mandate to identify means of ensuring the continued effectiveness of the ECtHR. It was composed of the then President of the ECtHR, Luzius Wildhaber; Deputy Secretary General Chris Krüger, and was Chaired by Ambassador Justin Harman of Ireland. Its report, was published on 27 September 2001, EG (Court) 2001, contained a number of recommendations for reform of the ECtHR, in view of the rising volume of applications submitted to the ECtHR and its relatively limited available resources. Available at http://www.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm

[40] Evaluation Group, "Report of the Evaluation Group to the CoM on the ECtHR", 27 September 2001, para.44.

[41] The member states of the CoE in Warsaw Summit (16-17 May 2005), in an attempt to secure the efficiency of the ECtHR, have set up the Group of Wise Persons, an international panel of eminent personalities to examine the issue of the long-term effectiveness of the ECHR mechanism. The Group is made up of 11 members: Lord Woolf (United Kingdom), Veniamin Fedorovich Yakovlev (Russia), Rona Abray (Turkey), Fernanda Contri (Italy), Jutta Limbach (Germany), Marc Fischbach (Luxembourg), Gil Carlos Rodriguez Iglesias (Spain), Emmanuel Roucounas (Greece), Jacob Sodermann (Finland), Hanna Suchocka (Poland), Pierre Truche (France). The Group of Wise Persons submitted its Report (CM(2006)203 15 November 2006) to the CoM on 15th November 2006.

[42] Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, para.16, available at: https://wcd.coe.int/ViewDoc.jsp?id=1063779&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

Andrew Drzemczewski is convinced that it is preferable that domestic courts and tribunals should effectively secure the rights and freedoms guaranteed by the ECHR, since an attempt at vindication through a lengthy process before Strasbourg organs may well deprive an individual of the immediate redress which is associated with domestic law.[43] Jorg Polakiewicz has argued that the settlement of litigation on the national level, saving both time and money, always remains the preferable solution.[44]

However, various commentators have questioned the efficiency and practicality/implementation of the Recommendations of the CoE at the national level. For example, Marie-Aude Beernaert has expressed her reservations, regarding the effectiveness of these Recommendations, since they are not mandatory[45] in member states. It should be remembered that the adoption of a recommendation does not create a legal obligation for the member state to comply with it. Moreover, she argues that although these Recommendations are welcome, their value remains "*largely symbolic*".[46] Furthermore, Leo Zwaak and Teresa Cachia have suggested that they will be "fruitless if they remain as simple recommendations and are not backed by a strong will to bring them into effect".[47]

On the other side of the argument, Martin Eaton and Jeroen Schokkenbroek are convinced that "the fact that recommendations are non-binding does not mean they are therefore ineffective". They argue that the evidence is that recommendations of the CoM are taken seriously by the member states and have considerable effect.[48] For example, the CoM adopted in 2000 a Recommendation to member states on "the re-examination or re-opening of certain cases at domestic level following judgments of the ECtHR". Through this Recommendation, in cases where a violation of the ECHR

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[43] Drzemczewski, A., "*European Human Rights Convention in Domestic Law*", Oxford: Clarendon Press, 1983, p.333.
[44] Polakiewicz, J., "The Application of the ECHR in Domestic Law", *Human Rights Law Journal*, Vol.17, p.406.
[45] The adoption of a Recommendation does not create a legal obligation of the State to comply with it.
[46] Beernaert, Marie-Aude, "Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price", European Human Rights Law Review, Vol.5, 2004, pp.544-557.
[47] Zwaak, L., & Cachia, Th. "The ECtHR: A Success Story?", *Human Rights Brief,* Vol.11, Issue 3, 2004, p.34.
[48] Eaton, M., & Schokkenbroek, J., "Reforming the Human Rights Protection System Established by the ECHR- A New Protocol No. 14 to the Convention and Other Measures to Guarantee the Long-term Effectiveness of the Convention System", *Human Rights Law Journal*, Vol.26, No. 1-4, p.14.

has been established by the ECtHR, the CoM asks member states to provide a means of reopening the relevant proceedings in domestic law. It has been noted that "most states have now incorporated some mechanisms into national law to permit criminal proceedings to be reopened" essentially in accordance with this Recommendation.[49]

In developing the research questions, it was considered that the ongoing debates about reforming and innovating the ECHR system could benefit from being viewed from the angle of the implementation of the ECHR at national level. Consequently the first objective of this thesis is to identify the essential elements for the construction of a theoretical framework to evaluate the domestic implementation of the ECHR. To date no published research of any real substance on what is actually the relationship of the domestic implementation of the ECHR in member states of the CoE and the ongoing reforms of the ECtHR, appears to have been carried out, although there is a degree of consensus, that priority should be given to the implementation of the ECHR, in order to decrease the number of applications reaching Strasbourg. This thesis appears to be the first study, which has as a main objective to analyse the status of the ECHR in the light of such questions.

This thesis also argues that the Recommendations constitute a critical element in the management of the ECtHR's caseload, and their message has been reinforced in the conclusions and recommendations in the Report of the Group of Wise Persons. It should be noted that it is beyond the scope of this thesis to discuss in detail the proposals made by the Group of Wise Persons, although reference to them is made where appropriate (for example, where they encourage the ECtHR to use the "pilot judgment procedure" as far as possible in future).[50]

It is self-evident that the number of applications would have spiralled out of control had member states not taken initiatives, whether by the introduction of specific effective domestic remedies or by means of general legislative measures, in order to enable individuals to seek redress for ECHR grievances at the domestic level or to remove structural defects in their domestic legal orders which of themselves generate

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[49] Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", CoE Publishing, Human rights files, No. 19, 2002, pp.16-17.
[50] Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, para.105.

considerable number of complaints before the ECtHR.

Defining the terms will be central to defining the research questions. By "legal order," we mean to include the legislature, the executive, the judiciary – indeed, any public authority, established through constitutional and public law, which produces or applies legal norms. The term, "domestic implementation", can certainly take various meanings. On the one hand, we understand "domestic implementation" to denote the ongoing coordination between the ECHR regime and the domestic legal order. Such coordination includes the acceptance of the letter and spirit of the ECHR, the case-law of the ECtHR, and compliance with the latter's judgments. On the other hand, "domestic implementation" may also entail the evasion of the ECHR or resistance to the ECtHR. Both aspects are significant in understanding the interaction of the ECHR and the domestic legal orders.

A focus on implementation, primarily, means considering how – through what mechanisms and to what extent – the domestic legal orders are "coordinated with," "adapted to," "adjusted with respect to" the ECHR. Some national officials may seek to resist, even defy, the ECtHR and adaptation, while others, acting as agents of coordination, may seek to increase the effectiveness of the ECHR. It is important to note that we are interested in both the cooperative and conflictual aspects of domestic implementation. It has been argued that "implementation is a key problem in making the system of international protection of human rights effective, and it has proved difficult and troublesome".[51] The basic objective of our focus therefore is to shed more light on something that tends to remain a black box in the ECHR law, namely the processes through which the ECHR norms are operationalised so as to produce consequences in practice.

Possible obstacles and deficiencies in two model states (Cyprus and Turkey) will be evaluated in light of the Recommendations for improved domestic implementation of the ECHR. It is anticipated that the analysis and comparison of how the ECHR is implemented in these two different domestic legal orders and how the two states

[51] Bilder, R., "An Overview of International Human Rights Law" in Hannum, H., "Guide to International Human Rights Practice", Philadelphia: University of Pensylvania Press, Second Edition, 1992, pp.3-18.

responded to the Recommendations for improved implementation will reveal a number of failures of the system in practice, and consequently suggest that there is room for improvement in the area.

In particular, this thesis will address the following questions:

- How effective is the incorporation of the ECHR into domestic law of the two model states? What is the status of the ECHR in their domestic legal order?

- What is the reaction of the two model states to individual cases: The objective is to look at the key cases from the model states, which have come before the ECtHR and the former Commission of Human Rights in Strasbourg, and to examine the way in which the national governments have responded to the findings of a violation.

- What is the effect of the ECtHR's judgments on the domestic legal order (execution of judgments): Do the model states comply with the judgments of the ECtHR and to what extent and how swiftly? Do they have formal mechanisms in order to comply with the judgments of the ECtHR?

- Do the model states have formal mechanisms for the systematic verification of ECHR compatibility of all laws and administrative practice (legislative drafting procedure) and to what extent are they effective?

- Do the model states provide effective domestic remedies for anyone having an arguable complaint of a violation of the ECHR? The main target is to trace these remedies (if any) within the model states and critically assess their sufficiency and effectiveness in relation to the right breached.

- Do the model states provide sufficient education and professional training about the ECHR rights? The aim will be to examine the education and training in the model states particularly for law students and lawyers. It will also be evaluated whether NGOs have any role in increasing people's awareness about ECHR rights.

➢ Do the model states provide any procedures for the reopening or re-examination of cases at domestic level following judgments of the ECtHR?

1.4 Research Methodology

A research problem such us the domestic implementation of the ECHR lends itself to several approaches and it is crucial to clarify from which perspective the topic would be examined. A mere abstract analysis of the domestic implementation of the ECHR is not likely to increase the understanding of the dynamics of continuity and change of the implementation and/or application of the ECHR in the legal orders of member states. Therefore the issues raised above are best discussed and illustrated by means of a comparison of two member states of the CoE.

A comparative approach is adopted because it is expected to find that the meaning of domestic implementation – the impact of the ECHR on the domestic legal orders, for instance – will change over time in any one system, and will be registered differently across systems. Thus the comparison is across legal systems, circumstances, and time. It is through examining the domestic implementation of the ECHR that we hope to be able to assess, comparatively the evolving status of the ECHR within the domestic legal orders of Cyprus and Turkey. Hence, this thesis focuses, comparatively, on the domestic implementation of the ECHR in the domestic legal orders of Cyprus and Turkey.

1.4.1 Focus on Cyprus and Turkey

The decision to concentrate on Cyprus and Turkey for particular scrutiny has been determined by a number of factors which are explained below.

The Republic of Cyprus is a fairly new democracy; it became independent on 16 August 1960, became a member of the CoE in 1961, ratified the ECHR in 1962 and became a full member of the EU in May 2004. Therefore, it is extremely interesting to examine how the ECHR is applied and implemented in this democratic system and how the ECHR affects the quality of life of its citizens. It is worth mentioning that

whilst Cyprus was still a British Crown Colony, the United Kingdom extended the ECHR to Cyprus among other territories for whose international relations the United Kingdom government was responsible.[52]

Turkey ratified the ECHR, shortly after its entry into force in 1954. However, the competence of the ECommHR under Article 25 was only recognised in 1987 and of the ECtHR under Article 46 in 1990. Since the early 1990s, many thousands of cases have been submitted to the ECommHR and ECtHR against Turkey, and Turkey has on numerous occasions been found to have committed serious violations of human rights.[53] Stephen Greer claimed that of all the Western European member states of the CoE, Turkey has had the most serious systemic problems with a lack of respect for human rights on the part of executive institutions.[54] Turkey was formally granted the status of EU candidate country at the Helsinki summit in December 1999 and is making great efforts to improve the standards of human rights within its territory.[55] According to Aslan Gündüz "hardly any country in the world has been so criticised for its human rights record, nor is the future of any other country so dependent on the promotion of human rights".[56] Therefore, it is extremely interesting to examine the effort that Turkey is making to improve the protection of human rights, as well as the role of the ECHR in this process.

The decision to concentrate on Cyprus and Turkey has been determined by a number of factors, which enable a compare and contrast approach to the issues examined in the thesis:

- Both Cyprus and Turkey are relatively old member states of the CoE.[57]

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[52] Declaration No. 61/48/53, on 23 October 1953.

[53] Of the 1503 judgments that the ECtHR delivered in 2007, the highest number (331) concerned Turkey, 2007 Survey of Activities, ECtHR, p.57.

[54] Greer, S., "The ECHR, Achievements, Problems and Prospects", Cambridge University Press, 2007, p.95.

[55] In addition to the traditional economic criteria, candidate countries of EU must also fulfil the political criteria set by the European Council 1993 in Copenhagen. This means they must have in place stable institutions guaranteeing democracy, rule of law, human rights and respect of minorities.

[56] Gündüz, A., "Human rights and Turkey's future in Europe", *Orbis- Philadelfia*, Vol. 45, 2001, p.21.

[57] Turkey is a founding member of the CoE, having become the thirteenth member state of the organisation in 1949, the same year the organisation was founded. Turkey has ratified the statute of the CoE on 12 December 1949 through Law No. 5456. The Republic of Cyprus became the sixteenth member of the CoE on 24th May 1961. It signed the ECHR on 16th December 1961 and ratified it by

➢ Geographically, Cyprus and Turkey are neighbouring countries situated at the south eastern corner of Europe.

➢ Legally the Turkish legal system is based on the continental law and Cypriot legal system is based on common law.

➢ Chronologically, both countries decided to incorporate/ make the ECHR part of their domestic law soon after they ratified it but under a different system of treaty implementation: Cyprus follows the dualist system and Turkey the monist system.

➢ Cyprus is a recent member of the EU and Turkey is a candidate country on its way to become a member of the EU.

➢ There have been a number of interstate applications with far reaching consequences as a result of the Turkish invasion and occupation of part of the territory of Cyprus.[58]

➢ By virtue of the case-law of the ECtHR (and in particular the three *Loizidou v. Turkey* judgments[59] and the 4th inter-state application *Cyprus v. Turkey*[60]) the area of the Republic of Cyprus under the effective control of Turkey post its 1974 invasion, has been held to fall under Turkey's jurisdiction within the meaning of Article 1 of the ECHR. For the purposes of this thesis the developments in that part of Cyprus will be discussed in the chapter which concerns Turkey.

➢ The "pilot judgment procedure" has been applied to one systemic situation in Turkey[61] and is being again proposed in relation to violations of property rights in the northern part of Cyprus.[62]

Law No. 39/1962. The instrument of ratification was deposited with the Secretary-General of the CoE on 6th October 1962.

[58] *Cyprus v. Turkey,* Nos. 6780/74 and 6950/75, (adm.) 26/05/1975; *Cyprus v. Turkey,* No. 8007/77, (adm.) 10/07/1978; *Cyprus v. Turkey,* No. 25781/94, 10/05/2001.

[59] *Loizidou v. Turkey,* No. 15318/89, (Preliminary objection -23/03/1995, Merits and Just Satisfaction-18/12/1996, Just Satisfaction- 28/07/1998).

[60] *Cyprus v. Turkey*, No. 25781/94, 10/05/2001.

[61] *Doğan and Others v. Turkey,* Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29/06/2004.

[62] *Xenides-Arestis v. Turkey*, No. 46347/99, 22/12/2005.

All these factors are relevant to the decision to focus on Turkey and Cyprus.

1.4.2 Legal Approach

First of all, the legal approach both to the ongoing reforms of the ECtHR and to the domestic implementation of the ECHR relies predominately on an analysis of a wide range of documents. A detailed reading of the *travaux préparatoires* of the ECHR has increased the historical and actual understanding of the domestic implementation in the national legal orders. For the "living aspects" of this procedure, use was made of the extensive jurisprudence of the ECommHR and ECtHR. Both sources were further complemented and interpreted through a large number of scholarly publications on the domestic implementation of the ECHR and on the European system of protection of human rights in general. This literature was readily available in a number of excellent monographs, collected volumes and scholarly journals on human rights and international law.

Moreover, as far as the ongoing reforms of the ECtHR are concerned, a variety of legal documents were consulted: reports of the Steering Committee for Human Rights (CDDH) and the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), opinions of the ECommHR and ECtHR, position papers of the ECtHR, resolutions and recommendations of the CoM, reports of the Parliamentary Assembly (PACE) and Non Governmental Organisations (NGOs) reports.

The legal analysis would not have been complete, however, without interviews with a number of key persons, both inside and outside the CoE. The interviewees[63] were distinguished practitioners, academics, judges of the ECtHR, CoE personnel, who have a thorough knowledge of the caseload problem of the ECtHR. Some of them are familiar with the mechanisms of the two legal systems of the model countries and the domestic status of the ECHR in the countries. In addition, some of the people

[63] See Appendix 6.

mentioned above have been involved in the ongoing reforms of the ECtHR and they expressed their opinions regarding their effectiveness.

In-depth interviews, as opposed to quantitative surveys have been favoured, because the objective here was to develop ideas and not to collect data. Therefore, the in-depth interview format had the advantage of expanding on and sharpening ideas to issues, to be investigated. These exchanges were not conducted as structured interviews but were designed as open and informal discussions to verify the major conclusions of this thesis. The interviewees were asked open-ended questions and were free to speak for as long as they wanted. Although the author went into each interview with a personal protocol of questions and topics to cover, no formal structure was used. For the most part, all interviews covered the same essential questions. However, those interviews conducted later were more focused, as the author was able to ask the interviewees to comment on issues that had emerged in previous interviews. Furthermore, each interviewee's area of expertise was different and often the focal point of an interview varied.

It should be noted that some of the most productive information was obtained during the author's study visit, which was carried out during the spring of 2007 to the Committee on Legal Affairs and Human Rights of the PACE (Strasbourg). While there, the author made great use of the ECtHR's library, again working with background and current materials. Moreover, the author sat in on actual ECtHR hearings, sessions of the PACE and participated in CDDH meetings.

1.5 Overview of the Parts

The thesis is divided into five parts, which relate to the main areas of concern for its author, but also reflect the direction and development of the overall argument.

In order to engage meaningfully with the issues, it was necessary to discuss them in the context of the continuous reforms of the ECHR system. The first part serves precisely that purpose. In particular, the aim of this part is to provide a critical survey of the proposals and the attempts to reform the ECHR system.

Whereas the focus of Part I is directly on the reforms of the ECHR system the rest of the thesis is concerned with the issue of the domestic implementation of the ECHR at national level. Part II has three functions: to explain and analyse the issue of the implementation of the ECHR at national level and to critically assess the Recommendations of 2004, which aim to improve the domestic implementation of the ECHR. In addition, the "pilot judgment procedure" is analysed and critically evaluated.

The objective of Part III is to review the status of the ECHR in the Cypriot and Turkish domestic legal order. Each of these chapters on Cyprus and Turkey provides first a general introduction to the constitutional system of the country under discussion, before going on to address the precise role, if any, of the ECHR within its legal system. Where it exists, that role is invariably deeply rooted in and defined by the constitutional order, which is the subject matter of part one of each of these chapters. A third section in each of these chapters is then devoted to the discussion of the ways in which judgments adverse to the state under discussion have been (or have not been) implemented within the jurisdiction. Relating to the Recommendations of 2004 for improved domestic implementation, the responses of the two states and possible obstacles in the two domestic legal orders are evaluated in the fourth section.

Part IV provides a comparative analysis of the impact of the ECHR on the national legal orders of Cyprus and Turkey. Furthermore it seeks to comparatively evaluate the effectiveness of the May 2004 Recommendations and to critically assess their implementation in the relevant countries.

Part V draws together themes, which run through this thesis and offers some conclusions on the general question of the relationship between the implementation of the ECHR in member states and the reforms of the ECtHR. It offers a new approach to the question based on the comparative material covered in Part IV.

PART I

CHAPTER 1: Reforming the ECtHR: An Ongoing Challenge

"Give me where to stand and I will move the earth"

Archimedes

The ECtHR plays a unique and central role in upholding human rights in Europe, but in recent years has experienced a huge increase in its workload. The exponential growth in the number of individual applications has and continues to pose a serious threat for the effectiveness of the ECHR system and it can be argued that it is the biggest challenge the ECtHR has been faced with in its history. Despite the substantial increase in its productivity and its output in general, the caseload continues to rise considerably, putting the effectiveness and credibility of the ECHR system in serious danger. Even with the reform of Protocol No. 11 in 1998, the caseload of the ECtHR continued to rise sharply. The need for a second major reform became obvious only a few years after the drastic reform of 1998. Since then, there have been various efforts to make the ECtHR more effective and accessible, which culminated into the 2004 "reform package" of measures that address the issue of ECtHR's excessive caseload, including Protocol No. 14 to the ECHR. This chapter provides analysis and critical evaluation of the ongoing efforts to reform the ECtHR in order to guarantee its long-term effectiveness.

2.1 Introduction

It is evident that the current caseload of the ECtHR bears no relation to the situation during the first years of existence of the ECHR institutions. From the 1980's onwards, there has been a steady increase in the number of applications brought before the ECommHR and ECtHR. The statistics reveal explicitly the scale of the increase in the

volume of applications; between 1955 and 1989 a total number of 49,122 applications were lodged with the ECommHR and ECtHR.[64] Since then the annual number of applications, which were lodged with the Commission and Court, grew from 5,279 in 1990 to 30,069 in 2000 and in 2004 44,128 applications were lodged with the ECtHR.[65]

According to Robert Harmsen, the ECtHR now receives every year almost the equivalent of the total number of applications which had been lodged with the previous institutions during their first three decades of existence.[66] Marie-Aude Beernaert suggests that the increase in the volume of individual applications had attained critical levels. In her view the ECtHR might face a real risk of drowning under the sheer volume of cases brought before it.[67] Lord Woolf[68] states that the ECtHR had made tremendous efforts to improve efficiency but cannot "keep abreast of this ever-increasing caseload".[69]

The number of cases registered after preliminary examination shows comparable rise: Between 1955 and 1989 the ECommHR registered in total some 15,911 cases but just in 2007 the ECtHR registered over twice as many cases-41,700.[70] In addition there has been a remarkable rise in the number of judgments which the ECtHR delivers annually: Between 1955 and 1989 the ECtHR handed down just 205 judgments.[71] This figure has increased steadily since then so that in 2006 and 2007 the ECtHR

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[64] Survey of Activities 2005, ECtHR, Information issued by the Registrar of the ECtHR, p. 33 available at: http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/SurveyofActivities2005.pdf

[65] *Ibid*, p. 33

[66] Harmsen, R., "The ECtHR as a Constitutional Court: Definitional Debates and the Dynamics of Reform", Conference in Memory of Stephen Livingstone, Queen's University, Belfast, 7th & 8th October 2005.

[67] Beernaert, M.,A., "Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price", Vol. 5, *European Human Rights Law Review*, 2004, p.545

[68] Lord Woolf was a member of the "Group of Wise Persons" which had been set up by the Third CoE Summit in Warsaw in May 2005 and commissioned the Review of the Working Methods of the ECtHR" available at: http://www.echr.coe.int/ECHR/Resources/Home/LORDWOOLFREVIEWONWORKINGMETHODS.pdf

[69] Review of the Working Methods of the ECtHR, The Right Honourable The Lord Woolf, p.8.

[70] Survey of Activities 2007 available at: http://www.echr.coe.int/NR/rdonlyres/59F27500-FD1B-4FC5-8F3F-F289B4A03008/0/Annual_Report_2007.pdf , p. 149

[71] Survey of Activities 2005 available at: http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/SurveyofActivities2005.pdf , p. 33

produced a total of 1,560 and 1,503 judgments respectively.[72] Dinah Shelton has pointed out that only during 2001 the ECtHR issued more than one-third of the total number of judgments delivered since it was created; the ECtHR delivered 888 judgments in 2001, out of the total number of 2,597 judgments delivered by the ECtHR since 1959.[73]

The workload of the ECtHR has been successfully described "as an iceberg, only a little tip is visible to the outside world; the great mass remains hidden under water".[74] Visible are obviously only the cases which are decided by the ECtHR every year. Thousands of other cases remain unnoticed but they form the bulk of the work at the ECtHR. Not to be ignored is the remarkable increase in the "output" of the ECtHR as confirmed when one considers the number of decisions (14,249) issued by the ECommHR and ECtHR until 1998 as compared to the number of decisions reached by the ECtHR only in 2003 and 2004 ,18,034 and 21,181 respectively.[75]

The steep rise in individual applications is the biggest challenge in the history of the ECtHR. Consequently, there is a considerable backlog of cases pending before the ECtHR; 102,700 cases were pending on 28th February 2009.[76] The ECtHR pointed out that the increasing number of applications does pose a threat to the effectiveness of the system and accepted that it has difficulty in processing applications within a "reasonable time".[77] It must be added that the "reasonable time" requirement is protected by Article 6 of the ECHR which provides a detailed right to a fair trial including the right to a public hearing before an independent and impartial tribunal within "reasonable time". The ECtHR considers that, ideally, a case at Strasbourg level should be finally disposed of within two years.[78] Since this is very difficult to be achieved in the current situation, it has set itself a "target for the handling of

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[72] Survey of Activities 2007 available at: http://www.echr.coe.int/NR/rdonlyres/59F27500-FD1B-4FC5-8F3F-F289B4A03008/0/Annual_Report_2007.pdf , p. 149

[73] Shelton, D., "The Boundaries of Human Rights Jurisdiction in Europe", Vol.13, Issue No. 4, *Duke Journal of International and Comparative Law*, 2003, p.149.

[74] Schermers, H., "The Eleventh Protocol to the ECHR", *European Law Review*, Vol. 19, 1994, p.370.

[75] Survey of Activities 2005, p.33.

[76] ECtHR, Statistics, 28/02/2009, available at: http://www.echr.coe.int/NR/rdonlyres/C28DF50A-BDB7-4DB7-867F-1A0B0512FC19/0/Statistics2009.pdf

[77] CDDH-GDR(2003)024, "Position Paper of the ECtHR on Proposals for Reform of the ECHR and Other Measures as Set Out in the Report of the CDDH of 4 April 2003", para.4.

[78] Evaluation Group Report to the CoM on the ECtHR, 29 September 2001, Preface, available at: http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm, para.31.

applications" within three years.[79] However, it seems that even this target cannot be achieved since a case taken to the ECtHR usually takes four to five years to progress through the current system and some cases take even longer.

In 2003 the ECtHR delivered 703 judgments and it took on average[80] of 4 years and 6 months[81] for these cases to be decided. In 2004 it took on average of 4 years and 8 months for the ECtHR to deliver 718 judgments[82], whilst in 2005, 1105 judgments took on average of 4 years and 5 months.[83] That is an extremely long period of time, especially in view of the fact that applicants probably had exhausted their domestic remedies before turning to Strasbourg as required by Article 35 of the ECHR which stipulates that the ECtHR "may only deal with the matter after domestic remedies have been exhausted". This provision is designed on the one hand, to ensure that states have been given the opportunity to resolve the matter domestically, to give the national courts the opportunity to test the factual evidence in the normal way and on the other hand to minimise the caseload of the ECtHR.[84]

A number of cases are illustrative of the length of proceedings problem at its extreme: In *Koua Poirrez v. France*[85] the length of domestic proceedings took approximately 8

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[79] *Ibid*, para.31.

[80] The estimation of the average time is based on the year which the cases were lodged with the ECtHR and on the year in which the cases were decided.

[81] 2 of the cases (0.2%) which the ECtHR decided in 2003 were lodged in 1990, 1 (0.2%) in 1991, 1 (0.2%) in 1992, 6 (0.9%) in 1993, 27 (3.8%) in 1994, 46 (6.6%) in 1995, 94 (13.4%) in 1996, 134 (18.8%) in 1997, 169 (24%) in 1998, 163 (23.2%) in 1999, 53 (7.5%) in 2000, 53 (7.5%) in 2001 and 7 (1%) in 2002. Available at : http://www.echr.coe.int/NR/rdonlyres/F669187E-E17C-4CCC-97A2-34546CD7929B/0/MicrosoftWordSUBJECT_MATTER_2003_TABLE.pdf

[82] 2 of the cases (0.3%) which the ECtHR decided in 2004 were lodged in 1993, 7 (1%) in 1994, 16 (2.2%) in 1995, 28 (3.9%) in 1996, 48 (6.7%) in 1997, 103 (14.3%) in 1998, 170 (23.7%) in 1999, 131 (18.2%) in 2000, 131 (18.3%) in 2001, 79 (11%) in 2002, 2 cases (0.3%) in 2003 and 1 (0.1) in 2004. Available at: http://www.echr.coe.int/NR/rdonlyres/6FF7A3DB-D885-41A4-9E4C-88DDF7F22C8C/0/MicrosoftWordSUBJECT_MATTER_2004.pdf

[83] 1 of the cases (0.1%) which the ECtHR decided in 2005 was lodged in 1993, 2 (0.2%) in 1994, 16 (1.5%) in 1995, 25 (2.3%) in 1996, 34 (3%) in 1997, 79 (7.2%) in 1998, 142 (12.9%) in 1999, 189 (17.1%) in 2000, 200 (18%) in 2001, 260 (23.5%) in 2002, 135 (12.2%) in 2003, 21 (1.9%) in 2004 and 1 (0.1%) in 2005. Available at: http://www.echr.coe.int/NR/rdonlyres/FAF5D123-47A3-42CA-A833-0C0504A65802/0/SUBJECT_MATTER_2005.pdf

[84] Clements, J.,L., & Mole, N., & Simmons, A., "European Human Rights Taking a case under the Convention", London, Sweet & Maxwell, 1999, p.25.

[85] Mr Koua Poirrez (*Koua Poirrez v. France,* No. 40892/98, 30/09/2003) was a physically disabled applicant, a national of Ivory Coast, who had been adopted as an adult by a French citizen, although he did not thereby acquire French nationality. He applied for an adult disability allowance, but the French courts rejected his application on the ground of his Ivory Coast nationality. The French Court hearing his appeal decided to ask the Court of Justice in of the European Communities for a preliminary ruling on the compatibility between the relevant French Law and Community Law, on the basis that the applicant was a direct descendant of a citizen of the European Union. The Luxembourg Court found

years and then the applicant had to wait for 5 more years (13 in total) before finally being vindicated in Strasbourg. In *Steel and Morris v. The United Kingdom*[86] the applicants pointed out this was the longest trial, civil or criminal, in English legal history.[87] The entire length of the proceedings, from the issue of the writ on 20 September 1990 to the refusal by the House of Lords of leave to appeal on 21 March 2000 was nine years and six months. Then it took approximately 4 years for the case to be decided by the ECtHR, which finally delivered a judgment on 15th February 2005. Thus the applicants had to wait for nearly 15 years before the final judgment of the ECtHR.

Another case which demonstrates that many applicants have to wait for several years for their case to proceed to admissibility and then several more years to proceed to judgment is that of *Varnava v. Turkey*.[88] This case concerned an application brought by 18 Cypriot nationals, nine of whom disappeared after being captured and detained during the Turkish military operations in the northern part of Cyprus in July and August 1974. The other applicants (three of whom have since died and been replaced by their heirs) are or were relatives of the men who disappeared. The applications were lodged with the ECommHR on 25 January 1990.[89] At the time of writing, about

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that Community Law did not apply to the facts of the case: although the applicant's adoptive father was a national of a member state of the European Communities; he did not qualify as a migrant worker, since he had always lived and worked in France. His requests were consequently rejected and after having exhausted all the local remedies, the applicant applied to the ECtHR which found that the applicant had been the victim of discrimination based on nationality (*See* Wildhaber, L., "Conference on The Position of Constitutional Courts Following Integration Into the European Union", Bled, 30th September 2004; Spielmann, D., "The ECtHR- Recent developments", University of Cambridge, Lauterpacht Research Centre for International Law, 14th January 2005).

[86] Mr Morris and Ms Steel (*Steel and Morris v. The United Kingdom,* No. 68416/01, 15/02/2005) were associated with London Greenpeace, a small group, unconnected with Greenpeace International, which campaigned principally on environmental and social issues. In the mid-1980s London Greenpeace began an anti-McDonald's campaign. In 1986 a six-page leaflet entitled "What's wrong with McDonald's?" was produced and distributed as part of that campaign. On 20th September 1990 McDonald's Corporation ("US McDonald's") and McDonald's Restaurants Limited ("The United Kingdom McDonald's") issued a writ against the applicants claiming damages for libel allegedly caused by the alleged publication by the defendants of the leaflet. The applicants were refused legal aid and so represented themselves throughout the trial and appeal, with only some help from volunteer lawyers. Throughout the proceedings McDonald's were represented by leading and junior counsel, experienced in defamation law and by a one or, at times, two solicitors and other assistants. The trial took place before a judge sitting alone between 28 June 1994 and 13 December 1996. It lasted for 313 court days and was the longest trial in English legal history.

[87] *Steel and Morris* v. *The United Kingdom*, No. 68416/01, 15/02/2005, para.49.

[88] *Varnava and Others v. Turkey*, Nos. 16064/1990, 16065/1990, 16066/1990, 16068/1990, 16069/1990, 16070/1990, 16071/1990, 16072/1990 and 16073/1990.

[89] They were joined by the ECommHR on 2 July 1991, and declared admissible on 14 April 1998. They were transmitted to the ECtHR on 1 November 1998.

eighteen years after its introduction the case is currently pending before the Grand Chamber of the ECtHR.[90]

Indeed, the time taken for the ECtHR to reach its decisions is a critical issue for all Strasbourg applicants. Unfortunately, the ECtHR, at the time of writing, in the majority of cases cannot deliver judgments within a satisfactory period of time. As outlined above, it cannot even comply with its own targets of disposing of a case within two or three years. Nicola Rowe and Volker Schlette have argued that the long wait that applicants at Strasbourg have to endure is "especially awkward" in light of the very strict approach taken by the ECtHR of Article 6 (1) of the ECHR, according to which states must guarantee judgment within "a reasonable time".[91] Furthermore, the failure to comply with one of the most fundamental guarantees of Article 6 is in danger of becoming a common feature of the ECHR system.[92] As Lord Woolf has successfully put it: "If 'justice delayed is justice denied', then a large proportion of the ECtHR's applicants-even those who are the victims of serious violations- are effectively denied the justice they seek".[93] It also delays the guidance that the ECtHR should give to member states as to how the ECHR is to be applied.[94] In addition, former President Wildhaber disputes that this sort of delay is unacceptable and that it can complicate the execution process because it can give rise to government claims that the situation represented in the judgment no longer reflects the reality.[95]

2.2 Expansion of the caseload of the ECtHR

A number of factors have contributed to the increase in applications at the ECtHR.

From 1953 until 1998, when Protocol No. 11 entered into force, enforcement of the ECHR had been monitored by three institutions: The ECommHR, the ECtHR and the

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[90] The ECtHR held a Grand Chamber hearing on 19 November 2008.
[91] Rowe, N., & Schlette, V., "The Protection of Human Rights in Europe after the Eleventh Protocol to the ECHR", *European Law Review*, Vol.23, 1998, p. HR/8.
[92] Ryssdal, R., "The Coming of Age of the ECHR", *European Human Rights Law Review*, Vol.1, 1996, p.26.
[93] Review of the Working Methods of the ECtHR, p.8.
[94] *Ibid*, p.8.
[95] Wildhaber, L., "A constitutional future for the ECtHR?", *Human Rights Law Journal*, Vol.23, No. 5-7, 2002, p.164.

CoM. The European Commission and Court of Human Rights were "part-time bodies" and their members were from the member states of CoE simultaneously engaged with their professional activities in their home state.[96] They were not resident in Strasbourg and mostly worked as judges, academic or practising lawyers at home, convening generally in Strasbourg whenever necessary for the transaction of ECHR business.[97] The CoM consists of the Ministers of Foreign Affairs of the CoE member states, or their permanent diplomatic representatives in Strasbourg. The CoM supervises the execution of judgments of the ECtHR[98] and its essential function is to ensure that member states comply with the judgments of the ECtHR.[99]

The Pre-Protocol No. 11 system was extraordinary complex: The mechanism for human rights complaints under the ECHR had involved the three abovementioned organs of the CoE in a two-tiered, three-stage process. The ECommHR decided on the admissibility of a complaint; the CoM and/or ECtHR determined the merits of cases which came before them and reached a conclusion as to whether there had been a violation or not.[100] The ECommHR was capable of rejecting the application before passing it on to the ECtHR or it could even pass it to the CoM, avoiding the ECtHR altogether.[101] This procedure was causing a considerable overlap between the competencies of the various organs, work was often duplicated and there was a risk that the various organs would reach different decisions in substantially similar cases.[102] Also, the relatively limited resources of the ECHR system constituted an important parameter in the growth of the number of applications.

There is no doubt that the enlargement of the CoE had significantly changed the landscape of Strasbourg. The end of the Cold War encouraged many of the formerly communist states of Central and Eastern Europe to apply for membership of the CoE.

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[96] Turnbull, L., "A Victim of its Own Success: The Reform of the ECtHR", *European Public Law*, Volume 1, Issue 2, 1995, p.216.

[97] Evaluation Group Report to the CoM on the ECtHR, 29 September 2001, available at: http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm, para. 11.

[98] According to Article 46 of the ECHR, as amended by Protocol No. 11.

[99] *See* www.coe.int/T/CM/aboutCM_en.asp

[100] House of Commons, "Protocol 11 and the New ECtHR", Research Paper 98/109, 4th December 1998.

[101] Turnbull, L., "A Victim of its Own Success: The Reform of the ECtHR", *European Public Law*, Volume 1, Issue 2, 1995, p.220.

[102] Rowe, N., & Schlette, V., "The Protection of Human Rights in Europe after the Eleventh Protocol to the ECHR", *European Law Review*, Vol.23, 1998, p. HR/10.

From the former Soviet Bloc countries, Hungary (1990), Poland (1991) and the Czech Republic (1991), were among the first to ratify the ECHR and join the CoE. There was a rapid expansion of the ECHR system in the 1990's when the majority of Central and Eastern European countries joined the CoE and ratified the ECHR. This period will always be remembered for the radical political transformations in Europe and it was justifiably described as "a decade that made history", due to the fact that East-West division was brought to an end by the "autumn of the peoples", which swept away the Berlin Wall and the bipolar system inherited from Yalta.[103] As a result, after the fall of the Berlin Wall in 1989 there was a dramatic increase in the number of the member states of the CoE, from 23 at the end of 1989 to 47 in 2008,[104] bringing the total number of potential applicants to 800 million, from Reykjavik to Vladivostok. Since the entry into force of the ECHR it has experienced a dramatic enlargement and the number of the Contracting Parties has quadrupled.

The Heads of State and Government of the member states of the CoE meeting at the Vienna summit conference in October 1993 decided that ratification of the ECHR shortly after joining the Organisation should be a condition for accession thereto.[105] Consequently, every state wishing to accede to the CoE should at the same time agree to ratify the ECHR within a short time. The practice was that new members had to sign the ECHR on the day they formally joined the CoE and then proceeded rapidly to

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[103] Huber, D., "A decade which made history. The CoE 1989-1999", CoE, 1999, available at www.coe.int

[104] Albania (entry into force- 2/10/1996), Andorra (22/1/1996), Armenia (26/4/2002), Austria (3/9/1958), Azerbaijan (15/4/2002), Belgium (14/6/1955), Bosnia and Herzegovina (12/7/2002), Bulgaria (7/9/1992), Croatia (5/11/1997), Cyprus (6/10/1962), Czech Republic (1/1/1993), Denmark (3/9/1953), Estonia (16/4/1996), Finland (10/5/1990), France (3/5/1974), Georgia (20/5/1999), Germany (3/9/1953), Greece (28/11/1974), Hungary (5/11/1992), Iceland (3/9/1953), Ireland (3/9/1953), Italy (26/10/1955), Latvia (27/6/1997), Liechtenstein (8/9/1982), Lithuania (20/6/1995), Luxembourg (3/9/1953), Malta (23/1/1967), Moldova (12/9/1997), Monaco (30/11/2005), Montenegro (6/6/2006), Netherlands (31/8/1954), Norway (3/9/1953), Poland (19/1/1993), Portugal (9/11/1978), Romania (20/6/1994), Russia (5/5/1998), San Marino (22/3/1989), Serbia and Montenegro (3/3/2004), Slovakia (1/1/1993), Slovenia (28/6/1994), Spain (4/10/1979), Sweden (3/9/1953), Switzerland (28/11/1974), the former Yugoslav Republic of Macedonia (10/4/1997), Turkey (18/5/1954), Ukraine (11/9/1997), United Kingdom (3/9/1953), available at http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG

[105] "...accession [to the Organisation] presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights. The people's representatives must have been chosen by means of free and fair elections based on universal suffrage. Guaranteed freedom of expression and notably of media, protection of national minorities and observance of the principles of international law must remain, in our view, decisive criteria for assessing any application for membership. An undertaking to sign the ECHR and accept the ECHR's supervisory machinery in its entirety within a short period is also fundamental". Vienna Declaration, 9 October 1993.

ratify it.[106] Hence, membership of the CoE, and acceptance of its human rights protection system have, in practice, become one and the same.[107]

However, the rapidity of the enlargement process was strongly criticised. The critics suggested that the CoE had admitted a number of states which manifestly did not meet its established "minimum standards" concerning the respect for the rule of law and the existence of stable, functioning democratic institutions.[108] Peter Leuprecht[109] has noted that "intellectual honesty requires acknowledging that some of the countries admitted (...) clearly did not comply with the statutory requirements at the time of accession".[110] He has also added that: "as far as the ECHR is concerned, some of the new member states have rushed into ratification without bringing domestic law and reality into line with its requirements".[111] Frederick Sudre has argued that the CoE had undergone an unfortunate transformation from an established "club of democracies" to a simple "training centre" for countries which, in some instances, were clearly incapable of respecting the organisation's founding principles.[112]

On the other hand, Daniel Tarschys, former Secretary General of the CoE, disagreed with such criticisms. He admitted that there were new member states whose democratic institutions and behaviour were still at a formative stage. He also noted that there were serious problems in the geographical area covered by the CoE but he was convinced that membership in the CoE strengthened the prospects for democratic stability in Europe and respect for human rights.[113] Andrew Drzemczewski[114] stated

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[106] Leuprecht, P., "Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?", *Transnational Law & Contemporary Problems*, Vol. 8, 1998, p. 327.
[107] Harmsen, R., "The ECHR after enlargement", *The International Journal of Human Rights*, Vol.5, No. 4, 2001, p.19.
[108] *Ibid*, p.19
[109] Peter Leuprecht has been an official of the CoE from 1961 to 1997. From 1980 to 1993, he served as Director of Human Rights; in 1993 he was elected Deputy Secretary General. He resigned from his post in 1997 because of disagreement with dilution of CoE standards and values.
[110] Leuprecht, P., "Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?", *Transnational Law & Contemporary Problems*, Vol. 8, 1998, p. 328.
[111] *Ibid*, p.333.
[112] Sudre, Fr., "La Communauté européenne et les droits fondamentaux après le Traité d'Amstrrdam: Vers un nouveau systéme européen de protection des droits de l'homme?", La Semaine Juridique, 7 January 1998, pp.9-16.
[113] Tarschys, D., "The CoE: strengthening European security by civilian means", *NATO Review*, Vol.45, No. 1, 1997, pp.4-9, Available at: www.nato.int/docu/review/articles/9701-1.htm

that the enlargement of the CoE posed a serious threat for the ECHR *acquis* since the legal standards in a number of new member states from Central and Eastern Europe fell below those required by the ECHR control organs.[115] Also, he stressed the need for maintenance of high standards[116] in order to avoid, as Lord Lester of Herne Hill has put it, the "insidious temptation to resort to a "variable geometry" of human rights which pays undue deference to national or regional sensitivities".[117]

The decision for rapid enlargement has undoubtedly had noteworthy impact on the caseload of the ECtHR, since the vast majority of the current caseload comes from the Central and Eastern European countries where the political systems and methods of rights protection are still in transition from communism. Thus in 2004 the Russian Federation (14%) and Poland (14%) had the largest number of applications lodged with the ECtHR against them, just ahead of Turkey (12%), Romania (12%), Ukraine (6%) and France (6%).[118] Clearly, some 60 per cent of the 2004 caseload of the ECtHR concerned the Central and Eastern European countries which have recently acceded to the CoE.

It cannot be claimed that this development was unforeseeable since these, financially weak, countries were emerging from decades of totalitarian government and were required to ratify the ECHR within a very short time after joining the CoE, rather than being granted a reasonable time within which to bring their legal systems into conformity with the ECHR.[119] It appears that the CoE had embarked on a risky policy of enlargement, bringing new Contracting Parties into the ECHR system generally unprepared to meet its standards thus creating problems for the entire system.[120]

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[114] Andrew Drzemczewski is the Head of Secretariat of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the CoE.

[115] Drzemczewski, A., "The European Human Rights Convention: Protocol No. 11- Entry into force and first year of application", *Human Rights Law Journal*, Vol.21, No 1-3, 2000, p.10.

[116] *Ibid,* p.10.

[117] Lord Lester of Herne Hill, "The ECHR in the New Architecture of Europe", proceedings of 8th international colloquy on the ECHR, held in Budapest in 1995, *A yearbook of the ECHR,* Vol.38, 1997, pp.226-227.

[118] ECtHR Statistics 2004, April 2005, available at:
www.echr.coe.int/.../0/ MicrosoftWordstatistical_charts_2004__internet_.pdf

[119] Wildhaber, L., "Consequences for the ECtHR of Protocol No. 14 and the Resolution on judgments revealing an underlying systemic problem- Practical steps of implementation and challenges", Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the high-level seminar, Oslo, 18 October 2004, www.coe.int/T/E/Human_rights/prot14e.asp

[120] Evenson, E., "Reforms Ahead: Enlargement of the CoE and the Future of the Strasbourg System", *Human Rights Law Review*, Vol.1, 2001, p.239.

Robert Harsmen stated in very critical language that the CoE had "gambled" that the states concerned would be encouraged to complete the process of democratic transition more rapidly within the organisation than outside.[121] In his point of view the CoE followed this particular strategy which privileged inclusiveness, seeking to bring states "into the club" as soon as possible so that they could be "socialised into its norms".[122]

The impact on the ECtHR following the accession of these countries to the CoE was not only quantitative. For the former Soviet Bloc states the system of protection of human rights guaranteed by the ECHR constituted "an important element for the building-up of fundamental rights, democracy and the rule of law".[123] The rights defined in ECHR have had a lasting influence on the lists of fundamental rights embodied in the new constitutions adopted after 1989 and all these states have incorporated ECHR into their domestic law; most have given it precedence over domestic legislation.[124] On the other hand, this had a qualitative effect on the case-law of the ECtHR; the nature of the cases coming before the ECtHR has changed due to the fact that many applications concern countries that have a more fragile democratic base than the original participating countries.[125]

Consequently, it was necessary for the ECtHR to deal to a greater extent with structural and systemic problems of human rights protection related to the process of democratisation in these countries.[126] Cases come before the ECtHR which arise from unsuccessful processes of reform in the new member states, and the ECtHR is called to "act as an adjudicator in transition".[127] Complaints for the length of the judicial proceedings (a problem which concerns Italy to a great extent too) is a common phenomenon in many Central and Eastern European countries; in 2004 there were 500

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[121] Harmsen, R., "The ECHR after enlargement", *The International Journal of Human Rights*, Vol.5, No. 4, 2001, p.22.
[122] *Ibid*, p.22.
[123] CoE PA Recommendation 1194, 1992, 6 October 1992.
[124] Kruger, H., & Polakiewicz, J., "Proposals For a Coherent Human Rights Protection System in Europe", *Human Rights Law Journal*, Vol.22, No. 1-4, 2001, p.2.
[125] Mahoney, P., "Speculating on the future of the reformed ECtHR", *Human Rights Law Journal*, Vol.20, No. 1-3, 1999, p.4.
[126] Harmsen, R., "The ECtHR as a Constitutional Court: Definitional Debates and the Dynamics of Reform", Conference in Memory of Stephen Livingstone, Queen's University, Belfast, 7th & 8th October 2005.
[127] Harmsen, R., "The ECHR after enlargement", *The International Journal of Human Rights*, Vol.5, No. 4, 2001, p.30.

applications against Czech Republic, more than 700 against Poland, and 410 against Slovenia.[128] Moreover, for the issue of non-execution of judgments there were about 90 applications against Romania, 120 against Moldova and about 220 applications against Russia.[129] Additionally, there were 110 applications against Russia for the events in Chechnya.[130] Furthermore, in 2005 there were approximately 1400 property cases pending before the ECtHR brought primarily by Greek-Cypriots against Turkey (known as post-Loizidou cases).[131]

Inevitably the nature of the cases coming before the ECtHR reflects the changed composition of the CoE, with a significant number of states which are still in many respects, and particularly with regard to their judicial systems, in transition.[132] Furthermore, it is worth mentioning that many of the cases pending before the ECtHR relate to violations of human rights which having been ruled upon in the domestic courts have failed to give rise to the required process for introduction of the necessary reforms for the prevention of further violations.[133]

It should also be noted that the effective protection of individual rights and freedoms by the mechanism set up under the ECHR has become widely appreciated. Increasingly, lawyers and judges are becoming familiar with the ECtHR's jurisprudence and case-law and use them in their professional work in national courts.[134] Citizens and lawyers have become more accustomed to "taking a case to Strasbourg" and European human rights law has become an ordinary part of the legal expectations of many Europeans.[135] Also, there is a remarkable trend in Central and Eastern Europe where individuals are gradually becoming aware of their rights and turning often to the Strasbourg system demanding redress for their complaints. This trend has perhaps been nowhere more dramatically demonstrated than in the case of

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[128] "Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the high-level seminar", Oslo, 18 October 2004, www.coe.int/T/E/Human_rights/prot14e.asp
[129] *Ibid.*
[130] *Ibid.*
[131] Case of *Xenides-Arestis* v. *Turkey*, No. 46347/99, 22/12/2005
[132] Wildhaber, L., "A constitutional future for the ECtHR?", *Human Rights Law Journal*, Vol.23, No. 5-7, 2002,p.163.
[133] Resolution 1226, 2000, "Execution of Judgments of the ECtHR", para.5
[134] Mendel, T., "The Strasbourg Safeguard", available at: www.tol.cz/jun00/thestras.html
[135] Janis, M., Kay, R., & Bradley, A., "European Human Rights Law: Texts and Materials", Oxford University Press, 1995.

Russia. The Strasbourg institutions had logged hundreds of complaints (*a priori* inadmissible) against Russia even before the country ratified the ECHR.[136]

Indeed, the growth in the number of applications is a success for the ECHR supervisory system and reflects the important and significant role which the ECtHR plays in the lives of Europeans. As President Wildhaber pointed out, the ECtHR is not overburdened because it has failed in its mission but simply "because it has become so widely known over the years and such high expectations are placed on it by more and more European citizens".[137] Undoubtedly, there is an increased understanding of the system of the ECHR in member states of the CoE and the publicity given to some successful applications has had a "snowball effect"[138] among the legal profession and the public in general.[139] The ECtHR's judgments have had a considerable effect upon member states' domestic law, and so have stimulated human-rights discussions at national level. The judgments have attracted public attention, particularly in the mass media and this, in turn, has encouraged citizens to file further applications.[140] It seems that European citizens are today more conscious of their individual rights than at any time in the history of Europe and they do increasingly turn to Strasbourg institutions to seek redress for their grievances in sometimes very ordinary situations, far removed from the concerns to defeat totalitarian dictatorship and deter genocide that motivated the ECHR's system's founders.[141]

A high number of applications lodged with the ECtHR allege that the length of the domestic criminal, civil or administrative court proceedings has exceeded the "reasonable time" stipulated in Article 6 (1) of the ECHR (more than 3,129 of a total of 5,307 applications declared admissible between 1955 and 1999).[142] In addition, the "reasonable time" requirement has been cited in nearly 50 percent of the cases in

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[136] Harmsen, R., "The ECHR After Enlargement", *The International Journal of Human Rights*, Vol.5, No. 4, 2001, p.27.
[137] Wildhaber, L., "Solemn Hearing of the ECtHR on the Occasion of the Opening of the Judicial Year, Friday, 21 January 2005", Speech by Mr Luzius Wildhaber.
[138] See for example the *Loizidou* case discussed in chapter 3.
[139] Evaluation Group Report to the CoM on the ECtHR, 29 September 2001, available at: http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm para.35.
[140] Meyer-Ladewig, J., "Reform of the Control Machinery", in Macdonald- Matscher-Petzold (eds) *The European System for the Protection of Human Right*, 1993, p.912.
[141] Ryssdal, R., "The Coming of Age of the ECHR", *European Human Rights Law Review*, Vol.1, 1996, p.22.
[142] Evaluation Group Report to the CoM on the ECtHR, 29 September 2001, available at: http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm para.27.

which judgment has been given by the ECtHR and in many admissibility decisions.[143] Although delay in the administration of justice seems to be a common phenomenon in most European legal systems, Italy is the country that has most often been "found guilty of a violation of the right to due process".[144] Of the total of 21,128 applications registered in the period from 1st November 1998 to 31st January 2001, 2,211 were directed against Italy of which 1,156 related to the length of the proceedings.[145]

In *Bottazzi v. Italy*,[146] a length of proceedings case, the ECtHR had pointed out that the frequency, with which violations were found, showed that there was "an accumulation of identical breaches" which were "sufficiently numerous to amount not merely to isolated incidents".[147] Such breaches reflected "a continuing situation" that had not yet been remedied and in respect of which litigants had no domestic remedy. This accumulation of breaches constituted a practice that was incompatible with the ECHR.[148]

In 2000, the CoM of the CoE expressed its deep concern on the matter, reiterating its previous remarks that "excessive delays in the administration of justice constitute an important danger, in particular for the respect of the rule of law",[149] noticing furthermore that this situation was overburdening the ECtHR and affecting the whole supervisory mechanism.[150]

Under these circumstances the Italian Parliament approved Law No. 89 of 24th March 2001, commonly known as the "Pinto Law" (from the name of the Senator who was its first signatory). This act introduced the principle under which a citizen is entitled to "fair reparation" if suffering damage due to the "unreasonable" length of proceedings

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[143] Brett, J., "Justice in time", 26/08/2004 available at: http://lawzone.thelawyer.com/human
[144] Wolf, S.,"Trial Within a Reasonable Time: The Recent Reforms of the Italian Justice System in Response to the Conflict with Article 6 (1) of the ECHR", *European Public Law*, Vol. 9, Issue 2, 2003, p.189.
[145] Evaluation Group Report to the CoM on the ECtHR, 29 September 2001, available at: http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm para.27.
[146] *Bottazzi v. Italy*, No. 34884/97, 28/07/1999.
[147] *Bottazzi v. Italy*, No. 34884/97, 28/07/1999, para.22.
[148] Press Release issued by the Registrar, ECtHR, 28.07.1999
[149] Resolution DH (97) 336.
[150] "Length of proceedings in Italy", Written Question No. 384 by Mr Georges Clerfayt, issued on 3 May 2000.

affecting him or her, requiring the timely management of the related proceedings.[151] More precisely, this law provides for the possibility to file a case with an appeal court for compensation for damages suffered for overlong judicial proceedings and also provides for the possibility to receive expropriation compensation.

However, the first evaluation of the law's application revealed several problems that made the judicial proceedings even longer. The right of Italian citizens to file a complaint with the ECtHR was now threatened due to the fact that they needed an excessively long time to exhaust all domestic legal remedies. Yet while the law stated that an appeal court had to conclude a case within four months after the case had been filed, in practice first hearings were arranged as late as after six months and further hearings after more than one year. In addition, compensation orders issued by the ECtHR have usually been higher than those issued in Italian courts of appeal.

Following the approval of the "Pinto Law", the ECtHR has agreed to adjourn a series of over 800 Italian length-of-proceedings cases, pending its decision in a test case concerning the application of Italy's "Pinto Law".[152] The applicants in these cases claim that they received insufficient compensation, although the Italian courts found, applying the Pinto Law, that the length of the civil, criminal or administrative proceedings to which they were parties was excessive. They all rely on Article 6 (1) (right to a fair hearing within a reasonable time) and, in some cases, on Article 13 (right to an effective remedy) of the ECHR.[153]

In one such case - *Scordino v. Italy,*[154] (it is also a "pilot judgment"-see the relevant chapter 2 for detailed analysis of "pilot judgments") the Grand Chamber of the ECtHR found a double systemic problem in relation with the effectiveness of the "Pinto Act". In order to satisfy its obligations under Article 46, the ECtHR held that Italy should, above all, remove every obstacle to the award of compensation reasonably related to the value of the expropriated property, and thus guarantee by

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[151] Oberto, G., "The reasonable time requirement in the case-law of the ECtHR", Paper for the Workshop on "The Impact of EC Law at National Level and the Protection of Fundamental Rights", organised in the framework of the External Actions of the European Community-Cards Regional Project 2003. The workshop was held in Split (Croatia) on 14-16 September 2005.
[152] Press release issued by the Registrar, ECtHR, 18.01.2005.
[153] *Ibid.*
[154] *Scordino v Italy*, No. 36813/97 [GC], 29/03/2006.

appropriate statutory, administrative and budgetary measures that the right in question be guaranteed effectively and rapidly in respect of other claimants affected by expropriated property. In respect of the "Pinto Act" the ECtHR noted that although the existence of a remedy is necessary, it is not in itself sufficient and invited the respondent State to take all measures necessary to ensure that the domestic decisions are not only in conformity with the case-law of the ECtHR but are also executed within six months of being deposited with the registry.[155]

Another notable reason overloading the caseload of the ECtHR is the great number of cases since the mid-1990s against Turkey concerning gross violations of the right to life, torture, deaths in custody, extrajudicial killings, inhumane treatment and disappearances. In many of these cases it was necessary for the ECtHR to hold fact-finding hearings, in Turkey and in Strasbourg, in order to resolve fundamental factual disputes between the parties.[156] The ECtHR is able, where the facts remain fundamentally in dispute between the parties to carry out hearings (by hearing witnesses) in order to establish the facts. Despite its crucial role for the applicants in obtaining redress from the ECHR system, this procedure is expensive and time-consuming. A significant number of these hearings can take up to a week and involve at least five or six ECtHR officials (usually three judges, a registrar and lawyers) and interpreters.[157] Some of the judges of the ECtHR consider that memories and evidence are too unreliable after the five to seven years it may take a case to get to the ECtHR, while other judges feel that the ability of the ECtHR to undertake fact-finding serves as an important check on efforts to conceal or distort the record in human rights.[158]

However, Dinah Shelton seems to be convinced that these controversies are likely to be resolved for "time-management considerations" rather than for other, more substantive reasons. In her approach the pressure of the caseload is likely to dictate

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[155] It is worth mentioning that these indications did not appear in the operative provisions of the judgment and similar pending cases were not adjourned as is usually the practice in "pilot judgments".
[156] See International Human Rights & Fact-finding, An analysis of Fact-finding Hearings and Missions of the European Court (and Commission) of Human Rights, February 2009. The Human Rights and Social Justice (HRSJ) Research Institute at London Metropolitan University has conducted research on the Fact-finding missions carried out by the European Court (and Commission) of Human Rights.
[157] Leach, Ph., "Taking a case to the European Court of Human Rights", Oxford University Press, Second Edition, 2005, p.66.
[158] Shelton, D., "The Boundaries of Human Rights Jurisdiction in Europe", *Duke Journal of International and Comparative Law*, Vol.13, Issue No. 4, 2003, p.151.

the future of ECHR practice.[159] Marie-Benedicte Dembour stated that if the ECtHR abandons the pursuit of fact-finding missions, the credibility of the system demands that another institution be set up with the resources, ability and authority to conduct such missions, otherwise "the result would be that human rights are the least protected when they are the most blatantly violated".[160] Francoise Hampson suggested the establishment of an additional independent fact-finding chamber of the ECtHR which could investigate situations in which it is alleged that violations of human rights and humanitarian law are occurring, but this suggestion has not yet been accepted.[161]

It must be clear that fact-finding missions are an important aspect of the procedure before the ECtHR and in a number of cases they are crucial in securing a fair judgment. Furthermore fact-finding missions are more likely to be required in cases involving gross and systematic violations. The absence of clear facts which are indispensable for the determination of the case is the *sine qua non* for a fact-finding mission; their establishment being the main aim of fact-finding. Despite the problems which may arise in holding fact-finding missions some years after the events in question, the ECtHR should not rule out holding such missions solely on this ground. It is submitted here that an effective fact-finding mechanism within the ECtHR is of paramount importance in ensuring access to justice for victims of grave human rights violations within Europe.

2.3 Protocol No. 11

The steadily increasing caseload of the ECommHR and ECtHR over the years and the consequential problem of the length of the proceedings gave rise to a lengthy debate[162] towards the end of the 1980's as to how the ECHR's enforcement machinery

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[159] *Ibid*, p.151.

[160] Dembour, M., D., "Finishing off cases: the Radical Solution to the Problem of the Expanding Caseload", *European Human Rights Law Review*, Vol.5, 2002, p.620.

[161] Hampson, F., "Study on Human Rights Protection during Situations of Armed Conflict, Internal Disturbances and Tensions", CDDH, 2001, 21, 31st October, 2001.

[162] *See generally*; Meyer-Ladewig, J., "Reform of the Control Machinery", in Macdonald- Matscher-Petzold (eds), *The European System for the Protection of Human Rights*, 1993, pp.909-926; De Vey Mestdagh, K., "Reform of the ECHR in a changing Europe", in R. Lawson & M. de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe, Essays in Honour of Henry G. Shermers, Volume III*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1994, pp.337-360; Golsong, H.,

could be streamlined. During the European Ministerial Conference on Human Rights, held in Vienna in 1985, the Swiss delegation proposed a merger of the Commission and the Court.[163] This proposal to establish a single Court then became the subject of exhaustive discussions in various expert committees. The principal argument invoked in favour of a merger was that a single-body system would avoid the complexity, and especially the duplication, flowing from the then two-stage procedure, thereby reducing the length of proceedings.[164] However, doubts had been expressed as to whether a single body system would in practice result in a significant reduction in the length of proceedings or be a solution to the workload problem facing members of the ECHR's organs.[165] Moreover, it was argued that there were certain important advantages inherent in a two-stage procedure which should not be lost.[166]

The debate for the future of the ECHR's mechanism resulted in the adoption of Protocol No. 11 to the ECHR.[167] The fundamental purpose of Protocol No. 11 was to bring about an improvement in the ECHR system which would lead to the examination of human rights complaints by a single ECtHR within "reasonable

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"On the Reform of the Supervisory System of the ECHR", *Human Rights Law Journal*, Vol.13, 1992, pp.265-269.

[163] "Functioning of the Organs of the ECHR (Assessment, Improvement and Reinforcement of the International Control Machinery set up by the Convention)", Report submitted by the Swiss Delegation, European Ministerial Conference on Human Rights, European Ministerial Conference on Human Rights, Vienna, 19-20 March 1985.

[164] "The Possibility of Merging the ECommHR and ECtHR" in "Reform of the Control System of the ECHR", H(92)14, Strasbourg, December 1992, p.7.

[165] *Ibid.*

[166] *Ibid.*

[167] *See generally*; Bratza, N., & O'Boyle, M., "The Legacy of the Commission to the New Court Under the Eleventh Protocol", *European Human Rights Law Review*, Vol. 3, 1997, pp.211-228; Zwaak, L., "Overview of the European experience in giving effect to the protections in European Human Rights Instruments" available at www.internationaljusticeproject.org/pdfs/Zwaak-speech.pdf ; Schermers, H., "The Eleventh Protocol to the ECHR", *European Law Review*, Vol. 19, 1994, pp.367-384; Schermers, H., "Human Rights in the European Union After the Reform of 1st November 1998", *European Public Law*, Vol. 4, 1998; Mowbray, A., "The Composition and Operation of the New ECtHR", *Public Law*, 1999, 219-231; Drzemczewski, A., & Meyer-Ludwig, J., "Principal Characteristics of the New Convention Control Mechanism, as Established by Protocol No. 11, Signed on 11 May 1994; A Single ECtHR is to be replace the existing Commission and Court in Strasbourg", *Human Rights Law Journal*, Vol. 15, 1994, pp.81-86; Drzemczewski, A., "The ECHR: A New Court of Human Rights as of November 1, 1998", *Washington and Lee Law Review*, Vol. 55, 1998, pp.697-719; Drzemczewski, A., "The Internal Organisation of the ECtHR: The Composition of Chambers and the Grand Chamber", *European Human Rights Law Review*, 2000, pp.233-248; Drzemczewski, A., "The European Human Rights Convention: Protocol No. 11 –Entry Into Force and First Year of Application", Vol. 21, *Human Rights Law Journal*, 2000, pp.1-17; Bernhardt, R., "Reform of the Control Machinery Under the ECHR: Protocol No. 11", *The American Journal of International Law*, Vol. 89, 1995, pp.145-154.

time".[168] Moreover, the aim of the reforms in November 1998 was to enhance the efficiency of the means of the protection and to maintain the high quality of human rights protection.[169] As Luzius Wilhaber, the former President of the ECtHR has put it "the ECtHR was restructured to cope with an increasing volume of applications, to speed up the time taken to examine cases and to strengthen the judicial nature of the system".[170]

Protocol No. 11 was a bold attempt to modernise the old system and to eliminate its weaknesses. It streamlined, fully judicialised and, with full-time judges permanently resident in Strasbourg, professionalised the Strasbourg system of human rights protection.[171] The ECtHR now functions on a full-time basis and as a single institution, thus eliminating the time-consuming examination by two institutions. The ECHR under Protocol No. 11 has been fully altered into a completely judicial system. The CoM no longer has jurisdiction to decide on the merits of the cases (since its former competence to deal with individual applications declared admissible but not referred to the ECtHR was abolished),[172] though it continues to retain its role of monitoring the enforcement of the ECtHR's judgments.[173] Moreover, a remarkable achievement of Protocol No. 11 was the abolition of the optional character of the right to individual petition and the acceptance of the right is now mandatory and the competence of the ECtHR applicable to all participating states.

However, the drafting of the text of the Protocol was not easy and it is accepted that it constituted a political compromise, a result of long and arduous negotiations. Many of the states preferred a two-tier system, changing the former Commission into a Court of First Instance and the former Court into a Court of Appeal. Other states wanted a full merger of the previous institutions into a single Court. Hence, the eventually

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[168] Bratza, N., & O'Boyle, M., "The Legacy of the Commission to the New Court Under the Eleventh Protocol", *European Human Rights Law Review*, Vol. 3, 1997, p.211.
[169] Zwaak, L., "Overview of the European experience in giving effect to the protections in European Human Rights Instruments", available at www.internationaljusticeproject.org/pdfs/Zwaak-speech.pdf
[170] Press release issued by the Registrar, ECtHR, 21.06.1999.
[171] Mahoney, P., "Speculating on the future of the reformed ECtHR", *Human Rights Law Journal*, Vol.20, No. 1-3, 1999, p.1.
[172] Zwaak, L., & Cachia, Th., "The ECtHR: A Success Story?", *Human Rights Brief*, Vol.11, Issue 3, 2004, p.32.
[173] Schermers, H., "The Eleventh Protocol to the ECHR", *European Law Review*, Vol. 19, 1994, p.377.

approved single Court with the prospect for a re-hearing in exceptional cases appears to be the product of a political compromise.[174]

Even with the reform of 1998 the ECtHR caseload continued to rise sharply. Despite the success of Protocol No. 11 in establishing a permanent ECtHR, the Protocol proved to be insufficient in managing the ever-increasing flow of cases to the ECtHR.[175] Almost a year after the restructure of the ECtHR it was recognised by its President that the continuing steep increase of applications was putting even the new, reformed system under pressure.[176] The following year President Wildhaber stated that "for as long as the number of incoming cases obviously exceeds the number of outgoing cases, the backlog will continue to grow and there will come a point at which the system becomes asphyxiated".[177] In parallel, the need for a second major reform only a few years after the drastic reform of the ECHR mechanism was stressed.

In the years which followed the entry into force of Protocol No. 11 the productivity of the ECtHR has increased considerably; the new ECtHR has delivered more judgments in two years than its predecessor in 39 years[178] and according to Wildhaber it is "without a shadow of doubt, the most productive of all international tribunals".[179][180] The year 2001 was considered by Wildhaber as a landmark in the history of the ECtHR since it was a year in which "all the records were broken".[181] The ECtHR delivered 889 judgments, at that time this was the most judgments ever given in a year during its entire history. Also, 8,989 judicial decisions were taken where applications were ruled inadmissible or struck out. Despite the incredible increase in the output of the ECtHR in 2001 (almost 900 judgments and almost 9,000 judicial decisions), in the

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[174] *Ibid*, p.374.
[175] Leach, Ph. "Taking a case to the ECtHR", Oxford University Press, Second Edition, 2005, p.8.
[176] Press release issued by the Registrar, ECtHR, 21.06.1999.
[177] Press release issued by the Registrar, ECtHR, 08/06/2000.
[178] Press release issued by the Registrar, ECtHR, 05/12/2000.
[179] Wildhaber, L., "Solemn hearing of the ECtHR on the occasion of the opening of the judicial year, Friday, 21 January 2005", Speech by Mr Luzius Wildhaber.
[180] It should be pointed out that according to President Wildhaber the United States Supreme Court delivers some 80 to 90 judgments a year, the Supreme Court of Canada some 120 and the German Federal Constitutional Court between 30 and 40. The Court of Justice of the European Communities gave around 240 judgments in 2001 (see Wildhaber, L., "A constitutional future for the ECtHR?", *Human Rights Law Journal*, Vol.23, No. 5-7, 2002, p.163).
[181] Press release issued by the Registrar, ECtHR, 21/01/2002.

same year 31,398 applications were lodged before the ECtHR and 13,845 allocated to a decision body.

The statistics also clearly reveal that the number of applications which can be disposed of is far exceeded by the number of new applications made. In 2003, 17,975 applications were disposed of by decision or judgment, contrary to 28,214 applications which were lodged before the ECtHR, leaving a deficit of 9,214. In 2004, 21,068 were disposed of and the deficit amounted to 11,444 applications.[182]

Thus even after the entry into force of Protocol No. 11, the number of individual applications brought before the ECtHR, continued to rise sharply and, as a consequence, the backlog of cases, instead of diminishing, continued to increase considerably. This does not mean that Protocol No. 11 was a failure. On the contrary, it has enabled a substantial increase in the productivity of the system as the statistics mentioned above illustrate. Several factors contributed to the unceasing increase of the backlog. In addition, to the factors which have already been mentioned above, it should be pointed out that, on the day of entry into force of Protocol No. 11, the "new" ECtHR could not "start with a clean slate"[183] since it inherited as a "dowry" all the cases which could not be completed by the previous institutions.[184] The Evaluation Group gave the accurate figures; the new ECtHR inherited 92 pending cases from the former Court and 6,684 registered applications from the ECommHR.[185]

The wide acceptance of the right of individual petition and the acceptance of the jurisdiction of the ECtHR and the ratification of additional protocols by states not previously parties to them are important factors which contributed to the growth of the number of applications. Additionally, it should be noted that when the reform leading to Protocol No. 11 was first conceived the rapid enlargement of the CoE and the consequential impact it would have on the control machinery was not anticipated.[186]

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[182] Survey of Activities, 2004, ECtHR, information issued by the Registrar of the ECtHR, p.36.
[183] Schermers, H., "The Eleventh Protocol to the ECHR", *European Law Review*, Vol. 19, 1994, p.379.
[184] Zwaak, L., & Cachia, Th. "The ECtHR: A Success Story?", *Human Rights Brief,* Vol.11, Issue 3, 2004, p.33.
[185] Evaluation Group Report to the CoM on the ECtHR, 29 September 2001, preface , available at : http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm para. 24.
[186] *Ibid*, para. 15.

Moreover, the ECtHR recognises that the ECHR is "*a living instrument*" that should be interpreted in a dynamic manner, as to give practical effects to its objects and purpose. Certainly, the degree of protection offered to the ECHR rights under the Strasbourg system is by no means static.[187] The ECtHR has consistently stated that the ECHR is a "living instrument which… must be interpreted in the light of present day conditions".[188] This notion means that as society and attitudes change, the ECtHR can change and develop the way in which it interprets the ECHR. Hence, this principle implies that the ECtHR is not formally bound by precedent and instead recognises that the conditions prevailing at the time a case is considered, may properly affect the outcome of a particular decision. The application of this "dynamic, rather than historical approach"[189] of the ECHR undoubtedly contributes to the growth in the number of applications.

Developments at the Registry of the ECtHR are also worth mentioning. Over the years, with the growing needs of the Registry, the increase in the number of officials became a necessity. An increase in the staff became essential since an efficient and competent registry may considerably reduce the workload of judges. At the beginning of 2001 the Registry was composed of 295 officials. 196 of these were case-processing lawyers (including 62 permanent and 31 temporary lawyers).[190] At the beginning of 2004 it was composed of 427 officials of whom 157 were case-processing lawyers (75 permanent and 82 temporary, of whom 23 were junior lawyers).[191] Similarly, the growth in the number of the staff continued in 2005; on 1st January 2005 the Registry was composed of 458 staff members of whom 176 were case-processing lawyers (83 permanent and 93 temporary, of whom 33 were junior lawyers).[192]

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[187] Masterman, R., "Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act", *International Comparative Law Quarterly*, Volume 54, Part 4, October 2005, p.911.

[188] *Tyrer v. The United Kingdom*, No. 5856/72, 25/04/1978, para.30.

[189] Leach, Ph. "Taking a case to the ECtHR", Oxford University Press, Second Edition, 2005, p.164.

[190] Evaluation Group Report to the CoM on the ECtHR, 29 September 2001, available at : http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm, para. 18.

[191] "Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the high-level seminar", Oslo, 18 October 2004, www.coe.int/T/E/Human_rights/prot14e.asp

[192] Paper by Ms Claudia Westerdiek, ECtHR, "The Organisation of Work of Legal Secretaries in the Registry of the ECtHR", 07.10.2005, available at: http://www.usrs.si/3csg/index.php?sv_path=1801,1968

Protocol No. 11 replaced the two existing part-time institutions by a single full-time Court, to which individual applicants have direct access. The optional features of the previous system were eliminated, as was the adjudicative role of the CoM. Following the reforms introduced by Protocol No. 11 the new ECtHR has shown itself able to cope with a much heavier caseload than its two predecessors. However, while the central aim of the Protocol was to restructure the system in order to work efficiently in the context of an expected increase in the number of applications, the developments since its adoption have been such that a new reform has proved to be necessary. Ironically, the advances introduced with this Protocol compounded/created additional reasons for the increase of the caseload of the ECtHR.

2.4 Towards Protocol No. 14 (Reform Package) – Reflection Period

The exponential growth in the number of individual applications has been and will continue to represent a serious threat to the effectiveness of the ECHR system. Official recognition of the existence of the problem had already been expressed a mere two years after the entry into force of Protocol No. 11, at the Ministerial Conference on Human Rights held in Rome in 2000 on the occasion of the 50th anniversary of the ECHR. In the first of the resolutions adopted in Rome, the Conference called upon the CoM to "initiate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the ECtHR in the light of this new situation through the Liaison Committee with the ECtHR and the CDDH".[193] The Conference also considered it "indispensable, having regard to the ever-increasing number of applications, that urgent measures be taken to assist the ECtHR in carrying out its functions and that an in-depth reflection be started as soon as possible on the various possibilities and options with a view to ensuring the effectiveness of the ECtHR in the light of this new situation".[194] The "reform of the reform" debate had thus begun.

As a response to the first Resolution adopted at the end of the Rome Conference, the CoM Deputies established (7th February 2001) an Evaluation Group to make

[193] *See* para.18 (ii) of Resolution I, "Institutional and functional arrangements for the protection of human rights at national and European level" [CM (2000)172].
[194] Declaration of the Rome Ministerial Conference on Human Rights: "The ECHR at 50: what future for the protection of human rights in Europe?".

proposals on the means of guaranteeing the continued effectiveness of the ECtHR.[195] Simultaneously, the CDDH set up a Reflection Group on the Reinforcement of the Human Rights Protection Mechanism. The CDDH's Activity Report[196], which was adopted in June 2001, was dispatched for consideration to the Evaluation Group. The latter delivered its Report in September 2001.

The above activity led to the adoption of a Declaration of the CoM at its 109th Session on 8th November 2001 "On the protection of Human Rights in Europe-Guaranteeing the long-term effectiveness of the ECtHR". On the basis of instructions received from the CoM, and after submission of an Interim Report[197] in October 2002, the CDDH put forth concrete proposals for guaranteeing the long term effectiveness of the ECtHR submitting them to the CoM on 4th April 2003. The proposals were focused on three main areas: "Preventing violations at national level and improving domestic remedies", "optimising the effectiveness of filtering and subsequent processing of applications", and "improving and accelerating the execution of the ECtHR's judgments".[198]

These CDDH proposals were widely published and were considered to encapsulate the desired objective as often discussed at the ECtHR (which delivered a Position Paper in September 2003)[199] and the national committees and organisations for human rights and NGOs.[200] Also the CoE Commissioner for Human Rights has submitted relevant proposals.[201] It is worth mentioning that to promote transparency the CoM recommended that the member states organise special meetings for the purpose of disseminating information about as well as enabling the discussion of the above mentioned proposals and positions within the "civil society" framework.[202] With this in view, the CDDH carefully examined the opinions and proposals submitted by the

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[195] The Evaluation Group composed of the Chairman of the Ministers' Deputies of the CoE Wolf, the President of the ECtHR Wildhaber, the Deputy Secretary General of the CoE Kruger and Permanent Representative of Ireland to the CoE Harman.
[196] Doc. CDDH-GDR (2001) 010.
[197] Doc. CM (2002) 146.
[198] Doc. CDDH (2003) 006.
[199] CDDH-GDR(2003)024.
[200] "(Updated) NGOs Response to Proposals to Ensure the Future Effectiveness of the ECtHR", April 2004.
[201] Doc. CDDH-GDR(2003)027.
[202] Doc. CM(2003)55.

ECtHR, the CoE Commissioner for Human Rights and certain member states, NGOs and national institutions for the promotion and protection of human rights.[203]

Subsequently, the CoM adopted on 15th May 2003 a Declaration on "Guaranteeing the long term effectiveness of the ECtHR". The CDDH delivered in November 2003 an Interim Activity Report[204] to the CoM informing of the state of progress in its work, and in April 2004 its Final Activity Report.[205][206] The CoM invited the PACE to give its opinion on the draft of Protocol No. 14 and this opinion,[207]which influenced the final shape of Protocol No. 14, was adopted by the Assembly on 28th April 2004.

Finally on 13th May 2004 the CoM adopted the Reform Package: A Declaration, "Ensuring the effectiveness of the implementation of the ECHR at national and European levels", the text of Protocol No. 14 and five Recommendations to member states the object of which is ensuring effective protection for ECHR rights within the national legal systems.

Protocol No. 14 was the result of almost four years reflection and its target was principally to "maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the ECtHR and the CoM of the CoE".[208] Various proposals for possible reforms of the system were examined during the period which followed the European Ministerial Conference on Human Rights in 2000 until the final approval of the Protocol. Quite a few of these proposals were retained and adopted in the relevant protocol but others were rejected.

Several other proposals which were not endorsed are worth noting. The proposal for the establishment, within the framework of the ECHR, of "regional courts of first instance" was rejected because of the risk it would create of diverging case-law and

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[203] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 30.
[204] Doc. CM (2003) 165.
[205] Doc. CM (2004) 65.
[206] It contained a draft Protocol No. 14 to the ECHR, a draft explanatory report to this protocol, a draft declaration, three draft recommendations and a draft resolution of the COM to member states.
[207] Opinion No. 251 (2004).
[208] Preamble to Protocol No. 14.

the high cost of their establishment.[209] The ideas of empowering the ECtHR to give preliminary rulings at the request of national courts or to expand the ECtHR's competence to give advisory opinions were also rejected since they would result in more than less work for the ECtHR.[210] Furthermore, the proposals that the ECtHR should be given discretion to decide whether or not to take up a case for examination and that it should be made compulsory for applicants to be represented by a lawyer or other legal expert, from the moment of introduction of the application were rejected since they would have restricted the right of individual application.[211]

A clear division has emerged within academic literature regarding the effectiveness of introducing compulsory legal representation of applicants at all stages of the Strasbourg proceedings. John Wadham and Tazeen Said strongly disagreed with this proposal. They stressed the importance of the fact that the applicants can communicate with the ECtHR in the first stages of the procedure without the need of a lawyer, and they argued that "any curtailment of this would considerably limit and devalue the right of individual petition".[212] The opposing argument was that this could be the "antidote" to the flood of the ECtHR from unmeritorious cases.[213] Marie-Aude Beernaert remarkably advocated the effectiveness and usefulness of the compulsory legal representation of applicants insisting that the right of individual petition was being more seriously curtailed by the new admissibility criterion than it would have been by compulsory legal representation.[214]

The suggestion for setting up a separate body for the filtering of applications staffed by persons other than the judges of the ECtHR was also rejected on the grounds that the protocol is based on two fundamental principles: Filtering work must be carried out within the judicial framework of the ECtHR and there should not be different

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[209] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.34.
[210] *Ibid,* para.34.
[211] *Ibid,* para.34.
[212] Wadham, J., & Said, T., "What Price the Right of Individual Petition: Report of the Evaluation Group to the CoM on the ECtHR", *European Human Rights Law Review*, 2002, p.172.
[213] Fragkakis, N., "A Look at the Future of the Individual Application Following Half a Centrury of Application of the ECHR", *Nomiko Vima*, Vol. 53, Issue 2, February 2005.
[214] Beernaert, Marie-Aude, "Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price", *European Human Rights Law Review*, Vol.5, 2004, p.557.

categories of judges within the judiciary body.[215] Finally, it was decided not to make provision for permitting an increase of the number of judges without any new amendment to the ECHR.[216] The PACE considered that this proposal would create inequalities between countries and questioned the expediency of such a measure.[217]

2.5 Protocol No. 14

Protocol No. 14, which will come into force only when it has been ratified by all signatories of the ECHR[218] introduces a number of significant reforms to the ECHR machinery. In certain cases a single-judge formation of the ECtHR[219] is introduced, competent to decide on inadmissible applications. Thus, the main difference between the Pre-Protocol No. 14 system and the new arrangements is that the preliminary decision about admissibility will be taken by judges sitting in a single-judge formation and a Registry lawyer, rather than by committees of three judges advised by a single Judge-Rapporteur and Registry lawyer.[220] However, when a judge sits in a single judge formation cannot examine applications against the state in respect of which he or she has been elected as a judge. Though this is an indispensable guarantee of impartiality it raises practical questions regarding the effective understanding of the file of the case,[221] and the importance of familiarity with the domestic law of the defendant member state.[222] This reform apparently intends to reinforce the filtering

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[215] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.34.
[216] *Ibid*, para.34.
[217] Opinion No. 251 (2004), para.7.
[218] The CoM has urged member states to take all necessary steps to sign and ratify Protocol No. 14 to the ECHR in order to ensure its entry into force within two years of being open for signature (Declaration of the CoM, "Ensuring the Effectiveness of the Implementation of the ECHR at National and European levels", adopted at its 114th Session, 12th May 2004). Protocol No. 14 has, at the time of writing, been ratified by 46 out of the CoE's 47 member states; Russia is the last member state to ratify the ECHR. On 20th December 2006 the Russian State Duma voted against the ratification of protocol No. 14. The CoM stressed that it was deeply regrettable and a source of serious concern that the Russian Duma has not ratified Protocol No. 14, even though all the member states expressed their determination at the Warsaw Summit to ensure that it would (reply to Recommendation 1756 (2006) of the Parliamentary Assembly, adopted 18th January 2007). The new elected president of the ECtHR Jean-Paul Costa speaking at the ECtHR's annual press conference in Strasbourg on 19th January 2007 emphasised the need to ensure that: "Protocol 14 must enter into force and as quickly as possible."
[219] Article 26 and 27 ECHR, as amended by Articles 6 and 7 of Protocol No. 14.
[220] Greer, St., "Protocol No. 14 and the future of the ECtHR", *Public Law*, SPR, 2005, p.87.
[221] It should be remembered that the individual applications and the relevant documents (ECtHR judgments etc) when they submitted, do not need to be translated in one of the official languages of the CoE (English and French).
[222] Sicilianos, L., A., "The Reform of the European System of Protection of Human Rights: The 14th Protocol to the ECHR", *Nomiko Vima*, Vol. 53, p.224.

capacity of the ECtHR.[223] However, Amnesty International noted that the CDDH has not received any information indicating how much time the ECtHR's judges currently sit in Committees. Nor has the CDDH received information which would indicate that having a single judge decide admissibility, as opposed to a Committee of three Judges, would save judicial time or would enable the Judges to rule on the admissibility of more applications than they currently do.[224] It would appear clear however that with the single-judge formation there will be a reduction of the number of the actors involved in the adoption of decisions; one judge will be needed instead of three. Martin Eaton and Jeroen Schokkenbroek have argued that "there will be an important multiplication of filtering formations operating simultaneously in the ECtHR. Theoretically, [47] new filtering bodies can be created".[225]

According to the new Art. 28 (1) (b) of the ECHR the three-judge committees are able to declare applications admissible and decide on their merits, when the questions they raise concerning the interpretation or application of the ECHR are covered by "well-established case-law" of the ECtHR. Whether case-law is "well-established" or not, is clearly a matter subject to interpretation. According to the Explanatory Report to Protocol No. 14 "well established case-law" normally means case-law which has been consistently applied by a Chamber.[226] Nevertheless, it seems uncontested that a Grand Chamber judgment, even if the first on a particular issue expresses the "established" position of the ECtHR.[227] If a judge elected in respect of the respondent member state is not a member of the committee, the committee may invite him/her to replace one of the members of the committee, having regard to all the relevant factors including whether or not the respondent state has contested resort to the summary procedure.[228] The point here is that the expertise of the "national judge" in domestic law and

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[223] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.62.
[224] Amnesty International's Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the ECtHR, 1st February 2004, para.46.
[225] Eaton, M., & Schokkenbroek, J., "Reforming the Human Rights Protection System Established by the ECHR- A New Protocol No. 14 to the Convention and Other Measures to Guarantee the Long-term Effectiveness of the Convention System", *Human Rights Law Journal*, Vol.26, No. 1-4, p.5.
[226] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.68.
[227] Sicilianos, L., A., "The Reform of the European System of Protection of Human Rights: The 14th Protocol to the ECHR", *Nomiko Vima*, Vol. 53, pp.222.
[228] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.71.

practice will be relevant to the issue and will be helpful for the committee.[229] However, Amnesty International pointed out that the particular expertise on the laws and legal system of the state which is the subject of the application would not be necessary in such cases, as this procedure would only be applied to those applications which raise issues about which the case-law of the ECtHR is already clear - manifestly well-founded, repetitive cases.[230]

The Art.28(1) (b) procedure is the main measure for speeding up the processing of repetitive cases[231] and the hope is that its implementation will increase substantially the ECtHR's decision-making capacity and effectiveness, since many cases can be decided by three judges, instead of the seven currently required when judgments or decisions are given by a chamber.[232] A document prepared by a study group of the Registry concluded that the proposal for amending Art. 28 (1) (b) would have an undoubted impact, which could be further enhanced if the legal condition for its application (underlying question of interpretation already decided by the ECtHR) were understood as going beyond the present rather conservative list of established "clone cases".[233] In addition, it was noted that under this proposal a considerable number of cases would be dealt with by a committee of three judges rather than in a Chamber of seven judges.[234]

It should be pointed out that the Art.28(1) (b) procedure is one of the two measures included in the 2004 "reform package" targeting the "repetitive" or "clone" cases. The other measure is indeed the establishment of the "pilot judgment procedure" (discussed in detail in the following chapters). What is important is that it is not clear at all under what circumstances these two measures will be applied. A number of pertinent questions can be asked about the circumstances and the type of cases in which these two procedures can be applied. The main difference between the two procedures is that with the Art.28(1) (b) process the applicants will in the end have in

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[229] *Ibid,* para.71.
[230] Amnesty International's Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the ECtHR, 1st February 2004, para.23.
[231] Article 28 (1) of the ECHR, as amended by Article 8 of the Protocol No. 14.
[232] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.70.
[233] CDDH-GDR(2003)017, "Impact Assessments of Some of the Reform Proposals Under Consideration", para.11.
[234] *Ibid,* para.12.

their hands judgments of the ECtHR. However, in the "pilot judgment procedure" individuals who have lodged the other applications deriving from the same systemic source as the one selected as the "pilot case" will not, if the procedure follows the planned course, receive a full, or indeed any judicial examination of their grievance by the ECtHR, as they have expected when lodging their application. From the applicants' point of view it is obviously preferable if the ECtHR decides to apply the Art.28(1) (b) procedure in their cases.

The CoM is given the additional power to ask the ECtHR to interpret a final judgment for the purpose of facilitating the supervision of its execution[235] and is to be empowered to bring proceedings before the ECtHR where a state refuses to comply with a judgement.[236] In order to strengthen their independence and impartiality, the judges of the ECtHR are to be elected for a single, nine year term and to be retired at 70.[237] The CoE Commissioner for Human Rights is to be entitled to intervene in cases as a third party.[238] An amendment is also introduced with a view to the possible accession of the EU to the ECHR.[239]

Protocol No. 14 adds a new admissibility criterion to those already laid down in Article 35 of ECHR. This proved to be the most controversial of the reform proposals, probably because of its potential impact on the right to individual application. Concerns for the introduction of the new admissibility criterion have been raised by NGOs, some governments, judges of the ECtHR, members of the Registry and the PACE. It has been strongly opposed by NGOs across Europe which consider the right of individual application as "a vital element of the protection of human rights" and that "curtailing this right would be wrong in principle". For the NGOs "such a measure would be seen as an erosion of the protection of human rights by CoE member states"[240] and they feared that the new admissibility criterion "will give the ECtHR too wide a discretion to reject otherwise meritorious cases, and will also create real uncertainty amongst applicants and their advisers as to the prospects of the

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[235] Article 46 (3) of the ECHR, as amended by Article 16 of Protocol No. 14.
[236] Article 46 (4) of the ECHR, as amended by Article 16 of Protocol No. 14.
[237] Article 223 (1) of the ECHR, as amended by Article 2 of Protocol No. 14.
[238] Article 36 of the ECHR, as amended by Article 13 of Protocol No. 14.
[239] Article 59 (2) of the ECHR, as amended by Article 17 of Protocol No. 14.
[240] "(Updated) NGOs Response to Proposals to Ensure the Future Effectiveness of the ECtHR", April 2004.

success of their applications to the ECtHR".[241] NGOs' concerns were also shared by some judges of the ECtHR who stressed that on the basis of a new and "rather vague, even potentially arbitrary"[242] condition, an application is likely to be rejected without a judicial determination of the merits of the case, even if it is well-founded. Also the PACE stated that the new admissibility criteria is "vague, subjective and liable to do the applicant serious injustice".[243]

Under the reformed admissibility criteria, an individual application shall be declared inadmissible if "the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the ECHR and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal".[244]

The purpose of this amendment is to provide the ECtHR with some degree of flexibility required for its filtering work and allow it to devote more time to cases which warrant examination on the merits, whether seen from the applicant's perspective, from that of the law of the ECHR or from the perspective of European public order.[245] However, reservations have already been expressed regarding the effectiveness of the admissibility test and there is some degree of consensus that "such a test would have little impact upon the ECtHR's case management".[246] In some instances, the criticisms were even more severe and it has been claimed that the new admissibility criterion will have the opposite results and will make the admissibility process more time-consuming and more complex.[247] It has been noticed that, since a judge still has to decide whether an application concerns a case of minor or secondary importance, it is rather uncertain that such a provision will bring with it an important gain of time.[248]

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[241] *Ibid.*
[242] CDDH-GDR(2003)024, "Position Paper of the ECtHR on Proposals for Reform of the ECHR and Other Measures as Set Out in the Report of the CDDH of 4 April 2003", para.34.
[243] Opinion No. 251 (2004), para.11.
[244] Article 35 (3) (b) of the ECHR, as amended by Article 12 of the Protocol No. 14.
[245] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.77-78.
[246] Greer, St., "Protocol No. 14 and the future of the ECtHR", *Public Law*, SPR, 2005, p.89.
[247] "(Updated) NGOs Response to Proposals to Ensure the Future Effectiveness of the ECtHR", April 2004.
[248] Lathouwers, J., "Protocol No. 14: Object, Purpose and Preparatory Work" in P. Lemmens & W. Vandenhole (eds) *Protocol No. 14 and the Reform of the ECtHR*, Intersentia, 2005, p.9.

The main issue introduced by the new admissibility criterion is whether the applicant has suffered a "significant disadvantage".[249] The purpose is to reject cases considered as carrying only minor consequences for the applicant, underlined by the principle that judges should be allowed to concentrate on important cases with far reaching consequences.[250] Nonetheless, the very wording of this criterion suggests that a violation of a right protected by the ECHR can occur without a significant disadvantage for the individual.[251] The logical consequence of such an approach is that some of the victims of human rights violations will be deprived of their right to obtain redress from the ECtHR.

Additionally the meaning of "significant disadvantage" is not elaborated by Protocol No. 14. Therefore, it is up to the ECtHR itself to set up relevant criteria on a case-by-case basis. Furthermore, it was agreed that for two years following the entry into force of the protocol only Chambers and Grand Chamber will be able to apply the new admissibility criterion and not the single-judge formation and committees to allow time for adequate case-law to develop.[252]

The third clause of the new admissibility criterion was introduced in the latest stages of the process, so an application would not be rejected as inadmissible on this new ground where there was no effective remedy in the domestic legal order. It is worth noting, that the aim of this clause which reflects the principle of subsidiarity, is to ensure that "every case will receive a judicial examination whether at the national level or at the European level".[253]

The Explanatory Report to Protocol No. 14 states that the Protocol makes changes related more to the functioning than the structure of the ECHR system, unlike

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[249] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.80.
[250] Beernaert, Marie-Aude, "Protocol 14 and New Strasbourg Procedures: Towards Greater Efficiency? And at What Price", *European Human Rights Law Review*, Vol.5, 2004, p.551.
[251] Vanneste, F., "A New Admissibility Ground" in P. Lemmens & W. Vandenhole (eds) *Protocol No.14 and the Reform of the ECtHR*, Intersentia, 2005, p.70.
[252] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.84.
[253] *Ibid,* para.82.

Protocol No. 11 which made radical changes to the system.[254] However, this position has been strongly criticised. Pietro Sardaro argued that to the contrary the Protocol does bring radical change to the system to the extent that "it entails the abandonment of the principle of full and generalised right to an international remedy" for every victim of a violation of the ECHR rights.[255] Leo Zwaak and Therese Cachia appear also convinced that this amendment constitutes a radical departure from the Pre-Protocol No. 14 system in which "the individual is the centre of attention".[256] "From the individual's point of view, he/she who has an arguable claim for which redress is seemingly not offered at the domestic level is left only with a complaint at the international level. Is this redress now to be taken away simply to solve a backlog of cases?".[257]

The reforms of Protocol No. 14 are primarily directed at the two main challenges which the ECtHR is facing: Firstly, the burden of screening out the huge mass of unmeritorious applications and secondly, the burden of taking to judgment and assessing just satisfaction in repetitive or routine applications that are well founded.[258] It was observed that much of the ECtHR time is spent dealing with cases which are either inadmissible or concern repetitive violations following pilot judgments. In 2003, 96% of applications considered were declared inadmissible (unmeritorious applications); these are cases which in their vast majority are manifestly inadmissible. However they take up a considerable proportion of judicial and above all Registry time.[259] Also, some 60% of the judgments given by the ECtHR concerned repetitive cases or routine applications that are well founded. These are applications deriving from a structural or systemic situation in the respondent member state, which generates large numbers of, by definition, well-founded cases.[260]

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[254] *Ibid,* para.35.
[255] Sardaro, P., "Individuals Complaints", in P. Lemmens & W. Vandenhole (eds), "*Protocol No. 14 and the Reform of the ECtHR*", Intersentia, 2005, p.67.
[256] Zwaak, L., & Cachia, Th. "The ECtHR: A Success Story?", *Human Rights Brief,* Vol.11, Issue 3, 2004, p.35.
[257] *Ibid*, p.35.
[258] CDDH-GDR(2003)024, "Position Paper of the ECtHR on Proposals for Reform of the ECHR and Other Measures as Set Out in the Report of the CDDH of 4 April 2003", para.5.
[259] *Ibid*, para.6.
[260] *Ibid,* para.8.

Therefore, the reforms address the two main procedural weaknesses of the ECtHR regarding the great number of cases which are declared inadmissible and the fact that the majority of judgments concern repetitive cases. Hence, the principal aim of Protocol No. 14 was to enable the ECtHR to concentrate on the most important cases which warrant examination on the merits, whether seen from the applicant's perspective, from that of the law of the ECHR and eventually from the perspective of the European public order[261] and this could mainly be done by the introduction of the new admissibility criterion.

The long term controversy surrounding the tendency of the ECtHR to increasingly concentrate on the most important cases and the consequent reform of the admissibility criteria reflects in part the debate on whether the role of the ECtHR is to provide individual or constitutional justice. More specifically, the supporters of constitutional justice argue that the principal function of the ECtHR is that of acting as a "pan-European standard setter in the field of human rights"[262] and it should deal only with the most significant cases. On the other hand the supporters of individual justice argue that the primary aim of the ECHR system is to provide an effective international remedy for every victim of a human rights violation in Europe. In their view the soul of the ECHR is the entitlement of each and every complainant to an examination of his or her complaint.[263]

The case for constitutional justice is based on the fact that given the current state of the crushing caseload of the ECtHR there is no realistic prospect that every applicant with a legitimate complaint of a violation will receive judicial redress at Strasbourg.[264] The constitutional role of the ECtHR is strongly advocated by former President Wildhaber who repeatedly called for a need of realism and urging "a more realistic approach to the problem" of the caseload: "Is it not better for there to be far fewer judgments, but promptly delivered and extensively reasoned ones which establish the

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[261] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.77-78.

[262] Harmsen, R., "The ECtHR as a Constitutional Court: Definitional Debates and the Dynamics of Reform", Conference in Memory of Stephen Livingstone, Queen's University, Belfast, 7th & 8th October 2005.

[263] Mahoney, P., "New Challenges for the ECtHR Resulting from the Expanding Case Load and Membership", *Penn State International Law Review*, Vol. 21, 2002, p.104.

[264] Greer, St., "Protocol No. 14 and the future of the ECtHR", *Public Law*, SPR, 2005, p.96.

jurisprudential principles with a compelling clarity that will render them *de facto* binding *erga omnes*, while at the same time revealing the structural problems which undermine democracy and the rule of law in parts of Europe?".[265] The mechanism of individual application is to be seen as the means by which defects in the national protection of human rights are detected, with a view to correcting them and thus raising the general standard of protection of human rights.[266]

NGOs strongly disagree with Wildhaber' position arguing that "all violations of human rights are significant and that the individual victim, members of the community, and the integrity of the authorities suffer disadvantage when violations of human rights go without redress".[267] This view is shared by some of the judges of the ECtHR, who stressed that "The Strasbourg Court should not, in particular, place itself in the position of denying access to the victims of violations of ECHR rights on the grounds that the violation in question is too "minor" to warrant attention on the European level".[268]

The wording of the new admissibility criterion demonstrates that is the product of a difficult compromise, the result of a long and hard debate between the two camps. The supporters of the individual case seem to have prevailed in that the ECtHR will continue to interpret and apply the ECHR and whenever the legal interest of the individual is sufficiently at stake will the application is declared admissible.[269] On the other side, the constitutionalists have stressed the importance of the interpretation task via the admissibility criterion but they have not succeeded in the conversion of the ECtHR into a purely constitutional court in the sense that it would only deal with cases raising fundamental questions.[270] It could be suggested that, those who see the ECtHR as mainly concerned with the maintenance of the broad principles of the European human rights system are opposed by those, who see the defining function of

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[265] Wildhaber, L., "A constitutional future for the ECtHR?", *Human Rights Law Journal*, Vol.23, No. 5-7, 2002, p.164.
[266] Ibid, p.162.
[267] "(Updated) NGOs Response to Proposals to Ensure the Future Effectiveness of the ECtHR", April 2004.
[268] Harmsen, R., "The ECtHR as a Constitutional Court: Definitional Debates and the Dynamics of Reform", Conference in Memory of Stephen Livingstone, Queen's University, Belfast, 7th & 8th October 2005.
[269] Vanneste, F., "A New Admissibility Ground" in Lemmens, P., & Vandenhole, W., (eds) "*Protocol No.14 and the Reform of the ECtHR*", Intersentia, 2005, p.75.
[270] *Ibid*, p.75.

the ECtHR as that of providing a final recourse for individual victims of human rights violations who have failed to find redress at the national level.[271]

2.6 Conclusion

The latest estimations and forecasts for the sufficiency and success for Protocol No. 14 and even for the measures included in the entire reform package do not seem to be very optimistic. It has been already claimed that they "will not on their own be sufficient to close the gap between the level of incoming cases and the ECtHR's output capacity".[272] Former President Wildhaber stated that although Protocol No. 14 constitutes "a step in the right direction the ECtHR will continue to have an excessive caseload".[273] The former President seems to be convinced that the protocol "will not itself reduce the volume of cases coming to Strasbourg; it will not turn off the tap; it will not even slow down the flow".[274] Moreover, even before the entry into force of the protocol, academics have already expressed their reservations and disappointment that it was a "missed opportunity" and it's going to be "only a partial success".[275] The Recommendations accompanying it,[276] for ensuring the protection of ECHR rights within the national legal systems, have been described as "largely symbolic"[277] since they are not mandatory in member states and it has been suggested that they will be

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[271] Harmsen, R., "The ECtHR as a Constitutional Court: Definitional Debates and the Dynamics of Reform", Conference in Memory of Stephen Livingstone, Queen's University, Belfast, 7th & 8th October 2005.

[272] "Long-term Future of the Convention System", Memorandum by the ECtHR, Third Summit of the CoE, para.5.

[273] Interview with President Luzius Wildhaber, "The reform is an absolute necessity", 21 April 2004, www.coe.int/t/e/com/files/interviews/20040421_interv_wildhaber.asp.

[274] Wildhaber, L., "Solemn hearing of the ECtHR on the occasion of the opening of the judicial year, Friday, 21 January 2005", Speech by Mr Luzius Wildhaber.

[275] Greer, St., "Protocol No. 14 and the future of the ECtHR", *Public Law*, SPR, 2005, p.85.

[276] The CoM also adopted three recommendations for ensuring the protection of ECHR rights within the national legal systems (Recommendation Rec(2004)5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR; Recommendation Rec(2004)4 on the ECHR in university education and professional training; and Recommendation Rec(2004)6 on the improvement of domestic remedies). In addition to these three Recommendations two further Recommendations adopted by the CoM at an earlier stage, were also regarded as measures that aim to prevent human rights violations at national level and were referred to in the Declaration; Recommendation Rec (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the ECHR, Recommendation Rec (2002) 13 on the publication and dissemination in the member states of the text of the ECHR and of the case-law of the ECtHR.

[277] Beernaert, Marie-Aude, "Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price", *European Human Rights Law Review*, Vol.5, 2004, p.547.

"fruitless if they remain as simple recommendations and are not backed by a strong will to bring them into effect".[278]

As already noted the ECtHR has become a "victim of its own success". Despite the substantial increase in its productivity the caseload continues to rise considerably and this puts the effectiveness and credibility of the ECHR system in serious danger. Between 1999 and 2004 the ECtHR's budget increased by roughly 54%, the complement of Registry staff by roughly 80%, the productivity in terms of terminated applications rose by some 470%.[279] However, the constant efforts to streamline and reinforce the system proved to be inadequate in managing the challenge of the ever-increasing ECtHR caseload. The success in the productivity of the ECtHR has been virtually cancelled by the overwhelming number of incoming cases.

Thus one more round of reforms has been initiated and Governments are in effect invited to contemplate the nature of the international protection machinery, which must be provided to individuals in Europe of the 21st century.[280] Former President Wildhaber has stated that "something more radical is required".[281] He has illustrated his argument with reference to the two management audits which were submitted to the Governments on 15th May 2005 and have confirmed that the ECtHR caseload will continue to rise.[282] Europeans will need to respond to the questions now raised regarding the principal aims of the ECHR, the concrete objectives of the individual procedure and the future mandate of the ECtHR. In an attempt to secure the efficiency of the ECtHR, the member states of the CoE set up, at the Warsaw Summit (16-17 May 2005), an international panel of eminent personalities (Group of wise persons)[283] to examine the issue of the long-term effectiveness of the ECHR mechanism. As

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[278] Zwaak, L., & Cachia, Th. "The ECtHR: A Success Story?", *Human Rights Brief,* Vol.11, Issue 3, 2004, p.34.

[279] "Long-term Future of the Convention System", Memorandum by the ECtHR, Third Summit of the CoE, para.3.

[280] *Ibid*, para.3.

[281] Address by the President of the ECtHR, Luzius Wildhaber, Warsaw Summit, CoE, 16-17.05.2005, available at: http://www.coe.int/t/dcr/summit/20050516_speech_wildhaber_en.asp

[282] *Ibid.*

[283] The Group is made up of 11 members: Lord Woolf (United Kingdom), Veniamin Fedorovich Yakovlev (Russia), Rona Abray (Turkey), Fernanda Contri (Italy), Jutta Limbach (Germany), Marc Fischbach (Luxembourg), Gil Carlos Rodriguez Iglesias (Spain), Emmanuel Roucounas (Greece), Jacob Sodermann (Finland), Hanna Suchocka (Poland), Pierre Truche (France). The Group of Wise Persons submitted its Report (CM(2006)203 15 November 2006) to the COM on 15th November 2006.

Lucius Caflisch has succinctly put it, after the reform of 1998 and the "reform of the reform" of 2004, there will have to be a "reform of the reform of the reform".[284]

In a system faced with the gravity of the challenges discussed in this chapter, there has been widespread agreement that further reforms to the ECHR mechanism are required in order to cope with the major influx of cases coming from the 47 member states of the CoE. However, it should be remembered that the ECHR system has been subjected to ongoing reforms for the last 2 decades and the issue of reforming the system is still so commonly discussed in the corridors of the Strasbourg Court. It is submitted that this is certainly problematic for an institution such as the ECtHR. The reforms at some stage should come to an end. It is imperative that the ECtHR will be left undisturbed to carry out its mission. It must not be forgotten that every change and every reform need obviously time in order to produce their full results. The ECtHR should be able to face the demands of the 21st century and live with these demands in the new era.

Having said that, the responsibilities of the member states for the future of the ECtHR should not be ignored. Member states are indeed obliged to implement effectively the ECHR in their domestic legal orders and to comply with the "letter and spirit" of the judgments of the ECtHR. The problem of "repetitive" cases, for example, will not be solved despite the measures discussed in this chapter if the member states do not assume their responsibilities and provide solutions at national level. The suggestion here is that the success of any proposed reform does not depend only on the ECtHR itself but also on the clear willingness of member states to comply with their obligations under the ECHR. These obligations and the role of the member states in the attempt to "save" the ECtHR will be discussed in detail in the next chapter.

[284] Caflisch, L., "The Reform of the ECtHR: Protocol No. 14 and Beyond", *Human Rights Law Review*, Vol. 6, 2006, p.415.

PART II

CHAPTER 2: Returning the Protection of Human Rights to Where They Belong, At Home

"You must be the change you want to see in the world".

Mahatma Gandhi

In the previous chapter the issue of the ongoing reforms of the ECHR system was discussed. It became clear that the reforms should not target only the ECtHR, but member states should also assume their responsibilities and proceed with the adoption of appropriate measures at national level. This chapter seeks to explain and discuss the issue of the implementation of the ECHR at national level. It analyses and critically evaluates the Recommendations referred to in the 2004 Declaration of the CoM in an attempt to improve the implementation of the ECHR in the domestic legal orders of the member states of the CoE. In addition, it considers the question of the execution of judgments of the ECtHR. Finally, this chapter critically examines the novel "pilot judgment procedure" developed by the ECtHR in order to tackle the phenomenon of "repetitive" or "clone" cases.

3.1 Nature of the ECHR

The ECHR is a treaty concluded under the rules of international law and thus primarily creating obligations between the Contracting Parties.[285] As a treaty under international law, it has been elaborated, concluded and ratified according to the

[285] Polakiewicz, J., "The Implementation of the ECHR and the Decisions of the Strasbourg Court in Western Europe", in Alkema, A., Bellekom, T., L., Drzemczewski, A., Schokkenbroek, G., J, (eds) "The Domestic Implementation of the ECHR in Eastern and Western Europe", All-European Human Rights Yearbook, Vol. 2, 1992, p.147.

practice and rules valid for treaties, and accordingly it can also be denounced by any of the parties.[286]

The ECHR requires that the Contracting Parties guarantee the conformity of their domestic law and practice with the ECHR but it leaves the manner in which this result is achieved to the discretion of all states concerned. It imposes upon the Contracting Parties a certain body of legal principles, which they are obliged to conform to. Hence, the signatory states to the ECHR are considered to be free to secure the conformity of their domestic law with the international obligations under the treaty mechanism in the way, which seems to them most appropriate.[287]

The system of binding judicial review established by the ECHR was a unique development in international law and is undoubtedly an effective mechanism for the enforcement of human rights and fundamental rights. It should be noted that the ECHR possesses certain unique features which go beyond the traditional barrier between the individual and international order and which are difficult to classify in terms of traditional international law. Consequently, these special characteristics distinguish it from other international treaties. Andrew Drzemczewski suggested that the ECHR is a special kind of treaty. In his words: "Although the ECHR was constructed upon tenets of traditional treaty law, the ECHR law transcends the traditional boundaries drawn between international and domestic law. In short, the ECHR is *sui generis*".[288] He went on to say that the ECHR "is a treaty of a normative character which is developing an evolving notion of 'Convention law', which interpenetrates and transcends both the international and domestic legal structures".[289]

It has been suggested that the ECHR is a "hybrid instrument"[290] in the sense that it is an international multilateral treaty, which creates obligations and rights to its parties; and at the same time, it is an instrument, which provides that the recipients of its

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[286] Article 58 (ex65) of the ECHR, see the example of Greece in 1969.
[287] Drzemczewski, A., "European Human Rights Convention in domestic law", Clarendon Press-Oxford, 1983, p.22.
[288] Drzemczewski, A., "The Sui Generis Nature of the ECHR", *International and Comparative Law Quarterly*, 1980, Vol. 29, p.54.
[289] *Ibid*, p.54.
[290] Rozakis, Ch., "The ECHR and its application by the ECtHR", in "*The European Convention for the Protection of Human Rights: 50 Years of Implementation*" (in Greek), Sakkoulas Publishers, 2004, p.24.

substantive rights are the individuals within the jurisdictional boundaries of the Contracting Parties.[291] It is quite clear that the explicit beneficiaries of the imposition of human rights standards are the individuals subject to the jurisdiction of those states.

The European Human Rights system not only creates obligations for member states but also rights which are enforceable by individuals. It establishes in the field of civil liberties, a legal order designed to act as a substitute for the particular systems of individual states, a common European order.[292] The ECHR is designed to protect individuals against improper actions of their own state authorities, thereby conferring on the ECHR the same function as constitutional human rights guarantees. It is in effect an international instrument, which concerns itself with a field of law traditionally reserved to constitutional law, namely the protection of the rights of individuals *vis-à-vis* the state.[293] Every state acceding to the ECHR undertakes to respect the rights of the individuals contained therein, not only *vis-à-vis* these individuals, but also the states-parties to it. Judge Rozakis has argued that the fact that a state-party is liable to all other state-parties to perform faithfully its obligations towards individuals, is one of the main safeguards for the keeping of the promises of a state acceding to the system.[294]

It should be also stressed that the genesis of the ECHR took place in an era where the basic rule of international law was that a state had full sovereignty over individuals living in its territory. International law regulated the relations between states; rules with respect to individuals were a matter solely of national legislation. The protection of human rights was the concern of each individual state and was not of any concern to the international community. Human rights protection remained a matter for each individual state, fully covered by national sovereignty. Europe broke through the barrier of full national sovereignty by accepting the ECHR as a binding international

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[291] Rozakis, Ch., "The ECHR as an international treaty", in Dupuy, R.-J. (ed.) : "*Mılanges en l'honneur de Nicolas Valticos : droit et justice*", Paris : Pedone, 1999, p.499.
[292] Robertson, A.H., "Human Rights in Europe", Manchester University Press, 1977, p.231.
[293] Drzemczewski, A., "European Human Rights Convention in Domestic Law", Clarendon Press-Oxford, 1983, p.22.
[294] Rozakis, Ch., "The ECHR as an international treaty", in Dupuy, R.-J. (ed.) : "*Mılanges en l'honneur de Nicolas Valticos: droit et justice*", Paris: Pedone, 1999, p.501.

treaty; for the first time states were legally committed to other states to respect fundamental human rights.[295]

Additionally, the great innovation of the ECHR was the establishment of an international institutional mechanism for supervising the conformity of national actions with the ECHR. It was the first time that a human rights code, developed at international level, was backed up by a fully sanctioned enforcement system.[296] It also provided for individual petitions, at first to the ECommHR and after Protocol No. 11 to the ECtHR directly, thus eliminating the normal barrier between the individual person and the international order.[297] The rights and freedoms guaranteed by the ECHR benefit from a collective enforcement through the international supervision exercised by the ECtHR which may be addressed directly by anyone who is within the jurisdiction of one of the member states.[298] The relation of individuals to the practices of the system sharply distinguishes the system of ECHR from more common treaty arrangements.[299] It must not be forgotten that the typical international agreement is limited to states, in both its creation and its operation. Indeed, traditionally, international law, in general has been regarded as restricted to rules of behaviour imposing duties on states, where such duties are owed to other states.

The specific character of the ECHR was repeatedly stressed by the ECommHR and the ECtHR. The ECommHR in the case of *Austria v. Italy*[300] held that it was the purpose of the High Contracting Parties to establish a common public order of the free democracies of Europe and that the obligations undertaken by the parties are essentially of an objective character. The ECHR's special nature was also stressed by the ECtHR in the case of *Ireland v. United Kingdom.*[301] The ECtHR held that: "unlike international treaties of the classic kind, the ECHR comprises more than mere

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[295] Schermers, G., H., "Acceptance of International Supervision of Human Rights", *Leiden Journal of International Law*, Vol. 12, 1999, p.822.
[296] Hegarty, A., & Leonard, S., "Human Rights: An Agenda for the 21st Century", Cavendish Publishing Limited, London-Sydney, 1999, p.37.
[297] Bernhardt, R., "The Convention and Domestic Law", in eds Macdonald, R. St. J/Matcher, F./Petzold, H, "*The European System for the Protection of Human Rights*", 1993, p.26.
[298] Polakiewicz, J., "The Status of the Convention in National Law", in eds Blackburn., R.,-Polakiewicz, J., "*Fundamental Rights in Europe*", Oxford University Press, 2001, p.34.
[299] Kay, R., "The European Human Rights System as a System of Law", *Columbia Journal of European Law*, Vol.6, 2000, p.59.
[300] *Austria v. Italy*, No. 778/60, 23/10/1963.
[301] *Ireland v. The United Kingdom*, No. 5310/71, 18/01/1978.

reciprocal engagements between Contracting States. It creates over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the preamble, benefit from a 'collective agreement".[302]

Taking into account the fact that the ECHR combines elements of international and constitutional law, both the Commission and the ECtHR have characterised it as "a constitutional instrument of European public order (*ordre public*)" in the field of human rights.[303] It can be said that the ECHR through its mechanism intends to establish a uniform public order in Europe by a number of human rights standards for all the states participating in the system. The international application of the ECHR is based on the fact that national legal orders differ. Consequently, the ECHR as an international treaty obliges member states to bring their legal systems and the conduct of their national institutions in conformity with the standards of protection, which it prescribes. It does not require member states to introduce identical legal rules on human rights and fundamental freedoms – it specifies a certain level of protection, which states must provide while leaving them free to go further and furnish fuller protection.[304] This level must be defined in a uniform, valid fashion for all the states within the ECHR system. As Professor Evrigenis has put it: "The ECHR achieves its aim by harmonising national legal systems in terms of an irreducible minimum level of protection, which it defines uniformly for all the Contracting Parties".[305]

3.2 The issue of incorporation

It is clear that none of the Contracting States can violate the ECHR in applying their own national law (even their own constitutional law); at the international level the ECHR ranks higher than any municipal law.

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[302] *Ibid*, para.239.
[303] *Loizidou v. Turkey*, No. 15318/89 (prel. Obj.), 23/03/1995, para.75.
[304] Evrigenis, D., "Reflections on the National Dimension of the ECHR", in Proceedings of the Colloquy About the ECHR in Relation to Other International Instruments for the Protection of Human Rights, Athens, September 1978, (CoE 1979), p.71.
[305] *Ibid*, p.71.

The relationship between municipal law and the international legal order is often discussed in reference to the theories of monism and dualism.[306] In states with a monist approach the rights and freedoms guaranteed by a treaty are considered part of the law of the state and can be applied by the courts immediately and after ratification of a treaty. In states with a dualist approach to international law, the substantive norms of a treaty must be transformed or adopted in order to become applicable in domestic law. Therefore, they must be introduced through a law.

It has been the subject of some considerable debate whether the state parties are under an international obligation to make the ECHR part of domestic law.[307] It has been supported with reference to articles 1 and 13 of the ECHR that it created a legal obligation to make its provisions internally applicable otherwise there would be a breach of the treaty obligations. The treaties establishing the European Communities have been referred to as examples of treaties under public international law creating such an obligation.[308]

The ECtHR in the case of *Swedish Engine Drivers Union v. Sweden* held that: "neither Article 13 nor the ECHR in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the ECHR".[309]

The ECtHR has held on a several occasions that: "there is no obligation to incorporate the ECHR into domestic law", but "by virtue of Article 1 of the ECHR the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States". In the same vein, "Article 13 guarantees the availability within the national legal order of an effective remedy to enforce the ECHR rights and freedoms in whatever form

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[306] See for example, Brownlie, I., "Principles of Public International Law", 4th Edition, Oxford Univesity Press, 1990, pp.32-35.
[307] See Buergenthal, T., "The Domestic Status of the ECHR", *Buffalo Law Review*, 1963-1964, Vol.13, p.357; Buergenthal, T., "The Effect of the ECHR on the Internal Law", *International and Comparative Law Quarterly Supplementary*, No. 11, 1965, 79-106; Beddard, R., "The Status of the ECHR in Domestic Law", *International and Comparative Law Quarterly*, Vol. 16, 1967, p.212-213.
[308] Polakiewicz, J., "The Application of the ECHR in Domestic Law", *Human Rights Law Journal*, 1996, Vol.17, No. 11-12, p.405.
[309] *Swedish Engine Drivers Union v. Sweden*, No. 5614/72, 06/02/1976, para.50.

they may happen to be secured".[310] Hence, if the ECHR's rights and freedoms cannot be directly invoked before national judicial or administrative authorities, it is deemed to be sufficient if effective remedies exist for rights under the national legislation which in their nature and scope are equivalent to them.[311]

However, in 1978, in the case *Ireland v. United Kingdom,*[312] the ECtHR showed a clear preference for incorporation. It stressed that: "By substituting the words 'shall secure' for the words 'undertake to secure' in the text of Article 1 the drafters of the ECHR intended to make it clear that the rights and freedoms set out in Section 1 would be directly secured to anyone within the jurisdiction of the Contracting States. That intention finds a particularly faithful reflection in those instances where the ECHR has been incorporated into domestic law".

Nowadays, this discussion appears to be anachronistic. All these countries (Nordic countries, United Kingdom, Ireland), which with their denial to incorporate the ECHR in their domestic law might had caused the "conservatism" of the ECtHR in the interpretation of articles 1 and 13, have since gone on to incorporate the ECHR. With the coming into force of the United Kingdom Human Rights Act 1998[313] and following the incorporation by Norway of the ECHR into its domestic law in the summer of 1999,[314] Ireland was the last member state of the CoE which incorporated the ECHR into domestic law by the enactment of the ECHR Act 2003.[315] It must be presumed that the effective implementation of the ECHR does require some form of incorporation. Andrew Drzemczewski argued in 1989 that the fact that there might not be a legal duty to incorporate the ECHR did not mean that efforts to incorporate its substantive provisions should not be made.[316]

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[310] *James and Others v. United Kingdom*, No. 8793/79, 21/02/1986, para.84; *Lithgow and Others v. United Kingdom*, No. 9006/80; 9262/81; 9263/81;9265/81; 9266/81; 9313/81; 9405/81, 08/07/1986, para.205; *Observer and Guardian v. United Kingdom*, No. 13585/88, 26/11/1991, para.76.
[311] *James v. United Kingdom*, No. 8793/79, 21/02/1986, para.84, *Lithgow v. United Kingdom*, No. 9006/80; 9262/81; 9263/81;9265/81; 9266/81; 9313/81; 9405/81, 08/07/1986, 08/07/1986, para.205.
[312] *Ireland v. United Kingdom*, No. 5310/71, 18/01/1978, para.239.
[313] The Human Rights Act 1998 is an Act of Parliament of the United Kingdom which received Royal Assent on 9 November 1998, and mostly came into force on 2 October 2000.
[314] Act on the Strengthening of the Status of Human Rights in Norwegian Law (in Nor: *Lov 1999-05-21 nr 30. Lov om styrking av menneskerettigheternes stillning I norsk rett [menneskerettsloven]*).
[315] European Convention on Human Rights Act, Number 20 of 2003.
[316] Drzemczewski, A., "The CoE and the Issue of Incorporation", in Rehof, A., L., & Gulmann, C., (eds) "*Human Rights In Domestic Law and Development Assistance Policies of the Nordic Countries*",

It is generally accepted that states are in principle free to choose the means which suit them best for ensuring the effective enjoyment of the rights and freedoms set forth in the ECHR, be it by incorporation or not. Nevertheless, incorporation is undoubtedly an effective method of implementing the ECHR into domestic law. It is quite clear that it gives national authorities the opportunity to afford restore in cases of human rights violations before the case is taken to the ECtHR.[317] Therefore, it could be concluded that there was no legal duty (as such) to incorporate the ECHR into domestic law. On the other hand it was not so wise for the member states not to do it since there would have been many fewer problems for the states if they had actually incorporated the ECHR and applied it in domestic law at an earlier point.[318]

3.3 Status of the ECHR in domestic law

In states with a monist tradition like Belgium, Luxemburg, the Netherlands or Turkey (see chapter 4) the rights and freedoms of the ECHR were applied by the courts immediately after ratification. In states favouring a dualist approach to international law such as Germany, Italy, Greece or Cyprus (see chapter 3) and most of the states of Eastern and Central Europe, the ECHR had to be "transformed" into domestic law.

It is appropriate to note that the status of the ECHR in the hierarchy of domestic legal norms varies considerably from one country to another; in the great majority of member states to the ECHR, treaties in general and the ECHR in particular, possess a higher rank than normal legislation, but remain inferior to the national constitution.[319] There are few cases where the ECHR is granted constitutional status, as in Austria, or even supraconstitutional status, as in the Netherlands.[320] However, in quite a number

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Publications from the Danish Center of Human Rights No. 2, The Danish Center of Human Rights, Copenhagen 1989, p.131.

[317] Polakiewicz, J., "The Status of the Convention in National Law", in Blackburn, R., & Polakiewicz, J. "Fundamental Rights in Europe", Oxford University Press, 2001, p.35.

[318] Drzemczewski Andrew, Head Secretariat of Committee on Legal Affairs and Human Rights, Parliamentary Assembly, CoE, 29th November 2006, Strasbourg, interview by author, recording, Strasbourg, France.

[319] Polakiewicz, J., "The Status of the Convention in National Law", in Blackburn, R., & Polakiewicz, J. "Fundamental Rights in Europe", Oxford University Press, 2001, p.39.

[320] *Ibid*, pp.37-38.

of states, the ECHR, as an international treaty, enjoys intermediate status between that of ordinary legislation and the Constitution.[321]

It is interesting that all countries of Central and Eastern Europe which have ratified the ECHR since 1989 have, without exception, incorporated it into their domestic law. It is noteworthy that direct effect and the precedence of international human rights treaties over conflicting national legislation have been enshrined in a number of constitutional instruments of the new democracies in Eastern and Central Europe.[322]

In several other states which traditionally follow a dualistic approach to international law the ECHR is part of domestic law with the same rank and status as normal legislation. The question whether treaties are "transformed" into domestic law or incorporated without losing their nature as an international treaty appears to be of minor importance for the practical application of the ECHR.[323]

In theory, the ECHR has in these states the same status as other legislation. This means that the *lex posterior* rule would in principle apply, in the sense and with the consequence that the ECHR would supersede older statutes, but later statues would prevail over ECHR provisions. This theoretical position does not appear to have much practical importance since other principles come into play: the principle *lex specialis derogat leges generales* (by which the treaty rule can be considered to be the special law) and the widely recognised rule of presumption (according to which statutes should be construed in such a way as to bring them into conformity with the international obligations incurred by the state).

Finally, in countries which have a catalogue of fundamental rights in their constitution, the ECHR rights may be used as a complementary source in order to determine the scope and content of national constitutional guarantees which, in their

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[321] Ress, G., "The Effect of Decisions and Judgments of the ECtHR in the Domestic Legal Order", *Texas International Law Journal*, Vol. 40:359, 2005, p.375.
[322] This is the case in Bulgaria (article 5(4) of the Constitution), the Czech Republic (article 10 of the Constitution), Romania (article 20 of the Constitution), Slovakia (article 11 of the Constitution), Moldova (article 4(2) of the Constitution), the Russian Federation (article 15(4) of the Constitution). See Polakiewicz, J., "The Status of the Convention in National Law", in Blackburn, R., & Polakiewicz, J. "Fundamental Rights in Europe", Oxford University Press, 2001, p.41.
[323] *Ibid*, p.43.

turn, take precedence over conflicting legislation. The theoretical possibility that a later statute may be given precedence over the ECHR thus appears not to be of any real significance.[324]

3.4 Protection at national level

The most important aim of the system set up by the ECHR is to establish a situation in which in each and every Contracting State the rights and freedoms are effectively protected. This means primarily that the relevant structures and procedures are in place to allow individuals to vindicate those rights and to assert those freedoms in the national courts.[325] It must be clear that the ECtHR is not a court of last instance, but a court of last resort; it does not rehear cases as to their facts and law on appeal, as if it were, another national court.[326] It is not its task to re-hear cases, which have been the subject of domestic proceedings.[327] It is not its purpose to sit in judgement of alleged errors of law made by a national court or to substitute its own assessment of facts for that of the domestic courts.[328]

The ECtHR has emphasised that "the object and purpose underlying the ECHR, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the ECHR that the national systems themselves provide redress for breaches of its provisions, the ECtHR exerting its supervisory role subject to the principle of subsidiarity".[329] By ratifying the ECHR, states parties accept the double commitment resulting from Article 1 to ensure that their domestic law and practice is compatible with the ECHR and to remedy any violation of the rights and freedoms guaranteed by the ECHR.[330]

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[324] *Ibid*, p.43.
[325] Wildhaber, L., "The ECtHR in Action", *Ritsumeikan Law Review*, No. 21, 2004, p.83.
[326] Wildhaber, L. "The Role of the ECtHR : an evaluation", *Mediterranean journal of human rights*, Vol. 8, No. 1, 2004, p.11.
[327] Evaluation Group, "Report of the Evaluation Group to the CoM on the ECtHR" 27 September 2001
[328] Ryssdal, R., 'The coming of age of the ECHR', *European Human Rights Law Review*, Vol.1 , 1996, p.24.
[329] *Z. and others v. The United Kingdom*, No. 29392/95, 10/05/2001.
[330] Drzemczewski, A., "Monitoring Mechanisms of the CoE", in Linos-Alexander Sicilianos "*The Prevention of Human Rights Violations*", Martinus Nijhoff Publishers- Ant. N. Sakkoulas Publishers, 2001, p.155.

The objective of the ECHR was not to substitute the national organs of the Contracting Parties with the ECtHR, the primary task for the enforcement of the human rights protected by the ECHR was left to the national state organs. The ECtHR has repeatedly referred to the principle of subsidiarity: the whole logic of the Strasbourg system rests on the fundamental premise that it is primarily for national authorities, especially the courts, to protect the rights laid down in the ECHR. The crucial role of the ECHR machinery is to supervise the national protection of rights and freedoms guaranteed in the ECHR. In spite of the fact that, the ECHR does not mention expressly this principle, the ECtHR in the case of *Akdivar v. Turkey*[331] held that:"...[i]t is an important aspect of the principle that the machinery of protection established by the ECHR is subsidiary to the national systems safeguarding human rights."

Article 13 of ECHR is of paramount importance with regard to the competence of individuals to invoke human rights under the ECHR before the national courts. According to Article 13 of ECHR states are required to provide effective remedies before national authorities in respect of arguable complaints made by persons that their ECHR rights have been violated. In the words of the ECtHR this provision guarantees: "the availability of a remedy at national level to enforce the substance of the ECHR rights and freedoms in whatever form they may happen to be secured in the domestic legal order".[332]

A procedure should be available before a national authority in order to investigate a complaint of a breach of ECHR rights. In this procedure either the ECHR rights as such, or materially comparable national standards should be applicable.[333] It should be noted that the right to an effective remedy is an accessory guarantee, which means that it has actually no independent role to play in the ECHR system; an applicant may not claim a violation of Article 13 in *abstracto.*[334] In order to be considered effective

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[331] *Akdivar v. Turkey*, No. 21893/93, 16/09/1996, para.65.
[332] *Soering v. The United Kingdom*, No. 14038/88, 07/07/1989, para.120.
[333] Barkhuysen, T., & Van Emmerik, Mic., L., "Legal protection against violations of the European Convention on Human Rights: Improving (Co-)operation of Strasbourg and domestic institutions", *Leiden Journal of International Law*, Vol. 12, 1999, p.843.
[334] Balcerzak, M., "Guaranteeing the Long-Term Effectiveness of the ECHR: the Importance of Effective Remedies", in *The Improvement of Domestic Remedies With Particular Emphasis on Cases of Unreasonable Length of Proceedings*", Workshop Held at the Initiative of the Polish Chairmanship of the CoE's CoM, Strasbourg, 28th April 2005, p.23.

and thus conform to Article 13, a domestic remedy must allow the competent national authority both to deal with the substance of the relevant ECHR complaint and to grant "appropriate relief".[335]

The ECtHR in the case of *Kudła v. Poland* held that: "the rule in Article 35(1) is based on the assumption that there is an effective domestic remedy available in respect of the alleged breach of an individual's ECHR rights. In that way, Article 13, giving direct expression to the State's obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux préparatoires*, is to provide a means whereby individuals can obtain relief at national level for violations of their ECHR rights before having to set in motion an international machinery of complaint before the ECtHR".[336] The ECtHR went on to add that: "Article 13 of the ECHR guarantees the availability at national level of a remedy to enforce the substance of the ECHR rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the ECHR and to grant appropriate relief".[337]

If the complaint is found to be valid, the national authority should have the power to reach a binding decision on full redress (*restitutio in integrum*). This national authority does not necessarily need to be a judicial institution. However, the national courts are entrusted with the initial chief role of giving meaning and effect to the norms of the ECHR in concrete cases through the right solution by correction and redress and by bringing domestic law in harmony with such norms. Therefore, the role of the national judge in the trial and application of the ECHR is of paramount importance.[338]

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[335] See for example, *Smith and Grady v. The United Kingdom*, 27/09/1999, para.135; *Aksoy v. Turkey*, 18/12/1996, para.95.
[336] *Kudła v. Poland*, No. 30210/96, 26/10/2000, para.152.
[337] *Ibid*, para.157.
[338] Loucaides, L., "The Role of the National Judge in the Trial and the Application of the ECHR" in Loucaides, L., "*Essays on the Developing Law of Human Rights*", Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1995, p.171.

It is suggested that the system of protection of human rights under the ECHR can only operate effectively on the basis of smooth and constructive co-operation and interaction between the Strasbourg and domestic institutions. Professor Evrigenis has argued that: "just as the national dimension is strengthened by international control which is effective and consistent with the aims of the ECHR, so the international machinery becomes more effective if it has to match a living, dynamic national dimension".[339] As Rolv Ryssdall, late President of the ECtHR underlined: "the success of the ECHR system will ultimately depend on whether or not there is some form of co-operation between domestic courts and Strasbourg institutions. According to Andrew Drzemczewski: "the success of the Strasbourg system is contingent on adequate human rights protection in member States (thereby short-circuiting or even totally eradicating the need to go to Strasbourg), appropriate interplay between Strasbourg and the highest domestic judicial instances when necessary, and last but not least, the effective implementation (supervision of the execution of the ECtHR's findings by the CoM) of the Strasbourg findings when breaches occur".[340] Former President Wildhaber seems to be convinced that "if the national authorities are in position to apply ECHR case-law to the questions before it, then much, if not all, of the Strasbourg Court's work is done". This is ultimately, the objective underlying the system: to ensure that individual citizens throughout the ECHR community are able fully to assert their ECHR rights within their own domestic legal system.[341]

It is submitted that the emphasis in legal protection should then be on the domestic level. Obviously, an effective domestic remedy, which leads to a decision with which all parties can approve, is more efficient and practical than a similar finding at the international level primarily because it will save a lot of time. It is accepted that in order to provide effective legal protection at higher speed and of better quality, domestic institutions are, in principle, better equipped than international ones.[342]

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[339] Evrigenis, D., "Reflections on the National Dimension of the ECHR", in Proceedings of the Colloquy About the ECHR in Relation to Other International Instruments for the Protection of Human Rights, Athens, September 1978, CoE, 1979, p.80.

[340] Drzemczewski, A., "The European Human Rights Convention: Protocol No. 11- Entry into force and first year of application", *Human Rights Law Journal*, Vol.21, No 1-3, 2000, p.10.

[341] Wildhaber, L. "The role of the ECtHR: an evaluation", *Mediterranean journal of human rights*, Vol. 8, No. 1, 2004, p.12.

[342] Barkhuysen, T., & Van Emmerik, Mic., L., "Legal protection against violations of the European Convention on Human Rights: Improving (Co-)operation of Strasbourg and domestic institutions", *Leiden Journal of International Law*, Vol. 12, 1999, p.841.

Moreover, a domestic court can, unlike the ECtHR, immediately implement the human rights judgment in the final decision in the relevant case; if the case does not have to go to Strasbourg then the individual can additionally obtain his rights immediately and fully.[343] It has been argued that it would seem preferable that the rights and freedoms guaranteed by the ECHR should be effectively secured by domestic courts and tribunals, since an attempt at vindication through a lengthy process before Strasbourg organs may well deprive an individual of immediate redress which is associated with domestic law.[344]

From the early stages of the reform process which led to the 2004 "reform package" it was recognised that measures targeting the national level would have to form part of any reform measures. The Evaluation Group underlined that: "the primary duty to protect fundamental rights and freedoms lies with the national courts and authorities and it is at that level that protection can be secured most effectively". The NGOs in their Response to the Evaluation Group's proposals argued that the solution to the problem created by the increasing number of (alleged) human rights violations across the member states is to "reduce the number of human rights violations in the Convention states, rather than to weaken the Court's mechanism for providing remedies at applicants".

The urgent need for the improvement of the domestic implementation of the ECHR in the legal orders of the member states has a central position to the aim of guaranteeing the long-term effectiveness of the ECHR system. The Explanatory Report on Protocol 14 states: "Measures required to ensure the long-term effectiveness of the control system established by the ECHR in the broad sense are not restricted to Protocol No. 14. Measures must also be taken to prevent violations at national level and to improve domestic remedies, and also to enhance and expedite execution of the ECtHR's judgments. Only a comprehensive set of interdependent measures tackling the

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[343] Van Kempen, P., H., "The Protection of Human Rights Under National Constitutions and The European Convention; An Incomplete System?", *Journal of Constitutional Law In Eastern and Central Europe*, Vol.3:225, 1996, p.236.

[344] Drzemczewski, A., "European Human Rights Convention in domestic law", Clarendon Press-Oxford, 1983, p.333.

problem from different angles will make it possible to overcome the ECtHR's present overload".[345]

Hence, the various efforts to make the ECtHR more effective and accessible led to the 2004 "reform package" of measures that address the issue of the ECtHR's excessive caseload, including Protocol No. 14 to the ECHR as has already discussed in Chapter 1. The 2004 ECHR reforms do not include only measures for reforming the ECtHR. They constitute a package of measures to address the problem of the ECtHR's increasing workload at three levels: i) upstream: measures to be taken at national level to enhance the implementation of the ECHR and reduce the pressure on the ECtHR caused by the high numbers of incoming cases; ii) midstream: measures to enhance the ECtHR's filtering and case-processing capacity; iii) downstream: measures to improve and accelerate the execution of the ECtHR's judgments which should, in turn, contribute to reducing the pressure "upstream".[346]

More specifically, the CoM at the 114th Ministerial Session in May 2004 adopted a Declaration on "Ensuring the effective implementation of the ECHR at national and European level". The Declaration of the CoM in addition to Protocol No. 14 contains the key Recommendations that should be implemented by member states, namely:

✓ Recommendation Rec (2004) 4 on the ECHR in the university education and professional training;

✓ Recommendation Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR;

✓ Recommendation Rec (2004) 6 on the improvement of domestic remedies.

In addition to these three Recommendations a number of further Recommendations adopted by the CoM at an earlier stage, were also regarded as measures that aim to

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[345] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.14.

[346] CM(2006)39 final, 116th Session of the CoM (Strasbourg, 18-19 May 2006), Ensuring the continued effectiveness of the ECHR- The implementation of the reform measures adopted by the CoM as its 114th Session (12 May 2004).

prevent human rights violations at national level and were referred to in the Declaration:

✓ Recommendation Rec (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the ECHR;

✓ Recommendation Rec (2002) 13 on the publication and dissemination in the member states of the text of the ECHR and of the case-law of the ECtHR.

It is clear that these Recommendations are underpinned by the principle of subsidiarity. They endeavour to prevent violations at the national level and improve domestic remedies, including, requiring states to ensure continuous screening of draft and existing legislation and practice in light of the ECHR and the ECtHR case-law; and also by requiring states to increase provision of information, awareness-raising, training and education in the field of human rights. Therefore, member states should take practical measures in order to ascertain that effective domestic remedies exist and are available to any person alleging that there has been a violation of the ECHR. It is only when and to the extent that national authorities, including domestic courts[347] fail to fulfill their primary responsibility for the protection of the rights and freedoms laid down in the ECHR, that there is access to the mechanism provided for in the ECHR.[348]

It is therefore submitted that the underlying principle and impetus behind these Recommendations of the CoM is to ensure that everything possible is done to prevent or deal with ECHR violations at national level, so that the ECtHR is not overloaded with cases which could be dealt with adequately at the national level, and is assisted, in those cases which do reach it after having gone through the national channels, by full and well-reasoned judgments having been delivered on the ECHR questions at national level.

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[347] See Article 1 of the ECHR.

[348] See Article 35, paragraph 1, of the ECHR: exhaustion of local remedies as an admissibility requirements.

3.4.1 Recommendation Rec(2004)4

on the ECHR in university education and professional training[349]

The first Recommendation adopted by the CoM deals with the university education or education and professional training in human rights and has a longer term preventive aim. It is indeed connected with the preventive role played by education in the principles underlying the ECHR, the standards that it contains, and the case-law deriving from them. In addition to the wide publication and dissemination of the ECHR and the ECtHR's case-law, which has been the subject of previous recommendation from the CoM,[350] the effective implementation of the ECHR at national level also requires measures in the field of education and training.

The Recommendation stresses in particular the importance of appropriate university and professional training programmes in order to ensure the effective application of the ECHR and the case-law of the ECtHR by public bodies. It recommends that member states: ascertain that adequate university education and professional training concerning the ECHR and its case-law exist at national level and that such education and training are included as a core component of law, political and administrative science degrees, as part of the professional exams for access to the legal professions and the continuous training provided to judges, prosecutors and lawyers, and, in an appropriate form, in both the initial and continuous training offered to staff responsible for law enforcement and other persons, such as members of the police and security forces, prison and hospital staff and the immigration services.

Furthermore, it recommends the enhancement of the effectiveness of such education and training by providing for it to be incorporated into stable structures (public and private) and given by people with a good knowledge of ECHR concepts and case-law, and supporting initiatives aimed at training specialised teachers and trainers. Finally, it recommends the encouragement of non-state initiatives for the promotion of awareness and knowledge of the ECHR system.

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[349] Rec (2004) 4 on the ECHR in university education and professional training.
[350] Rec (2002) 13 on the publication and dissemination in the member states of the text of the ECHR and of the case-law of the ECtHR (adopted by the CoM on 18 December 2002 at the 822nd meeting of the Ministers' Deputies).

It is evident that many applications result from non-application or nor effective implementation of the ECHR by judges, other public officials and the police. It is suggested that better awareness of the ECHR and the ECtHR case-law by such people should reduce these numbers. However, it should be noted at the same time better awareness of the ECHR in the legal profession and public in general will probably lead to an increase in the number of applications to the ECtHR.

3.4.2 Recommendation Rec(2004)5

on the verification of the ECHR compatibility of draft laws, existing laws and administrative practice[351]

The Recommendation Rec (2004)5 deals with the verification of the compatibility of draft laws, existing laws and administrative practice with the ECHR standards. It is suggested that this Recommendation could be considered as the principal preventive measure, which it is hoped will reduce the flow of cases to the ECtHR. According to this Recommendation member states should ensure that there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the ECHR in the light of the case-law of the ECtHR. Clearly, this Recommendation is an attempt to secure greater efforts by member states to give full effect to the ECHR at national level by continuously adapting national standards in accordance with ECHR standards in light of the ECtHR's case-law.

The CoM recommends that member states ensure that there are appropriate and effective mechanisms for such systematic verification of compatibility of all laws and administrative practice, including as expressed in regulations, orders and circulars, and also that they ensure the adaptation, as quickly as possible, of laws and administrative practice to prevent violations of the ECHR. Not only should member states establish mechanisms for the systematic verification of ECHR compatibility, they should also ensure that procedures exist which allow follow-up of the

[351] Rec (2004) 5 (adopted by the CoM on 12th May 2004 at its 114th Session).

verification undertaken, for example by promptly taking the steps required to modify their laws and administrative practice in order to make them compatible with the ECHR. This should include improving or setting up appropriate revision mechanisms which should systematically and promptly be used when a national provision is found to be incompatible.

The Appendix to this Recommendation contains examples of good practice, which member states are expected to take into account when reviewing the adequacy and effectiveness of their arrangements for systematic verification of ECHR compatibility and adaptation of national standards in the light of such verification. Systematic scrutiny for ECHR compatibility should take place both within the executive, when laws are being drafted, and at the parliamentary level, when they are being scrutinised. Competent and independent bodies, including national institutions for the promotion and protection of human rights and NGOs, should be consulted during this verification process.

The main focus is on systematically verifying that draft laws are "ECHR-compatible", because by adopting a law that has been so verified, the State reduces the risk of that law giving rise to violations of the ECHR in the future. The Recommendation also encourages States to set up mechanisms for checking existing laws and administrative practice for compatibility with the ECHR.

3.4.3 Recommendation Rec(2004)6

on the improvement of domestic remedies[352]

The effectiveness of the ECHR system and of the protection of the rights guaranteed by it is a collective responsibility of all states parties. States are obliged to provide for domestic legal remedies in case of a breach of the ECHR. If the Strasbourg machinery is not to collapse, improved prevention of violations and greater emphasis on effective domestic legal protection is vital.

[352] Rec (2004) 6 on the improvement of domestic remedies.

The Recommendation relating to the improvement of domestic remedies for ECHR violations has two aims; it is concerned with both cure and prevention as ways of reducing the flow of cases to the ECtHR. This Recommendation urges member states to ascertain, through constant review, in the light of the case-law of the ECtHR that domestic remedies exist for anyone having an arguable complaint of a violation of the ECHR and that these remedies are effective, in that they can result in decision on the merits of the complaint and adequate redress for any violation found.

First, it seeks to elaborate on the obligation in Article 13 of the ECHR to provide effective remedies for arguable violations of ECHR rights. According to the Recommendation, Article 13 has the effect of requiring a remedy to deal with the substance of any "arguable claim"[353] under the ECHR and to grant appropriate redress. The remedy required must be effective in law as well as in practice; this notably requires that it be able to prevent the execution of measures which are contrary to the ECHR and whose effects are potentially irreversible. - the "authority" referred to in Article 13 does not necessarily have to be a judicial authority, but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy it provides is indeed effective; - the "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant; but it implies a certain minimum requirement of speediness.

The Recommendation suggests that the improvement of available domestic remedies will most probably have quantitative and qualitative effects on the workload of the ECtHR. On the one hand, the volume of applications to be examined ought to be reduced and on the other hand, the examination of applications by the ECtHR will be facilitated if an examination of the merits of cases has been carried out beforehand by a domestic authority.

The Appendix to this Recommendation suggests that member states should not only carefully examine draft legislation to ensure the availability and effectiveness of domestic remedies, but should also commission experts to conduct a study of the

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[353] See Hampson, F., "The Concept of an 'Arguable Claim' Under Article 13 of the ECHR", *International and Comparative Law Quarterly*, 1990, Vol.39, pp.891-899.

effectiveness of existing domestic remedies with a view to identifying any improvements which may be necessary to ensure that effective remedies are available.

Second, this Recommendation seeks to remind states of their obligation, which is part of the obligation to abide by judgments of the ECtHR in Article 46 ECHR, to solve the systemic problems which underlie a finding of a violation, by recommending that states review, following ECtHR judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the domestic remedies. The main aim is that this will avoid repetitive cases being brought before the ECtHR and thereby reduce the ECtHR's workload.

The Appendix to this Recommendation suggests that where the ECtHR has delivered a "pilot judgment" pointing to a structural deficiency in national law or practice, and a large number of repetitive cases raising the same problem are likely to be lodged, the state concerned should not only ensure that the individuals who have established the violation are able to obtain redress domestically, but also ensure that other potential applicants have a rapid and effective remedy allowing them to apply to a competent national authority and the ability to obtain redress at national level, instead of having to apply to the ECtHR. It also suggests that such remedies at the national level should be open to people who have already been affected by the problem prior to its resolution, which may require giving new or existing remedies a certain retroactive effect.

This Recommendation addresses particularly the problem of "repetitive" or "clone" cases which are identified as one of the main sources of the caseload of the ECtHR as outlined in Chapter 1. According to Pierre-Henri Imbert this Recommendation seeks not only to ensure full implementation of the Article 13 of the ECHR and to avoid cases coming to the ECtHR which have not been properly examined by a national authority and which create extra work for the ECtHR, but also to encourage the establishment of remedies for repetitive cases at the national level so as to avoid the need for the ECtHR to give judgment on the merits of large numbers of cases which

merely form a repeat of a case already decided by the ECtHR in a "pilot judgment".[354] It is understood that one of the crucial features of 2004 "reform package" that the ECtHR in future makes it very clear when a judgment it is adopting is to be seen as a "pilot" judgment thus triggering special attention to it not only by member state concerned but also by the CoM supervising the execution of judgment.[355] Obviously the aim is that immediate adoption of new domestic remedies will in effect mean that individuals who have complaints rising from the same systemic problems of member states will be able to have a remedy at national level and will not need to submit an application to Strasbourg.

The adoption of these Recommendations is undoubtedly a welcome development. This was the response to the need for better implementation of the ECHR at national level. The proposed measures aim at the prevention of human rights violations at national level and they seek to stress the responsibility of the national authorities according to the principle of subsidiarity. It is submitted that these measures intend to create a culture of human rights in the domestic legal orders of the member states and their significance should not be underestimated. Their proper implementation by the member states would strengthen the awareness of the ECHR at national level and will have a positive impact on the attempts to save the future of the ECtHR.

3.5 Execution of judgments

Pierre-Henri Imbert has claimed that the ECHR system is of a "circular kind".[356] In his view, "effective national systems and structures should be able to prevent or remedy human rights violations at home and only where the national systems fail does

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[354] Imbert, P.,H., "Follow-up to the CoM' Recommendations on the Implementation of the ECHR at the Domestic Level and the Declaration on "Ensuring the Effectiveness of the Implementation of the ECHR at National and European levels" in "*Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the high-level seminar*", Oslo, 18 October 2004, p.37 available at: www.coe.int/T/E/Human_rights/prot14e.asp.

[355] Eaton, M., & Schokkenbroek, J., "Reforming the Human Rights Protection System Established by the ECHR- A New Protocol No. 14 to the Convention and Other Measures to Guarantee the Long-term Effectiveness of the Convention System", *Human Rights Law Journal*, Vol.26, No. 1-4, p.13.

[356] Imbert, "Follow-up to the CoM' Recommendations on the Implementation of the ECHR at the Domestic Level and the Declaration on "Ensuring the Effectiveness of the Implementation of the ECHR at National and European levels" in "Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the high-level seminar", Oslo, 18 October 2004, p.35 available at: www.coe.int/T/E/Human_rights/prot14e.asp,

the Strasbourg system step in".[357] He went on to add that "after the ECtHR has given a judgment, the emphasis shifts back to the national arena where action must be taken to take the individual and/or general measures required to execute the judgment, under the supervision of the CoM".[358] It is evident that a timely and complete execution of the ECtHR's judgments is of paramount importance for the authority of the ECtHR, for an effective legal protection of the victims and for the prevention of future violations.

Article 46 of the ECHR provides: "the High Contracting Parties undertake to abide by the decision of the ECtHR in any case to which they are parties." This is an obligation accepted by the member states under international law. In addition to decisions on procedural grounds, the ECtHR may deliver declaratory judgments as to whether a certain action of state authorities is in conflict with the provisions of the ECHR and may award "just satisfaction" to the applicant.[359]

3.5.1 Threefold obligation

States have three separate obligations following a judgment from the ECtHR finding a violation of the ECHR: the obligation to put an end to the violation, to avoid repeating it and make reparation to the affected parties.[360] The obligation to "make reparation" is threefold.

The ECtHR has considered that, whenever *restitutio in integrum* is, either *de jure or de facto*, impossible, the conclusion is that the respondent state can only offer partial reparation under Article 46; hence, it is for the ECtHR to afford the applicant just reparation.[361] When the ECtHR has deemed necessary to award just satisfaction, it is the State's duty to pay the applicants the relevant sums. "Just satisfaction in the sense

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[357] *Ibid*, p.35.
[358] *Ibid*, p.35.
[359] See Costa, J., P., "The Provision of Compensation Under Article 41 of the ECHR", in eds Duncan Fairgrieve, Mads Andenas and John Bell "Tort liability of public authorities in comparative perspective", London, *British Institute of International and Comparative Law*, 2002, p. 3-16.
[360] Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", Human Rights Files No. 19, 2002, p.10.
[361] Costa, J., P., "The Provision of Compensation Under Article 41 of the ECHR", in eds Duncan Fairgrieve, Mads Andenas and John Bell "Tort liability of public authorities in comparative perspective", London, *British Institute of International and Comparative Law*, 2002, p.6

of Article 41 of the ECHR comprises monetary compensation for moral and pecuniary damages as well as reimbursement of costs and expenses.[362] Nowadays, the ECtHR automatically awards default interest for the time between the judgment and the actual payment of the specified sum; interest has become an integral part of just satisfaction.[363] It should be noted that "just satisfaction" is the only measure that the ECtHR can order a state responsible for a violation of the ECHR to take. The order to pay just satisfaction confers on a judgment of the ECtHR the value of judgment ordering performance, in contrast to its classic form of declaratory judgment. According to Elisabeth Lambert-Abdelgawad it is "an obligation capable of direct and clear performance".[364]

However, research into the ECtHR's practice pursuant to Article 41 ECHR shows that the ECtHR often does not award any damages at all. In fact, the ECtHR often only states, without giving reasons and without regard to the national possibilities for reparation that the mere finding of a violation of the ECHR constitutes sufficient satisfaction in cases where damage is of a non-pecuniary nature.[365] It should be noted that general awards of damages are relatively low compared with damages awarded by the domestic courts of many member states. This is probably due to a generally accepted view that the primary remedy in Strasbourg is the finding of a violation of the ECHR itself.[366]

The adoption of individual measures for the applicant's benefit may be necessary to ensure that the latter is put, insofar as possible, in the same situation as he or she enjoyed prior to the violation of the ECHR. These may entail, for instance, the need to put an end, if possible retroactively, to an unlawful situation.

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[362] Tomuschat, C., "Just Satisfaction Under Article 50 of the ECHR", in Mahoney, P., Matscher, F., Petzold, H., Wildhaber, L., (eds) *Protecting Human Rights: The European Perspective*, 2000, p.1413.
[363] Polakiewicz, J., "The Execution of Judgments of the ECtHR", in Blackburn, R., & Polakiewicz, J. "*Fundamental Rights in Europe*", Oxford University Press, 2001, p.64.
[364] Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", Human Rights Files No. 19, 2002, p.13.
[365] Barkhuysen, T., & Van Emmerik, M., "The Execution of Judgments of ECHR" in Christou, T., & Raymond, J., (eds) *ECtHR- Remedies and Execution of Judgments*, The British Institute of international and Comparative Law, 2005, p.4.
[366] Leach, Ph., "Taking a Case to the ECtHR", Oxford University Press, 2005, p.397.

In addition, States may have to take general measures, such as legislative amendments, in order to prevent further violations of a similar nature. It would be insufficient and not in line with the aims and purpose of the ECHR if a state, after a violation has been found in a specific case, took remedial action only in favour of the of the applicant without removing the root cause of the violation found.[367] Such an attitude might indeed lead to a repetition of similar violations and similar cases being brought before the ECtHR without bringing the law or practice which is at the origin of the violation into line with the ECHR as interpreted by the ECtHR.[368] It is quite clear that the obligation for a respondent state arising from a finding of a violation of the ECHR is the elimination of the causes of the violation to prevent its repetition. Therefore subsequent applications whose complaint arises from the same circumstances should be seen as a problem of execution[369]. The obligation of the states to adopt general measures in consequence of a judgment of the ECtHR finding a violation of the ECHR is associated with Article 46 of the ECHR and with the requirement not to repeat the violation.[370]

3.5.2 Restitutio in integrum

It can be said that a judgment finding a violation does entail for the respondent state a legal obligation under the ECHR to produce a certain, specific result – namely to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing prior to the violation: in other words, *restitutio in integrum*. Subject to monitoring by the CoM, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the ECHR, provided that such means are compatible with the conclusions set out in the Court's judgment.[371]

Reparation under Article 41 is intended to place the applicant as close as possible to the position in which he would have been had the violation of the ECHR not taken

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[367] Leuprecht, P., "The Execution of Judgments and Decisions" in eds Macdonald, R. St. J, Matcher, F., Petzold, H, "*The European System for the Protection of Human Rights*", 1993, p.794.
[368] *Ibid*, p.794.
[369] Wildhaber, L., "The ECtHR in Action", *Ritsumeikan Law Review*, No. 21, 2004, p.90.
[370] Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", Human Rights Files No. 19, 2002, p.20.
[371] See *Scozzari and Giunta v. Italy*, No. 39221/98 and 41963/98, 13/07/2000, para.249.

place.[372] In the case of *Papamichalopoulos v. Greece* the ECtHR held that: "a judgment in which the ECtHR finds a breach of the ECHR imposes on the respondent state a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach".[373] Article 41 of the ECHR shows that *restitutio in integrum* is only required insofar as it is possible under the municipal law of the respondent state.[374] However, it has been argued that the commitment to put an end to the violation is not prejudiced by Article 41 of ECHR. Eckart Klein has pointed out that this provision reduces the normal obligation under public international law to grant full reparation (*restitutio in integrum*), but in his view: "restitution and termination are two different legal categories and must be separated from each other".[375] When the ECtHR finds a violation of the ECHR, the respondent state is under an obligation immediately to discontinue the wrongful action. Cessation becomes relevant if the declared violation has a continuing character/nature[376] since the most important duty of the state is to bring the violation to an immediate end. The duty to terminate regards the present and future, while the concept of restitution refers to the past. While Article 41 provides that the national legal order may provide only for partial reparation, no reduction at all has[377] been provided with regard to the fundamental obligation to terminate the violation.[378]

According to the famous dictum by the Permanent Court of International Justice in the *Chorzow* case, full reparation for an internationally wrongful act: must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

In *Marckx v. Belgium* the ECtHR stated that its "judgment is essentially declaratory and leaves to the state the choice of the means to be utilised in its domestic legal

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[372] *Piersack v. Belgium*, No. 8692/79, 26/10/1984, para.15-16.
[373] *Papamichalopoulos and Others v. Greece*, No. 14556/89, 31/10/1995, para.34.
[374] *Papamichalopoulos and Others v. Greece*, No. 14556/89, 31/10/1995, para.34.
[375] Klein, E., "Should the Binding Effect of the Judgments of the ECtHR be Extended?", in Mahoney et all (eds) Protecting Human Rights: The European Perspective, 2000, p.708.
[376] See Loucaides, L., "The Concept of 'Continuing' Violations of Human Rights" in Mahoney, P., et al.(eds) "*Protecting Human Rights: The European Perspective- Studies in Memory of Rolv Ryssdal*", 2000, pp.803-815.
[377] Factory at *Chorzow (Claim for indemnity) (The Merits), P.C.I.J., Series A No. 17, (13/09/1928) 47*
[378] Klein, E., "Should the Binding Effect of the Judgments of the ECtHR be Extended?", in Mahoney et all (eds) Protecting Human Rights: The European Perspective, 2000, p.708.

system for performance of its obligations under Article 46(1) [then 53] and cannot of itself annul or repeal inconsistent national law or judgments".[379]

3.5.3 Effect of the judgments of the ECtHR

It has been suggested that the extent of the binding effect of the judgments of the ECtHR on the member states is limited *ratione personae*, *ratione materiae*, and *ratione temporis.*[380]

It follows not only from the terms of Article 46 but also from the principle of *res juricata* that the ECtHR's judgments have binding effect only on the states which are parties to the particular case; they are not binding *erga omnes*. Despite the suggestions that have been made to give binding effect *erga omnes* to the ECtHR's findings because of this rather "objective" or "ordre public" nature of the protection of the ECHR, Article 46 (1) expressly restricts the binding effects to the parties of the procedure.[381] It has been suggested that the judgments of the ECtHR do not have *erga omnes* effect, but they have an "orientation effect".[382] Moreover, practice has shown that many member states recognise the orientation marks given by the ECtHR and act accordingly.[383]

Although judgments are not binding *erga omnes* their binding authority extends beyond the confines of a particular case.[384] In the *Ireland v. United Kingdom* judgment the ECtHR held that "the Court's judgments serve not only to decide those cases brought before the ECtHR but, more generally, to elucidate, safeguard and develop the rules instituted by the ECHR, thereby contributing to the observance by the states of the engagements undertaken by them as Contracting Parties (Article

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[379] *Marckx v. Belgium,* No. 6833/74, 13/06/1979, para.58.
[380] Klein, E., "Should the Binding Effect of the Judgments of the ECtHR be Extended?", in Mahoney et all (eds) Protecting Human Rights: The European Perspective, 2000, p.705.
[381] Ress, G., "The effects of Judgments and Decisions in Domestic Law", in eds Macdonald, R. St. J/Matcher, F./Petzold, H, "*The European System for the Protection of Human Rights*", 1993, p.803.
[382] Ress, G., "The Effect of Decisions and Judgments of the ECtHR in the Domestic Legal Order", *Texas International Law Journal*, Vol. 40:359, 2005, p.374.
[383] Klein, E., "Should the Binding Effect of the Judgments of the ECtHR be Extended?", in Mahoney et all (eds) Protecting Human Rights: The European Perspective, 2000, p.706.
[384] Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", Human Rights Files No. 19, 2002, p.7.

19)".[385] This means that state parties, besides having to abide by the judgments of the ECtHR pronounced in cases to which they are party, also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice; in this respect, it must be underlined that cultural differences may not be used as a pretext to escape the *erga omnes* effects of the ECtHR's judgments.[386]

While a particular judgment by the ECtHR is binding only on the Contracting States that were parties to the case, other states have not infrequently looked to judgments for guidance on the compatibility of their own domestic law and practice with the ECHR and draw legislative or other consequences from it. They are aware that they too risk a condemnation by the ECtHR if they allow such a situation to continue.[387] On a number of occasions this has prompted a state that was not a party to a given case to amend its legislation or to adapt its practice or case-law.[388] In so doing, these 'non-party' states are doing no more than fulfilling the general obligation they have undertaken by virtue of Article 1 of the ECHR to secure to everyone within their jurisdiction the guaranteed rights and freedoms, as spelt out in the text of the ECHR but also as interpreted and explained by the ECtHR in its judgments.[389] There is reason to believe that they do so not only for reasons of principle, but also in order to prevent similar cases from being successfully brought against them before the ECHR

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[385] Klein, E., "Should the Binding Effect of the Judgments of the ECtHR be Extended?", in Mahoney et all (eds) Protecting Human Rights: The European Perspective, 2000, p.713.

[386] Opinion No. 209/2002, European Commission for Democracy Through Law (Venice Commission), Draft Opinion on the Implementation of the Judgments of the ECtHR, Strasbourg, 6 December 2002, para.33.

[387] Zwaak, L., "The Implementation of Decisions of the Supervisory Organs Under the ECHR" in Barkhuysen T., Van Emmerik, M., L., Van Kempen P., (eds) "The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order", Martinus Nijhoff Publishers, The Hague/Boston/London, 1999, p.77.

[388] For example in the light of the judgment of the ECtHR in the case of *Hirst v. The United Kingdom*, the Electoral Law of Cyprus was amended following legal advice from the Human Rights Sector of the Legal Service of the Republic on behalf of the Attorney-General, so as to give the right to prisoners to vote in elections. The Law was enacted before the Parliamentary elections held in May 2006, and prisoners were able to vote under the amended law (see chapter on Cyprus).

[389] Ryssdal, R., "*The Enforcement System Set Up Under the ECHR*", in Bulterman, M., K., & Kuijer, M., (eds), "*Compliance With Judgments of International Courts*", The Hague-Boston-London: Nijhoff, 1996, p. 61.

bodies.[390] In that respect, the judgments of the ECtHR have apart from a corrective effect, also a preventive effect.[391]

Where the ECtHR ascertains that a member state has infringed the ECHR, it is highly probable that it will declare the ECHR to have been breached in a comparable case involving the same or another state. Those states whose courts do not take this into consideration, namely by adapting their decisions to follow the ECtHR's interpretation of the ECHR have to deal with a spate of individual applications. It should not be forgotten that all Contracting States are under a general obligation to ensure that their law and practice are in line with the requirements of the ECHR as interpreted by the ECtHR.[392]

3.5.4 Declaratory judgments- The obligation of the State Organs to Implement the Judgments of the ECtHR -Effect of judgments in domestic legal order

As outlined above member states are obliged, as subjects of public international law, to abide by the final judgment of the ECtHR in any case they are parties to. As the state is bound as a whole, it does not matter which state organ or authority has caused the infringement of the ECHR; any such infringement is attributable to the state concerned.[393] Moreover, it is a well established rule of international law that at least on the international level, the ECHR (as an international treaty) is superior to any national law and as a result no state can refer to its domestic law in order to escape obligations derived from the ECHR.[394]

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[390] Leuprecht, P., "The Execution of Judgments and Decisions" in eds Macdonald, R. St. J/Matcher, F./Petzold, H, "*The European System for the Protection of Human Rights*", 1993, p.792.

[391] Zwaak, L. "The Effects of Final Decisions of the Supervisory Organs Under the ECHR", in Bayefski, A., The UN Human Rights Treaty System in the 21ts Century, Transnational Publishers Ardsley NY, 2001, p.269.

[392] Leuprecht, P., "The Execution of Judgments and Decisions" in eds Macdonald, R. St. J/Matcher, F./Petzold, H, "*The European System for the Protection of Human Rights*", 1993, p.791.

[393] See e.g. *Ilaşcu and others v. Moldova and Russia*, No. 48787/99, 08/07/2004; *Assanidze v. Georgia*, No. 71503/01, 08/04/2004.

[394] Article 27 of the 1969 Vienna Convention on the Law of Treaties as well as numerous judgments of the Permanent Court of International Justice and the International Court of Justice, eg *Wimbledon* case (1923), P.C.I.J., Series A No. 1, 19; *Fisheries* case, I.C.J. Reports 1951, 116 (132); *Nottebohm* case, I.C.J. Reports 1955, 4 (20-1).

It can be concluded from Article 46(1) of the ECHR that the member states shall provide in their internal law that a legal issue pertaining to a potential violation of the ECHR should be decided in accordance with the interpretation given by the ECtHR. Therefore, judgments on the merits that conclude that there has been a violation of a human right by the respondent state are not executable as such in domestic orders since there is no obligation arising out of the ECHR to make judgments of the ECtHR executable within the domestic legal system.[395] Normally, the judgments of international courts, including the ECHR, do not have a direct effect within the legal order. They only bind the respondent states which have the obligation to fulfil and respond to the different orders set out under the merits in the operative part of the judgment.[396]

A judgment by the ECtHR finding a violation of the ECHR is normally essentially declaratory in character, not prescriptive.[397] The finding of a violation by the ECtHR amounts to the determination of an internationally wrongful act.[398] Thus the ECtHR determines whether the conduct of state authorities by action or omission in a concrete case was in conformity with the ECHR. Accordingly, where an applicant succeeds in establishing violation of the ECHR, the ECtHR's practice has been to issue a declaration that the ECHR has been violated.[399] The judgments of the ECtHR, as opposed to the judgments of the Inter-American Court of Human Rights,[400] were supposed to have no direct effect on domestic law and national authorities unless the domestic law itself requires or at least permits national authorities to apply or execute them.[401] This is explicitly revealed from Articles 41, 44, 45 and 46 of the ECHR which are based on the traditional understanding of the effects of judgments of international tribunals.

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[395] Ress, G., "The Effect of Decisions and Judgments of the ECtHR in the Domestic Legal Order", *Texas International Law Journal*, Vol. 40:359, 2005, p.374.
[396] *Ibid*, p.374.
[397] Ryssdal, R., "*The Enforcement System Set Up Under the ECHR*", in Bulterman, M., K., & Kuijer, M., (eds) "*Compliance With Judgments of International Courts*", The Hague-Boston-London: Nijhoff, 1996, p.50.
[398] Polakiewicz, J., "The Execution of Judgments of the ECtHR", in Blackburn, R., & Polakiewicz, J. "Fundamental Rights in Europe", Oxford University Press, 2001, p.56
[399] Leach, Ph., "Beyond the Bug River- A New Dawn For Redress Before the ECtHR", *European Human Rights Law Review*, 2005, No. 2, p.150.
[400] Article 68(2) of the American Convention on Human Rights confers immediate legal effect upon the judgments of the Court in domestic law.
[401] Polakiewicz, J., "The Execution of Judgments of the ECtHR", in Blackburn, R., & Polakiewicz, J. "Fundamental Rights in Europe", Oxford University Press, 2001, p.56.

Such a judgment does not in itself have the effect of quashing a decision of the national authorities or abrogating national legislation which has been found to be at variance with the requirements of the ECHR.[402] Thus, Strasbourg judgments do not, by virtue of the ECHR, have direct effect in the domestic legal system of the respondent state. The judgements of the ECtHR do not imply any cessation effect, nor do they annul any laws, judgments or any other acts taken by a member state's authorities. As the Strasbourg Court itself has repeatedly held, it has no competence to annul, repeal or modify statutory provisions or individual decisions taken by administrative, judicial, or other national authorities.[403] It is up to the national organs of the member States to draw the necessary conclusions from such a decision. They must not contest a violation of the ECHR which has been declared by the ECtHR; and they must terminate an ongoing violation.

The judgments are not directly enforceable, not even the operative part concerning just satisfaction, which although obviously binding for the state concerned, is not directly enforceable by the ECtHR or any organ of the CoE. However, Lambert-Abdelgawad does not agree with this position. In her view the operative part of a judgment of the ECtHR ordering a state to pay just satisfaction is enforceable in the domestic legal order and unlike a foreign judgment, a judgment of the ECtHR cannot require a writ of execution.[404]

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[402] Ryssdal, R., "The Enforcement System Set Up Under the ECHR", in Bulterman, M., K., & Kuijer, M., (eds), "*Compliance With Judgments of International Courts*", The Hague-Boston-London: Nijhoff, 1996, p.50.

[403] Polakiewicz, J., "The Execution of Judgments of the ECtHR", in Blackburn, R., & Polakiewicz, J. "Fundamental Rights in Europe", Oxford University Press, 2001, p.56.

[404] Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", Human Rights Files No. 19, 2002, p.14.

3.5.5 Specific orders on how to execute the judgement

It used to be well settled as a matter of the ECtHR case-law that the ECtHR has no jurisdiction under Article 41 to issue directions to Contracting States on the measures or steps which they should take to rectify violations. Judgments of the ECtHR are "essentially declaratory in nature, and leave to the state concerned the choice of the means to be used in its domestic legal system for performance of its obligation" to abide by the judgment.[405]

The ECtHR did not consider itself competent to make recommendations as to which steps should be taken to remedy the consequences of the ECHR violation[406] and had always abstained from making any consequential orders or statements, arguing that it falls to the CoM to supervise the execution of its judgments.[407] Hence, in case of violation of the ECHR, the ECtHR used to refrain, as a matter of principle from making provisions or from instructing on how a member state should conform its domestic legislation to the ECHR; it was therefore left to the discretion of the member states as to the consequences of relatively vaguely defined norms of conduct.[408]

The ECtHR did not have the power to order the respondent State to take specific measures in order to remedy the violation, unlike the Inter-American Court of Human Rights which, pursuant to Article 63 (1) of the American Convention on Human Rights, "may rule, if appropriate, that the consequences of the measure or situation that constituted the breach of [a provision of the Convention] be remedied".

In numerous cases successful applicants asked the ECtHR to direct the respondent state to introduce necessary legislative amendments so as to bring into conformity

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[405] *Marckx v. Belgium*, No. 6833/74, 13/06/1979, para.58.
[406] Barkhuysen, T. & Van Emmerik, M., L., "Improving the Implementation of Strasbourg and Geneva Decisions in the Dutch Legal Order: Reopening of Closed Cases or Claims of Damages Against the State" in, Barkhuysen T., Van Emmerik, M., L., Van Kempen P., (eds) "The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order", Martinus Nijhoff Publishers, The Hague/Boston/London, 1999, 2005, p.7.
[407] Polakiewicz, J., "The Execution of Judgments of the ECtHR", in Blackburn, R., & Polakiewicz, J. "Fundamental Rights in Europe", Oxford University Press, 2001, p.57.
[408] Ress, G., "The effects of Judgments and Decisions in Domestic Law", in eds Macdonald, R. St. J/Matcher, F./Petzold, H, "*The European System for the Protection of Human Rights*", 1993, p.803.

with the ECHR national law found to have been at the source of a violation.[409] Each time the ECtHR categorically replied that the ECHR did not empower it to order the responded state to alter its legislation.[410] In the case of *Soering v. The United Kingdom*, the applicant submitted that "just satisfaction of his claims would be achieved by effective enforcement of the ECtHR's ruling" and he invited the ECtHR to give directions in relation to the operation of its judgment to the governments which were concerned in his case. The ECtHR responded that it was not empowered under the ECHR to make accessory directions of the kind requested by the applicant: "By virtue of Article 54 [now Article 46], the responsibility for supervising execution of the ECtHR's judgments rests with the CoM of the CoE".[411]

The absence of a power to enforce judgments on the part of the ECtHR was often criticised by academics[412] and by the PACE as not being conducive to the proper and rapid execution of the judgment.[413] Gradually the ECtHR has itself assumed more responsibility for the proper execution of its judgments, by giving indications as to what the best remedy would be, or by clearly giving orders for reparation.

There were already some early indications in judgments, e.g. in the judgment of *Iatridis v. Greece* concerning the withdrawal of a cinema license, where the ECtHR indicated that the best course of action would be to give the applicant a new cinema license.[414] However, the ECtHR has never directly pronounced such an order in the operative part of the judgment.[415] In the case of *Papamichalopoulos and others v. Greece* the ECtHR for the first time offered the state an alternative: either to make *restitutio in integrum* or to pay compensation for the pecuniary damage, within six months. Lambert-Abdelgawad argued that this was a "first serious assault on the

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[409] Ryssdal, R., "The Enforcement System Set Up Under the ECHR", eds Bulterman, M., K., & Kuijer, M., "*Compliance With Judgments of International Courts*", The Hague-Boston-London: Nijhoff, 1996, p.50.
[410] See, for example, *Pelladoah v. The Netherlands*, No. 16737/90, 22/09/1994.
[411] *Soering v. The United Kingdom*, No. 14038/88, 07/07/1989, para.25.
[412] See Cassese, A., "International Law", Oxford University Press, 2002, pp.366-367; Clayton, R., and Tomlinson, H., "The Law of Human Rights", Oxford University Press, 2000, p.1554.
[413] Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", Human Rights Files No. 19, 2002, p.7.
[414] *Iatridis v. Greece*, No. 31107/96, 19/10/2000, para.35.
[415] Ress, G., "The Effect of Decisions and Judgments of the ECtHR in the Domestic Legal Order", *Texas International Law Journal*, Vol. 40:359, 2005, p.372.

doctrine that the [ECtHR] has no power to issue directions to the states in respect of the execution of its judgments".[416]

Subsequently, the ECtHR has in a number of property cases held that the respondent state was to return to the applicant within a period from three to six months, the property concerned.[417] However, it almost always left open an alternative for the state, in that it ordered that failing restitution, a fixed sum in respect of pecuniary damage was to be paid to the applicant by way of just satisfaction.

Since 23 October 2003[418] the ECtHR has indicated in more than 60 cases against Turkey[419] (in which the applicant had been convicted by a security court, which was found not to be independent and impartial within the meaning of Article 6 of the ECHR) what the responded state must do in order to comply with the judgment. In the case of *Alfatli v. Turkey* included in its reasoning under Article 41 that "in principle, the most appropriate form of relief would be to ensure the applicant in due course a retrial by an independent and impartial tribunal".[420]

More precise indications were more recently given in the case of *Assanidze v Georgia* where the Grand Chamber of the ECtHR ordered for the first time an applicant's release at the earliest possible date, in addition to the payment of a just satisfaction for pecuniary damage. The ECtHR held that by its very nature, the violation found [continued depravation of liberty despite the existence of a court order for release] did not leave any real choice as to the measures required to remedy it, in contrast to the usual discretion a State enjoys in these matters.[421]

In *Ilascu and others v Moldova and Russia*, the ECtHR ordered the release of arbitrarily detained applicants held that "any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious

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[416] Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", Human Rights Files No. 19, 2002, p.27.
[417] See *Brumarescu v. Romania*, No. 28342/95, 28/10/1999.
[418] Case of *Gençel v. Turkey*, No. 53431/99, 23/10/2003.
[419] Vandenhole, W., "Execution of Judgments" in Lemmens, P., & Vandenhole, W., (eds) "*Protocol No.14 and the Reform of the ECtHR*", Intersentia, 2005, p.109.
[420] See *Alfatli v. Turkey*, No. 32984/96, 30/10/2003, para.52.
[421] *Assanidze v. Georgia*, No. 71503/01, 08/04/2004, para.202-204 and operative para. 14(a).

prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46 (1) of the Convention to abide by the Court's judgment".[422] Moreover the ECtHR stated that "the respondent States are to take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release".[423]

Judge Ress is convinced that the ECtHR rightly considered it has the inherent power to give such precise orders when the respondent state clearly has no discretion in the relevant case.[424] According to Steven Greer there are three particular advantages to the ECtHR being more specific about the kind of systemic action required by national authorities: compliance with the judgment is less open to political negotiation in the CoM, it is easier to monitor objectively both by the CoM and by other bodies such as NGOs and other domestic human rights agencies, and a failure by relevant domestic public authorities to comply effectively is, in principle, easier to enforce by both the original litigant, an others, through the national legal process as an authoritatively confirmed ECHR violation.[425]

3.5.6 Recommendation Rec (2000)2

The Obligation of the Domestic Judiciary to Implement the Judgments of the ECtHR

The ECtHR has considered in a number of cases what is required by the obligation to make reparation to the injured party following a finding of a violation of Article 6 (1) in the course of proceedings culminating in a criminal conviction. It is clear from those cases that such a finding of violation gives rise to an obligation on the state to bring about a result as close to *restitutio in integrum* as is possible in the nature of things, which may in certain circumstances require the quashing of the conviction, or the re-opening of proceedings, failing which compensation will be payable by the State under Article 41.

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[422] *Ilascu and others v. Moldova and Russia*, No. 48787/99, 08/07/2004, para.490.
[423] *Ibid*, operative para.22.
[424] Ress, G., "The Effect of Decisions and Judgments of the ECtHR in the Domestic Legal Order", *Texas International Law Journal*, Vol. 40:359, 2005, p.373.
[425] Greer, St.,"The ECHR, Achievements, Problems and Prospects", Cambridge University Press, 2006, p.160.

There is only one case of a constitutional court requiring national courts to reopen criminal proceedings, which had been declared incompatible with the ECHR, even in the absence of a provision for reopening the proceedings in the criminal procedural code. The Spanish Constitutional Court in the *Barbera Messegue and Jabardo v. Spain*[426] the ECtHR declared that national criminal courts have to take up a case if the ECtHR comes to the conclusion that the national decision is not in line with the ECHR. The Spanish Constitutional Court reserved their own previous constitutional law to allow them to quash the conviction on the strength of the Strasbourg judgment and to order the reopening of the proceedings against the successful applicants. However, it seems that the approach of the Spanish Constitutional Court has not been followed by other constitutional courts; if there is no procedural provision permitting it, a proceeding cannot be reopened.[427]

The majority of CoE states allow for criminal proceedings to be reopened following judgments of the ECtHR, and a smaller number also allow for the reopening of civil proceedings.[428] The CoE institutions have repeatedly emphasised the importance of mechanisms to allow for the re-opening of proceedings. The CoM has recommended, in its Recommendation on the re-examination or reopening of certain cases at domestic level following judgments of the ECtHR,[429] that member states should "examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the ECtHR has found a violation of the ECHR".

According to the Recommendation (2000)2 of the CoM two conditions must be satisfied before a member state would be asked to provide a means of reopening proceedings in domestic law. First "the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening" and second "the judgment of the ECtHR

[426] *Barbera Messegue and Jabardo v. Spain,* No. 10588/83 -10589/83 -10590/83, 13/06/1994.
[427] Hartwig, M., "Much Ado About Human Rights: The Federal Constitutional Court Confronts the ECtHR", *German Law Journal,* 2005, Vol. 6, No. 5, p.882.
[428] Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", Human Rights Files No. 19, 2002, p.15.
[429] Recommendation No. R (2000) 2, 19 January 2000.

leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the ECHR, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of".

The PACE in a report by the Committee on Legal Affairs and Human Rights' Rapporteur on the execution of judgments, has also recommended that states which lack legislation to remedy individual applicant's cases by reopening legal proceedings should begin work on the development of such legislation as a matter of priority.[430]

There is no obligation as such under the ECHR to have such a mechanism, but the CoM recognises that the re-opening of domestic proceedings which seriously breached the ECHR is of fundamental importance to the execution of the ECtHR's judgments and it has therefore made clear that the introduction of such a mechanism is highly recommended. The explanatory memorandum to the Recommendation explains (para.3) that "although the ECHR contains no provision imposing an obligation on Contracting Parties to provide in their national law for the re-examination or reopening of proceedings, the existence of such possibilities have, in special circumstances, proven to be important, and indeed in some cases the only, means to achieve *restitutio in integrum*".

However, the binding force of court decisions, the interest of legal certainty, the *bona fide* confidence or third parties, as well the statutory terms of preclusion or prescription are all legitimate grounds, which may, under the applicable municipal law, prevent the elimination of all the consequences of a declared violation.[431] Furthermore, in criminal matters, the reopening of a case may raise the question of what is to happen to any co-accused (who have not brought the matter before the ECtHR) and to the victims, and may cause problems from the aspect of the loss of evidence and the period which has elapsed.[432]

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[430] Committee on Legal Affairs and Human Rights, Report on the Execution of Judgments of the ECtHR, Doc 8808, Para12.i.d and para.76.
[431] Polakiewicz, J., "The Execution of Judgments of the ECtHR", in Blackburn, R., & Polakiewicz, J. "Fundamental Rights in Europe", Oxford University Press, 2001, p.61
[432] Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", Human Rights Files No. 19, 2002, p.15.

The reopening of the proceedings has been regarded by the ECtHR as a measure as close to *restitutio in integrum* as was possible.[433] Lambert-Abdelgawad suggested that: "following a judgment of the ECtHR, it is not acceptable merely to pay just satisfaction to an applicant who is still in prison or to release the individuals concerned without a fresh trial". The ECtHR in the case of *Alfatli v. Turkey* stated that there is "in principle" a duty on states to reopen domestic procedures if the ECtHR has come to the conclusion that the procedure was contrary to the ECHR.[434]

In case of a possible reopening of a proceeding, or a re-examination of the case, the national courts are indeed obliged to take the decision of the ECHR into account. They must not repeat the violation, which has been criticized by the ECtHR. However, this does not mean that the national court in the end is obliged to reach a different result than their earlier decision. Interestingly, in France in all cases in which the French courts reopened a criminal proceeding after the finding of violation by the ECtHR the result of the decision remained unchanged.[435]

3.6 The development of "Pilot judgment procedure"

During the reflection period for Protocol No. 14 the CDDH suggested[436] the establishment of what has become known as the "pilot judgment procedure". The CDDH concluded that it was first of all for the ECtHR to identify rapidly different kinds of cases, notably repetitive cases or "clone cases". It suggested that these be defined as cases concerning a specific piece of legislation or a specific practice that the ECtHR has already pronounced itself on in a judgment.[437] In its various opinions submitted to the CDDH the ECtHR deemed it necessary to urge the introduction of an ECHR provision formally establishing a "pilot judgment procedure".[438]

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[433] *Piersack v. Belgium*, No. 8692/79, 26/10/1984, para.11.
[434] *Alfatli v. Turkey*, No. 32984/96, 30/10/2003, para.52.
[435] Hartwig, M., "Much Ado About Human Rights: The Federal Constitutional Court Confronts the ECtHR", *German Law Journal,* 2005, Vol. 6, No. 5, p.887.
[436] Doc. CDDH (2003) 006, CDDH, Guaranteeing the long-term effectiveness of the control system of the ECHR--Addendum to the final report containing CDDH proposals (long version), April 9, 2003.
[437] CM(2002)146, at para.68.
[438] See para. 43 to 46 of the ECtHR's position paper of 12 September 2003, CDDH-GDR(2003)024, "Position Paper of the ECtHR on Proposals for Reform of the ECHR and Other Measures as Set Out in the Report of the CDDH of 4 April 2003", 12th September 2003 and the response by the ECtHR to the CDDH Interim Activity Report, prepared following the 46th Plenary Administrative Session on 2 February 2004, at para.37.

The CDDH had rejected this proposal and decided that it should not be included in the Protocol No. 14 but that the CoM should, instead, make appropriate recommendations. The CDDH took the view that it was legally difficult to provide for a general legal obligation of this kind. In their view "the pilot judgment procedure could be followed without there being a need to amend the ECHR".[439]

At the Ministerial Session of 12th May 2004, the CoM adopted along with the text of the Protocol No. 14, a number of recommendations (as already discussed) one of which deals with the issue of the improvement of domestic remedies and addresses *inter alia* the question of remedies following a pilot judgment.[440] On the same date the CoM adopted the Resolution Res(2004)3, which was addressed to the ECtHR and invited it: a) as far as possible, to identify, in its judgments finding a violation of the ECHR, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the CoM in supervising the execution of judgments; b) to specifically notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the state concerned and to the CoM, but also to the PACE, to the Secretary General of the CoE and to the CoE Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the ECtHR.

In this way the CoM invited the ECtHR to identify, in its judgments, those cases which revealed the existence of structural or systemic problems in the country concerned, especially if those problems were, or could become, the source of a large number of similar applications, in order to assist that country in finding an appropriate solution to the problem as a whole and the CoM in securing the implementation of the judgment concerned.

It is questionable whether the process, which was followed, in order to establish the "pilot judgment procedure" and the procedure as such is compatible with the ECHR

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[439]CDDH(2003)026, Addendum I Final "Guaranteeing the long-term effectiveness of the ECtHR – Implementation of the Declaration adopted by the CoM at its 112th Session (14-15 May 2003) -Interim Activity Report", Strasbourg, 26 November 2003, at para.21.
[440] Recommendation Rec(2004)6 on the improvement of domestic remedies.

or whether an amendment of the ECHR should have taken place, as the ECtHR itself suggested. It should be noted that the weakness of the legal basis of the "pilot-judgment procedure" has already been criticized by Judge Zagrebelsky. In a partly dissenting opinion, in the "pilot" judgment of *Hutten-Czapska v Poland,*[441] he stated on the one hand that the arguments set out by the CoM in Resolution Res(2004)3 and Recommendation Rec(2004)6 of 12 May 2004, which are addressed to governments, "are undoubtedly of much importance and must be taken into account by the ECtHR with a view to ensuring that the reasons given in its judgments are as clear as possible". On the other hand, he disputed that the "fact that the proposals to which the ECtHR refers in paragraph 233[442] of the judgment were not included in the recent Protocol No. 14 amending the ECHR" cannot be overlooked.

3.6.1 Broniowski v. Poland

The first judgment in which the ECtHR responded to the resolution and recommendations of the CoM was *Broniowski v. Poland.*[443] This case concerns a compensation scheme for Polish citizens displaced after the Second World War. The ECtHR found a violation of Art. 1 of Protocol No. 1 as a result of the failure to compensate the applicant for property which he and his family had lost after being forced to move to Western Poland leaving behind their home and property located beyond the Bug River.

Invoking Resolution Res(2004)3, the ECtHR transmitted its judgment to the CoM, and the two bodies eventually brokered a deal between Mr Broniowski and Poland which also contained the seeds of a settlement for all the other claimants. It has been suggested that the application of Resolution Res(2004)3 by issuing a "pilot judgment" saved the ECtHR an enormous amount of time and labour.[444] By issuing only a single judgment the ECtHR had dealt with all the 167 related cases pending before it and gave a solution for the 80,000 Bug River potential applicants.

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[441] *Hutten-Czapska v. Poland*, No. 35014/97, 19/06/2006.
[442] See para. 43 to 46 of the ECtHR's position paper of 12 September 2003, CDDH-GDR(2003)024, supra note n.146 and the response by the ECtHR to the CDDH Interim Activity Report, prepared following the 46th Plenary Administrative Session on 2 February 2004, at para. 37.
[443] *Broniowski v. Poland*, No. 31443/96, 22/06/2004.
[444] Caflisch, L., "The Reform of the ECtHR: Protocol No. 14 and Beyond", *Human Rights Law Review*, Vol. 6, 2006, p.411.

This judgment provides a definition of systemic violation[445] in the following terms as: "where the facts of the case 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 ECHR rights]", and "where the deficiencies in national law and practice identified (...) may give rise to numerous subsequent well-founded applications".[446]

In the particular case the ECtHR found that the violation "originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons".[447] The ECtHR indicated further that "general measures should either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found to have been in breach of the ECHR or provide equivalent redress in lieu".[448] In the operative provisions the ECtHR held particularly that the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining claimants or again provide them with equivalent redress. Moreover, consideration of applications derived from the same general cause would be adjourned pending the adoption of the necessary general measures.[449]

Although is not indicated anywhere in the judgment that this is a "pilot judgment", it can be said that it contains all the basic characteristics in order to be "baptised" as pilot. It is suggested that, the characteristics which are crucial for the pilot judgment procedure and can be found in *Broniowski* are the following: 1) a finding that the facts of the case 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 ECHR rights 2) a conclusion that these deficiencies in national law and practice may

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[445] Wildhaber, L., "Consequences for the ECtHR of Protocol No. 14 and the Resolution on Judgments Revealing an Underlying Systemic Problem- Practical Steps of Implementation and Challenges", *Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the high-level seminar*, Oslo, 18 October 2004, p.27 available at: www.coe.int/T/E/Human_rights/prot14e.asp

[446] *Broniowski v. Poland*, No. 31443/96, 22/06/2004, para.189.

[447] *Ibid*, at para.189.

[448] *Ibid*, at para.194.

[449] *Ibid*, at para.198.

give rise to numerous subsequent well-founded applications 3) recognition that general measures are called for and some guidance as to what such general measures may be 4) an indication that such measures should have retroactive effect 5) a decision to adjourn consideration of all pending applications deriving from the same cause.[450]

The *Broniowski v. Poland* judgment was followed by a strike-out judgment[451] in the same case. The terms of the settlement concluded by the parties they were intended to take into account "not only the interests of the individual applicant... and the prejudice sustained by him (...), but also the interests and prejudice of complainants in similar applications" and stressed "the obligation of the Polish Government under Article 46 of the ECHR, in executing the principal judgment, to take not only individual measures of redress in respect of Mr Broniowski but also general measures covering other Bug River claimants".[452]

The ECtHR adopted a series of "pilot judgments", in which it has identified an underlying systemic problem and called on states not just to provide redress for individual applicants, but also to resolve the broader problem.[453]

The ECtHR in the case of *Hutten-Czapska v. Poland* noted that one of the implications of the "pilot-judgment procedure" was that its assessment of the situation complained of in a "pilot" case necessarily extended beyond the sole interests of the individual applicant and required it to examine that case from the perspective of the general measures that needed to be taken in the interest of other people who might be affected. The objective of the ECtHR in designating a case for a "pilot-judgment procedure" is to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the ECHR right in question in the national legal order. One of the relevant factors considered by the ECtHR in devising and applying that

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[450] Paraskeva, C., "Returning the Protection of Human Rights to Where They Belong, At Home", International Journal of Human Rights, Vol.12, June 2008, p.435.
[451] *Broniowski v. Poland*, No. 31443/96 (friendly settlement) [GC], 28/09/05.
[452] *Ibid*, para.38.
[453] See: *Lukenda v. Slovenia*, No. 23032/02, 06/10/2005; *Xenides-Arestis v. Turkey*, No. 46347/99, 22/12/2005; *Scordino v. Italy (No. 1)*, No. 36813/97, 29/03/2006; *Hutten-Czapska v. Poland*, No. 35014/97, 19/06/2006; *Driza v. Albania* and *Ramadhi and Others v. Albania*, Nos. 33771/02 & 38222/02, 13/11/2007; *Urbárska obec Trenčianske Biskupice v. Slovakia*, No. 74258/01, 27/11/2007; *Gülmez v Turkey*, No. 16330/02, 20/05/2008.

procedure has been the growing threat to the ECHR system resulting from large numbers of repetitive cases that derive from, among other things, the same structural or systemic problem.[454]

The "pilot judgment procedure" is predicated on the basis that once a judgment pointing to a structural or systemic problem has been delivered, and where numerous applications raising the same problem are pending or likely to be brought before the ECtHR, the respondent state should ensure that applicants, actual or potential, have access to an effective remedy that will enable them to bring their case before a competent national authority.

Where national governments are unable to address the origins of their systemic problems themselves, by issuing a "pilot" judgment, the ECtHR attempts to direct them to proceed with a comprehensive resolution of such problems in compliance with ECHR standards. "Pilot" judgments are intrinsically connected to the obligation of member states to take general measures in order to eliminate the causes of the violation of the ECHR and prevent its repetition. These measures must be such as to remedy the systemic defect underlying the ECtHR's finding of a violation so as not overburden the ECHR system with large numbers of applications deriving from the same cause. It is of great importance that the ECtHR has now fully recognized that systemic defects in a national system, which automatically lead to violations of the ECHR, must be addressed as such. It is submitted that this can be done easily where legislation in the relevant domestic legal order is at the basis of the systemic defect. In that case legislation can and must be amended in order to comply with the ECHR.

If successful, such judgments could lead to swifter resolution at the national level, and prevent repeat violation cases being submitted to the ECtHR. The "pilot judgment procedure" has been widely identified as a means of tackling systemic violation cases and as an important element in solving the problems related to the caseload of the ECtHR. The early signs are relatively positive: the response to the first such case, *Broniowski v. Poland*, was the swift resolution of domestic legislation (in 2005),

[454] *Hutten-Czapska v. Poland*, No. 35014/97, 19/06/2006, para.234.

which is apparently being effectively enforced.[455] It is, however, still too early to assess the real significance of the "pilot judgment process". There is much uncertainty as to when the procedure ought to be applied, and concerns remain about possible adverse reactions from states fearing incursions on their sovereignty.

3.6.2 Need for clearer definition and criteria

Although the "pilot judgment procedure" is a significant development for the ECHR system there is an urgent need to have a clearer definition for "pilot" judgments. In addition clearer criteria and conditions need to be established as to the application of this procedure. The weakness of its legal basis has already been pointed out by Judge Zagrebelsky. Furthermore, he considers that the *Grand Chamber* is the proper forum for identifying the existence of systemic problems and drawing the necessary consequences therefrom.[456] Such an obligation is not foreseen in any of the adopted texts concerning the "pilot judgment procedure".[457] However, due to the importance of this procedure and due to the interest of the applicants whose cases are affected this thesis argues that it is of paramount importance that this type of judgments should be delivered by the Grand Chamber. Furthermore, it must be added that not all the cases which concern the same systemic problem are usually pending before the same Chamber. A number of cases are pending before other Chambers with a different composition and perhaps with a different opinion on the relevant question.

Despite its potential effect in reducing the ECtHR's caseload, the "pilot judgment procedure" cannot serve as the antidote for all the systemic problems found in the different member states of the CoE. It is acknowledged that not every structural or systemic problem is suitable for the implementation of this procedure.[458] The

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[455] See *Wolkenborg and others v. Poland*, No. 50003/99, (dec.) 04/12/2007 & *Witkowska-Tobola v. Poland*, No. 11208/02, (dec.) 04/12/2007.

[456] Partly dissenting opinion of judge Zagrebelsky in the case of *Lukenda v. Slovenia* (judgment of 6 October 2005).

[457] See Resolution Res(2004)3, 12 May 2004, and Recommendation Rec(2004)6, 12 May 2004, of the CoM.

[458] CDDH(2003)006 Addendum final, "Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights"--Addendum to the final report containing CDDH proposals (long version), 9 April 2003, at paras 8 and 9; Wildhaber, L., "Consequences for the ECtHR of Protocol No. 14 and the Resolution on Judgments Revealing an Underlying Systemic Problem-Practical Steps of Implementation and Challenges", *Applying and Supervising the European*

appropriateness and the suitability of the case should be considered an absolute requirement for the application of this process. Thus the "pilot judgment procedure" cannot be a panacea for resolving all such problems within the European system of protection of Human Rights.

Any generalisation of the implementation of this process might lead the ECtHR down an uncertain route. The happy ending in the case of *Broniowski* should not blind us. Judge Garlicki has suggested that the legal basis of "pilot" judgments "remains relatively fragile[459] and certain circumspection in resorting to that procedure may be in order" and that "an inflation of "pilot" judgments would be counterproductive".[460] He has further argued that the general application of this process will have the opposite effect and that there will not always exist the appropriate conditions and a favorable environment as in *Broniowski*. It should be noted that Polish legislation has always recognised that the "Bug River people" are entitled to the "right to credit" and the sole issue before the ECtHR was "whether Article 1 of Protocol No. 1 was violated by reason of the Polish State's acts and omissions in relation to the implementation of the applicant's entitlement to compensatory property, which was vested in him by Polish legislation on the date of the Protocol's entry into force and which subsisted on 12 March 1996, the date on which he lodged his application with the Commission".[461]

Attention has been drawn to the potential weaknesses and shortcomings arising from the application of the "pilot judgment procedure". It has been argued that the adjournment of cases of similarly situated applicants leaves the remaining applicants in an uncertain position and vulnerable to long delays whilst a resolution is agreed upon and implemented.[462] Furthermore, this procedure has been conducted in respect of certain complex systemic problems on the basis of a single case, which may not

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Convention on Human Rights-Reform of the European Human Rights System, Proceedings of the high-level seminar, Oslo, 18 October 2004, p.28, available at: www.coe.int/T/E/Human_rights/prot14e.asp.

[459] This procedure, although approved by the CoM, is not yet reflected in the text of the ECHR.

[460] Garlicki, L., "Broniowski and After: On the Dual Nature of Pilot Judgments", in Liber amicorum Luzius Wildhaber: Human Rights, Strasbourg views, eds. Lucius Caflisch ... [et al.]. - Kehl ; Strasbourg ; Arlington, Va : N.P. Engel, 2007, p.191.

[461] *Broniowski v. Poland*, No. 31443/96, 22/06/2004, para.125.

[462] Leach, P., "Beyond the Bug River- A New Dawn For Redress Before the ECtHR", *European Human Rights Law Review,* No. 2, 2005, p.162. See also: *Report of the Group of Wise Persons*, SAGES(2006) 06 EN Def., CoE, 10 November 2006, para.105.

reveal the different aspects of the systemic problem involved. Under these circumstances, the "pilot-judgment procedure" may not allow a global assessment of the problem and since all other related cases are frozen, the risk emerges that this procedure delays rather than speeds up the full implementation of the ECHR.[463] The crucial problem to be resolved in the area of pilot judgments is arguably the problem of enforcement.[464] Therefore, there is an urgent need for the ECtHR to ensure that class-wide relief applies to all similarly-situated applicants and is appropriate to the systemic human rights problems it has adjudicated.[465] A risk has been identified that individuals who have previously submitted their cases to Strasbourg will have to revert to the domestic courts, where they cannot be assured of obtaining effective redress. If this happens, it has been argued, they will have to go back to the ECtHR once again, thus extending considerably the length of such proceedings.[466]

3.7 Conclusion

The role of the ECHR system is closely associated with the protection role of national authorities since the ECHR system rests on the assumption that there are strong and effective protection systems in place at national level. It has been pointed out that one of the basic elements of the ECHR system is the balance between national protection and international protection; both components must function effectively if the system is to work. It has been claimed that in recent years that balance has been upset to the detriment of the international component.[467] Far too many cases come to Strasbourg which should, in accordance with the principle of subsidiarity, have been decided by

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[463] Doc. 11020, 18 September 2006, "Implementation of Judgments of the ECtHR", Report Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group.

[464] O'Boyle, M., "On reforming the operation of the ECtHR", *European Human Rights Law Review*, 2008, p.6.

[465] Helfer, L., "Redesigning the ECHR: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", Vanderbilt University Law School, Public Law & Legal Theory, Working Paper Number 07-20, p.28.

[466] Lambert-Abdelgawad, E., "Le protocole 14 et l'execution des arrest de la Cour europeene des droits de l'homme" in Cohen-Jonathan, G., and Flauss, J.F., "La Reforme du systeme de controle contentieux de la Convention europeenne des droits de l'homme", Droit et Justice, Vol. 61, Bruxelles: Bruylant, 2005, p.102.

[467] Wildhaber, L., "Consequences for the ECtHR of Protocol No. 14 and the Resolution on Judgments Revealing an Underlying Systemic Problem- Practical Steps of Implementation and Challenges", *Applying and Supervising the European Convention on Human Rights-Reform of the European Human Rights System, Proceedings of the high-level seminar*, Oslo, 18 October 2004, p.24, available at: www.coe.int/T/E/Human_rights/prot14e.asp

the domestic courts. The ECtHR cannot bear a disproportionate burden in enforcing the ECHR; that burden has to be shared with the domestic authorities.[468]

The principal and overriding aim of the system set up by the ECHR is to bring about a situation in which in each and every Contracting State the right and freedoms are effectively protected, that is primarily that the relevant structures and procedures are in place to allow individual citizens to vindicate those rights and to assert those freedoms in the national courts.[469] Leo Zwaak has argued that the ECtHR "is not a victim of its own success, but a victim of a general reluctance of the member States, to take the ECHR seriously. Human rights violations first of all should be redressed at the domestic level and the Strasbourg Court should only be used as an *ultimum remedium*".[470]

The reforms adopted in May 2004 were an attempt to involve all the actors of the ECHR system (that is the ECtHR, member states and the CoM) in order to share the burden of the backlog of the ECtHR. This was explicitly revealed by the establishment of the "pilot judgment procedure". As former President Wildhaber has successfully put it: "faced with a structural situation, the ECtHR is in effect saying to the respondent state and to the CoM that they too must play their role and assume their responsibilities".[471]

The "pilot judgment procedure" is on the one hand strictly linked to the obligation of the member states to take general measures to eliminate the causes of the violation in order to prevent its repetition whilst on the other hand this procedure constitutes a technique to tackle the backlog pending before the ECtHR. It is based on the assumption that once a judgment pointing to a structural or systemic problem has been delivered, and where numerous applications raising the same problem are pending or

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[468] *Ibid*, p.25.
[469] Wildhaber, L., "The ECtHR in Action", *Ritsumeikan Law Review*, No. 21, 2004, p.83.
[470] Zwaak, L., "Overview of the European Experience in Giving Effect to the Protections in European Human Rights Instruments", Working Session on the Implementation of International Human Rights Protections, p.14, available at http://www.internationaljusticeproject.org/pdfs/Zwaak-speech.pdf
[471] Wildhaber, L., "Consequences for the ECtHR of Protocol No. 14 and the Resolution on Judgments Revealing an Underlying Systemic Problem- Practical Steps of Implementation and Challenges", *Applying and Supervising the European Convention on Human Rights-Reform of the European Human Rights System, Proceedings of the high-level seminar*, Oslo, 18 October 2004, p.26, available at: www.coe.int/T/E/Human_rights/prot14e.asp

likely to be brought before the ECtHR, the respondent State should ensure that applicants, actual or potential, have an effective remedy that will enable them to bring their case before a competent national authority.[472] It is worth-noting that whilst the setting out of the specific requirement to take general measures by the ECtHR is a new procedure, in the sense that in cases like *Broniowski* (2005) the ECtHR is actively pushing for modifications of a national legal order, an indication that general measures should be taken was in fact first used in the case of *Marckx* (1979).[473]

A very significant contribution to reducing the caseload of the ECtHR could be achieved if a domestic remedy was available to other individuals who are also affected by the systemic problem exposed in the pilot judgment.[474] Wildhaber is convinced that "if the national authorities are in position to apply ECHR case-law to the questions before it, then much, if not all, of the Strasbourg Court's work is done". This is ultimately, the objective underlying the system: to ensure that individual citizens throughout the ECHR community are able fully to assert their ECHR rights within their own domestic legal system.[475]

The pilot judgment procedure is still embryonic. The ECtHR is still discovering how this procedure can be developed. This can be seen from the small amount of pilot judgments delivered to date. It is apparent that the ECtHR attempts to apply the *Broniowski* formula in different situations and this might lead to different types of pilot judgments. In some cases the ECtHR will go further in specifying the type of general measures required, sometimes including its recommendations as to general measures in the operative part,[476] sometimes adjourning consideration of similar applications.[477]

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[472] CDDH(2003)006 Addendum final, Guaranteeing the long-term effectiveness of the control system of the ECHR, Addendum to the final report containing CDDH proposals (long version), Strasbourg, 9 April 2003, p.Ab.

[473] Roukounas, E., "The Role of NHRIs in Monitoring the Execution of Judgments of the ECtHR-What NHRIs Could Do", 4th Round Table of European National Institutions for the Promotion and Protection of Human Rights and the CoE Commissioner for Human Rights, Athens, 27-28 September 2006, p.5.

[474] CDDH(2003)006 Addendum final, p.Ab.

[475] Wildhaber, L., "The Role of the ECtHR : an Evaluation", *Mediterranean Journal of Human Rights*, Vol. 8, No. 1, 2004, p.12.

[476] See cases of *Broniowski v. Poland*, *Xenides-Arestis v. Turkey*, *Hutten-Czapska v. Poland*.

[477] See cases of *Broniowski v. Poland*, *Xenides-Arestis v. Turkey*.

The Group of Wise Persons[478] in their report to the CoM "encourages the ECtHR to use the pilot judgment procedure as far as possible in the future".[479] It is to be expected that the ECtHR will apply the "pilot judgment procedure" in many more cases revealing systemic problems. For this reason criteria and conditions need to be established which will institutionalise the "pilot judgment procedure". The CoM should not only ensure the rapid execution of "pilot judgments", but also take all possible measures to guarantee that the manner of implementation genuinely affords an effective remedy for similarly situated persons.[480] In considering the effectiveness of the remedy, the state concerned and the CoM should examine not only whether the measures proposed afford just compensation, but also whether such measures effectively address the systemic problem.[481] This is particularly important since it is not simply a question of instituting a compensation procedure which, while complex and costly, will apply to a series of clearly defined individual cases.[482] On the contrary, the solution to the problem in the relevant case might need to involve a total overhaul of the legal system taking into account all the known difficulties.

There might be some enthusiasm that the ECtHR might have found the magic solution to tackle the repetitive cases and that by issuing a single judgment deals not only with all the pending cases before it but also finds a solution for all potential applicants. However, it still remains to be seen how successful and how effective this procedure is.

Some concern has been expressed that this procedure has been conducted in respect of certain complex systemic problems on the basis of a single case which may not reveal the different aspects of the systemic problem involved. Under these circumstances, the pilot procedure may not allow a global assessment of the problem and since all other

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[478] The member states of the CoE in Warsaw Summit (16-17 May 2005), in an attempt to secure the efficiency of the ECtHR, had set up an international panel of eminent personalities (Group of wise persons) to examine the issue of the long-term effectiveness of the ECHR mechanism. The Group was made up of 11 members: Lord Woolf (United Kingdom), Veniamin Fedorovich Yakovlev (Russia), Rona Abray (Turkey), Fernanda Contri (Italy), Jutta Limbach (Germany), Marc Fischbach (Luxembourg), Gil Carlos Rodriguez Iglesias (Spain), Emmanuel Roucounas (Greece), Jacob Sodermann (Finland), Hanna Suchocka (Poland), Pierre Truche (France).

[479] CM(2006)203, Report of the Group of Wise Persons to the CoM, 15th November 2006.

[480] NGO Comments on the Group of Wise Persons' Report, January 2007, p.11.

[481] *Ibid*, p.11.

[482] *Hutten-Czapska v. Poland*, No. 35014/97, 19/06/2006, Partly Dissenting Opinion Judge Zagrebelsky.

related cases are frozen the risk emerges that this procedure delays rather than speeds up the full implementation of the ECHR.[483] It is worth mentioning that in the Chamber case of *Xenides-Arestis v. Turkey* the applicant chose not to request a referral of the case to the Grand Chamber but an important number of applicants whose cases were frozen as a result of this case "attempted" to refer the case to the Grand Chamber. The applicants have suggested that as a result of the judgment in question their cases have been adjourned and in this way they were affected and thus became "parties" to the proceedings to which this judgment relates. Their attempt did not have any success before the ECtHR. It seems that this development was not predicted by the ECtHR; the decision not to give the opportunity to the other applicants to be heard because they did not have standing under Article 43 of ECHR does not appear to be all that convincing.

It is evident that not every structural deficiency (systemic or endemic) giving rise to repetitive cases is suitable for the pilot judgment procedure.[484] Judge Garlicki seems to be convinced that "an inflation of pilot judgments would be counterproductive".[485] The suitability of the case should be considered as a *conditio sine qua non* for the application of this procedure. Furthermore, it should be added that the reformed Article 28 which could be applied complementary and provide an insurance against the failure of the procedure, for the applicants whose cases are frozen, is still not in force and it is uncertain when it will be since the Russian State Duma voted against the ratification of Protocol 14 to the ECHR in December 2006.

It is to be hoped that the ECtHR has found the means (through the pilot judgment procedure) to push the member states "to take the European Convention seriously"

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[483] Doc. 11020, 18 September 2006, "Implementation of Judgments of the ECtHR", Report Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group.

[484] See CDDH(2003)006 Addendum final, p.Ab/ Roukounas, E., "The Role of NHRIs in Monitoring the Execution of Judgments of the ECtHR- What NHRIs Could Do", 4th Round Table of European National Institutions for the Promotion and Protection of Human Rights and the CoE Commissioner for Human Rights, Athens, 27-28 September 2006, p.5; Wildhaber, L., "Consequences for the ECtHR of Protocol No. 14 and the Resolution on Judgments Revealing an Underlying Systemic Problem-Practical Steps of Implementation and Challenges", *Applying and Supervising the European Convention on Human Rights-Reform of the European Human Rights System, Proceedings of the high-level seminar*, Oslo, 18 October 2004, p.28, available at: www.coe.int/T/E/Human_rights/prot14e.asp

[485] Garlicki, L., "Broniowski and After: On the Dual Nature of Pilot Judgments", in Liber amicorum Luzius Wildhaber : Human Rights, Strasbourg views = Droits de l'homme, regards de Strasbourg / eds. Lucius Caflisch ... [et al.]. - Kehl ; Strasbourg ; Arlington, Va : N.P. Engel, 2007, p.191.

and that this procedure will not become the Trojan horse of the ECHR system which will relieve the states which violate the ECHR from their international liabilities.

PART III

CHAPTER 3: The domestic implementation of the ECHR in the legal order of Cyprus

"Our greatest glory is not in never falling, but in getting up every time we do".

Confucius

4.1 Introduction

The main aim of this chapter is to analytically discuss the domestic implementation of the ECHR in the legal order of the Republic of Cyprus as well as critically evaluate its response to the Recommendations included in the "reform package" adopted by the CoM in May 2004 to member states of the CoE to promote the better implementation of the ECHR at the national level.

This chapter provides first a general introduction to the constitutional system of the Republic of Cyprus, and then addresses the precise role of the ECHR within its legal system. That role is deeply rooted in and defined by the constitutional order, which is also discussed below. The chapter then examines the impact of the ECHR on the Cypriot domestic legal order and the changes/reforms, which have been made in order to ensure full implementation of the ECHR guarantees at domestic level.

The remainder of this chapter is an assessment of the implementation of the Recommendations referred to in the 2004 Declaration of the CoM concerning various measures to be taken at national level in Cyprus. One of the crucial aims of this chapter is to critically evaluate the real extent to which progress has been made by the Republic of Cyprus in implementing the May 2004 Recommendations and the means employed in responding to the Recommendations for improved domestic

implementation of the ECHR. Obstacles and deficiencies in the implementation of the Recommendations will be identified and suggestions towards improvement will be made.

It is important to note that by virtue of the case-law of the ECtHR (and in particular the three *Loizidou v. Turkey* judgments[486] and the 4th inter-state application *Cyprus v. Turkey*[487]) the area of the Republic of Cyprus under the effective control of Turkey post its 1974 invasion, has been held to fall under Turkey's jurisdiction within the meaning of Article 1 of the ECHR.

This chapter is thus only concerned with the area within the control of the Republic of Cyprus and not with the northern part of Cyprus. For the purposes of this thesis the situation/developments in that part of Cyprus will be discussed in the following chapter on Turkey.

[486] *Loizidou v. Turkey,* No. 15318/89, (Preliminary objection -23/03/1995, Merits and Just Satisfaction-18/12/1996, Just Satisfaction- 28/07/1998).
[487] *Cyprus v. Turkey*, No. 25781/94, 10/05/2001.

4.2 Historical background

It has been rightly observed that the links of Cyprus with the ECHR date back to the period of the colonial regime.[488] When the ECHR was signed in 1950, it contained an article known as the "colonial clause" (then Article 63, now Article 56). Paragraph 1 of this article provides that "any state may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary-General of the CoE that the present Convention shall extend to all or any of the territories for whose international relation it is responsible". It has been argued that by empowering states to extend the application of the ECHR to territories for whose international relations they were responsible, "this clause waived its automatic application to non-metropolitan territories".[489]

The United Kingdom made such a declaration[490] thereby extending the ECHR's applicability to, among others, the Colony of Cyprus.[491] As a result Greece filed two inter-state applications[492] against the United Kingdom regarding alleged violations of the ECHR in Cyprus at that time.[493] Both applications were declared admissible by the ECommHR and were pending until the conclusion of the Zurich and London Agreements in 1959. The CoM following appropriate requests from the interested parties, decided in August and December of that year to discontinue relevant proceedings.

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[488] Tornaritis, C., "The ECHR in the legal order of the Republic of Cyprus", Nicosia, 1975 (Reprint from the *Cyprus Law Tribune*, Year 9th, Part II, pp. 3-5.

[489] Vasak, K., "The ECHR beyond the frontiers of Europe", *International and Comparative Law Quarterly*, Vol.12, 1963, p.1207.

[490] Declaration No. 61/48/53, on 23 October 1953.

[491] ECommHR, Documents and Decisions, 1955-1956-1957, The Hague, 1959, pp.46-47.

[492] *The Kigdom of Greece v. The United Kingdom*, No. 176/56, (Com.) 26/09/2958, lodged on 07/05/1956, *The Kingdom of Greece v. The United Kingdom*, No. 299/57, (Com.) 08/07/1959, lodged on 17/07/1957.

[493] When the colonial regime declared a state of emergency- after the liberation struggle had commenced- the United Kingdom, by notes verbale on 7th October 1955 and 13th April 1956 informed the Secretary-General of the CoE, of certain derogations of its obligations under the ECHR, by virtue of Article 15(3) of ECHR (Yearbook of the ECHR (1958-1959), Vol. 2, pp. 78-82). See Lauterpacht, E., "The Contemporary Practice of the United Kingdom in the Field of International Law- Survey and Comment", *International and Comparative Law Quarterly*, Vol.5, 1956, pp.405-406.

In the first application[494] it was alleged that a series of emergency laws and regulations introduced in Cyprus by the British government were incompatible with the ECHR. In the second the Greek government referred to 49 incidents of "torture and maltreatment amounting torture" which allegedly took place in Cyprus and for which the United Kingdom was responsible. The first application was declared admissible following investigation by a sub-commission, which had visited Cyprus.[495] In the second one 29 complaints were declared admissible in 1958, after the sub-commission had met several times and had held two hearings in Cyprus. The remaining twenty complaints were not admitted under Article 26 because domestic remedies had not been exhausted.[496]

With regard to the first Cyprus case, the ECommHR, after having received the conclusions of the *ad-hoc* sub-commission charged with establishing the facts and seeking "a friendly settlement of the matter", transmitted to the CoM a report containing its views.[497] As far as the second Cyprus case is concerned the ECommHR set up a sub-commission consisting of seven members to establish the facts. It was still working[498] when the states most directly concerned with the Cyprus problem succeeded in reaching an agreement on the status and political future of the island.

The CoM on the joint proposal of Greece and the United Kingdom decided on 20th August 1959 that no further action was called for in respect of the first application. On a similar request for the second application it decided on its 18th session that: "in view of the significance of the Zurich and London Agreements as a means of restoring to

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[494] See "The first Cyprus Case" in Simpson, B., "Human Rights and the end of Empire", Oxford University Press, 2001, pp.924-987.

[495] Modinos, P., "Effects and repercussions of the ECHR", *International and Comparative Law Quarterly*, Vol.11, 1962, p.1104.

[496] See "The Outcome of the Two Applications" in Simpson, B., "Human Rights and the end of Empire", Oxford University Press, 2001, pp. 988-1052.

[497] The ECommHR adopted its Report on 26th September 1958. However, the Report remained confidential until 17th September 1997 when the CoM decided to make it public following a request formulated by the Government of the United Kingdom on 24th April 1997 (see Resolution DH (97) 376, adopted by the CoM on 17 September 1997 at the 599th meeting of the Minsters' Deputies).

[498] See the Report of the ECommHR on the Second Application by the Government of the Kingdom of Greece Lodged Against the Government of the United Kingdom of Great Britain and Northern Ireland, No. 299/57, Strasbourg, 08/07/1959. This Report remained confidential until 5 April 2006 when the CoM decided to make it public following a request made by the Government of the United Kingdom on 9th March 2006 (See Resolution ResDH(2006)24 concerning the publication of the EComHR's report in the case of Greece against the United Kingdom (application No. 299/57), adopted by the CoM on 5th April 2006 at the 961st meeting of the Ministers' Deputies).

the population of Cyprus the full enjoyment of their rights and freedoms and since according to the information received, the terms of the Convention were again fully observed in Cyprus, the proceedings should be terminated".[499]

On 16th August 1960 the Republic of Cyprus was proclaimed an independent and sovereign republic, following the Zurich and London Agreements.[500] The Constitution of Cyprus was "a written rigid[501] Constitution which did not emanate from the exercise of the free will"[502] of its people, who were not consulted either directly or through their *ad-hoc* elected representatives, but from the Zurich Agreement between Greece and Turkey. The terms of that agreement were included in the Constitution as fundamental articles, which could not be revised or amended.[503]

The Constitution[504] provided for a system of quota participation by the two communities in the administration of the State and in all areas of public life. However, this system functioned only until 1963, when the Turkish Cypriots withdrew from the Government in protest, following an attempt by the Greek Cypriots to amend the Constitution. Since then, the administration of the state has been executed by the

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[499] By Resolution (59) (32) of 14th December 1959 the CoM "Having received the report of the Commission of Human Rights... Having taken note of the reasons why the Commission at the request of the parties has decided to terminate the proceedings without entering upon the substance of the application. Having regard in particular to the Zurich and London Agreements for the final settlement of the problem of Cyprus RESOLVES that no further action is called for", Yearbook (1958-1959), Vol. 2, pp.178-179 .

[500] The Zurich and London Agreements comprised three Treaties, which laid the foundations of the political structure of the new state. These were: the Treaty of Guarantee under which Greece, Turkey, and Great Britain undertook to guarantee the independence, territorial integrity, and security of the Republic of Cyprus (these three countries also were given the right of joint or unilateral action to restore the constitutional status quo in the event of its disruption. In addition, Cyprus undertook to prohibit any activity promoting union with another state or the partition of Cyprus); the Treaty of Alliance between Cyprus, Greece and Turkey, which provided for the stationing of Greek and Turkish contingents in Cyprus; the Treaty of Establishment, which provided, *inter alia*, for two British sovereign military bases in Cyprus (the Sovereign Base Areas at Episkopi and Dhekelia, comprising about 99 square miles).

[501] Professor S. A. De Smith has observed that: "...the Constitution of Cyprus is probably the most rigid in the world...", De Smith, A., S., "The New Commonwealth and Its Constitutions", London, Stevens, 1964, p.284.

[502] Tornaritis, C., "The Legal System of the Republic of Cyprus", Nicosia, 1984, p.7.

[503] The Constitution was drafted by the Joint Constitutional Commission created under Part VIII of the London Agreement of 19 February 1959. It comprised representatives of Greece, Turkey, the Greek-Cypriot community and the Turkish-Cypriot community. But the structure of the Constitution again reflected the Zurich Agreement, with various provisions from the 1950 Greek Constitution also incorporated along with the provisions of the ECHR in respect of fundamental rights and liberties.

[504] More on the Constitutional history of Cyprus can be found in Chrysostomides, K., "The Republic of Cyprus- A Study in International Law", Martinus Nijhoff Publishers, The Hague/ Boston/ London, 2000.

Greek Cypriots alone. Since 1974, following a military coup from Greece and the Turkish invasion, the two communities live apart, with Turkish Cypriots inhabiting the Turkish-occupied north and Greek Cypriots the south.[505]

According to Article 179 the Constitution is the supreme law of the Republic.[506] No law or decision of the House of Representatives (Parliament) and no Act or Decision of any organ, authority or person in the Republic exercising power or any administrative function shall in any way be repugnant to or inconsistent with any of the provisions of the Constitution.[507]

It should be noted that following the 1963 inter-communal clashes and the subsequent withdrawal of the Turkish-Cypriots from the Government, the doctrine of necessity[508] became part of the Cypriot legal system. The Turkish Cypriots refused to exercise their duties within the executive and legislative bodies notwithstanding which, certain laws were passed for the smooth administration of governmental matters despite the absence of the Turkish-Cypriot representatives from the legislative chamber. These laws had been attacked as being unconstitutional but the Supreme Court in the landmark case of *The Attorney-General v. Mustafa Ibrahim*[509] held that they were justified under the internationally recognised legal doctrine of necessity.[510] In this case "the principles for the application of the doctrine were set out, on the basis of which subsequent cases were decided. Since then the above case has become a landmark in the legal history of Cyprus as the doctrine of necessity has empowered the organs of the state with legal authority required to solve legal problems created by the Turkish Cypriots' rebellion against the State which otherwise, if not solved by the application of this doctrine, would have undermined the rule of law in Cyprus".[511]

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[505] In April 2003, the 30-year old ban prohibiting the movement of people across the cease-fire line was partially lifted, enabling each community to visit the other side.
[506] It should be noted, however, that according to Article 1A of the Constitution as amended by Law 127(I)2006, no provision of the Constitution is to be considered as invalidating any law, act or measure necessitated by the Republic's obligations a Member State of the EU, nor does any provision prevent EU Regulations, Directives or other acts or legally binding measures of a legislative character from having legal effect in the Republic.
[507] Article 179 of the Constitution.
[508] The doctrine of necessity is based on the principle "*salus populi est prema lex*".
[509] *Attorney-General v. Mustafa Ibrahim*, 1964, C.L.R. 195.
[510] Tornaritis, C., "Cyprus and its Constitutional and other Legal Problems", Nicosia, 1980.
[511] Efthymiou, A., "The Law of Necessity in Cyprus", *Cyprus Law Review*, Vol. 3, Issue 12, 1985, pp. 1951-1956.

Pursuant to Article 5 of the Treaty of Establishment of the Republic of Cyprus[512], Part II of the Constitution, "Fundamental Rights and Liberties"[513], incorporates the human rights and freedoms secured by ECHR and Protocol No. 1 verbatim and in some instances expanding upon, these rights and freedoms.

It has been rightly observed that Part II of the Constitution is modelled on the ECHR,[514] which has largely served as the prototype for this Part,[515] but has been extended[516] and enlarged in some respects with social and economic rights in order to meet the basic requirements of a modern society.[517] Thus, to the extent that the ECHR has been incorporated into the Constitution, the ECHR has constitutional force and as a consequence, no law that violates such constitutional norms is valid.[518] Hence, the substantive provisions of the ECHR and its First Protocol relating to the nature of the fundamental rights and freedoms guaranteed thereby were incorporated in the legal order of Cyprus even before its accession to the CoE.[519] Thus the Cypriot courts had started referring to the ECHR even before its ratification by the Republic of Cyprus.[520]

Article 35 of the Constitution provides that "the legislative, executive and judicial authorities of the Republic shall be bound to secure, within the limits of their

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[512] According to Article 5 of the Treaty of Establishment of the Republic undertook to secure for everyone within its jurisdiction, human rights and fundamental freedoms comparable to those set out in Section 1 of the ECHR.

[513] Articles 6 – 35 of the Constitution.

[514] Modinos, P., "Effects and repercussions of the ECHR", *International and Comparative Law Quarterly*, Vol.11, 1962, p.1108.

[515] *Christou v. Christou,* 1964, CLR para.346.

[516] An example of how the Constitution has been extended in comparison with the ECHR is to be found in Article 28 of the Constitution. The right of equality before the law, the administration, and justice and the entitlement to equal protection and treatment are safeguarded by Article 28§1 of the Constitution. Paragraph 2 of this article provided that: "every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his community, race, religion, language, sex, political, or other convictions, national, or social descent, birth, colour, wealth social class, or any ground whatsoever, unless there is express provision to the contrary in this Constitution".

[517] Loizou, A., "Cyprus", in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, p.217.

[518] Loizou, N., A., "The Constitution of the Republic of Cyprus" in Greek (Σύνταγμα Κυπριακής Δημοκρατίας),Nicosia, Cyprus, 2001, p.38.

[519] Tornaritis, C., "The ECHR in the Legal Order of the Republic of Cyprus", Nicosia, 1975 (Reprint from the *Cyprus Law Tribune*, Year 9th, Part II, p.6.

[520] Christos Artemides, President Cyprus Supreme Court, 9th October 2006, interview by author, recording, Nicosia, Cyprus.

respective competence, the efficient application of the provisions of this Part".[521] Moreover, Article 179 (3) of the Constitution expressly obliges the legislative, executive and administrative authorities of the Republic, not to enact laws, or issue acts or decisions, which are in any way repugnant to, or inconsistent with, any of the provisions of the Constitution, including the human rights provisions.

The Republic of Cyprus has signed or ratified most international and regional legal instruments in the field of human rights, which cover not only individual civil, political, economic, social and cultural rights, but also rights in the field of protection and respect of minorities and combating racism.[522] The Republic is bound by a large

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[521] Article 35 of the Constitution.

[522] The Republic of Cyprus has, *inter alia*, signed, ratified, acceded or succeeded to the following, international or regional human rights legal instruments: The International Covenant on Civil and Political Rights (Ratification Law 14/69) and the First and Second Optional Protocols to it (Ratification Laws 17(III)/92 and 12(III)/99, respectively); The International Covenant on Economic, Social and Cultural Rights (Ratification Law 14/69); The European Social Charter (Ratification Law 64/67, as amended by Laws 5/75, 3/88, 203/91 and 10(III)/00) and the Optional Protocol thereof (Ratification Law 9(III)/00); The Revised European Social Charter (Ratification Law 27(III)/00); The International Convention on the Elimination of All forms of Racial Discrimination (Ratification Law 12/67, as amended by Laws 11/92, 6(III)/95 and 28(III)/99); The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Ratification Law 235/90); The European Convention on the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (Ratification Law 24/89); UN Convention on the Political Rights of Women (Ratification Law 107/68); The UN Convention on the Elimination of All Forms of Discrimination against Women (Ratification Law 78/85) and the Optional Protocol thereof (Ratification Law 1(III)/02; UN Convention on the Nationality of Married Women (succession by the Republic of Cyprus on 26 April 1971); The UN Convention on the Prevention and Punishment of the Crime of Genocide (Ratification Law 59/80); The ILO Conventions No. 111, 97 and 143 on Discrimination (Employment and Occupation) (Ratification Law 3/68), on Migration for Employment (Revised) (ratified by the United Kingdom Government before independence and extended to Cyprus. After independence the Republic of Cyprus notified, on 23.09.60, that it considers itself bound by the Convention), and on Migrant Workers (Supplementary Provisions) (Ratification Law 36/77), respectively.; The Geneva Convention Relating to the Status of Refugees (ratified by the United Kingdom Government and extended to Cyprus in 1956. After independence the Republic of Cyprus notified, on 16.05.63, the Secretary General of the UN that it considers itself bound by the said Convention) and its Protocol (Ratification Law 73/68); The UN Slavery Convention and the amending Protocol thereto (The Republic of Cyprus has submitted a notification of succession on 24.06.86); The Framework Convention on the Status of National Minorities (Ratification Law 28(III)/94); The European Charter for Regional or Minority Languages (Ratification Law 39(III)/93); The European Cultural Convention (Ratification Law 48/68); The UN Convention on the Rights of the Child and the Amendment thereto (Ratification Laws 243/90 and 5(III)/00, respectively; The Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (Ratification Law 26(III)/94); The European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Ratification Law 36/86); The Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Ratification Law 31(III)/00); The Convention on Civil Aspects of International Child Abduction (Ratification Law 11(III)/94); The European Convention on the Legal Status of Children Born Out of Wedlock (Ratification Law 50/79); International Agreement for the Suppression of the White Slave Traffic as Amended by the Protocol thereto (succession by the Republic of Cyprus on 16 May 1963); The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Ratification Law 57/83) (Source : Ministry of Foreign affairs of the Republic of Cyprus).

number of multilateral human rights conventions, which were ratified either by law enacted by the House of Representatives[523] or under the doctrine of succession in respect to those international documents which were binding on Cyprus before it was declared a Republic.[524]

[523] Article 169(2) of the Constitution.
[524] Article 8 of the Treaty of Establishment.

4.3 The Court System

The administration of justice is exercised by the island's separate and independent judiciary. The judicial power is vested in the Supreme Court and inferior courts as established by law. Under the 1960 Constitution and other legislation in force the following judicial institutions have been established: the Supreme Court of the Republic; the assize courts; district courts; family courts; industrial disputes court; rent control courts and military court.

The Supreme Court is the highest court in the Republic. It has jurisdiction to hear and determine all appeals from lower courts in civil and criminal matters. Furthermore, the Supreme Court has exclusive jurisdiction to hear any recourse filed against a decision, act or omission of any person, organ or authority exercising executive or administrative authority. The Supreme Court has original and appellate jurisdiction in admiralty cases. As an electoral court the Supreme Court has exclusive jurisdiction to hear and determine petitions concerning the interpretation and application of the electoral laws. Moreover, the Supreme Court has jurisdiction to examine the constitutionality of any law or any conflict of power or competence which arises between any organs or authorities of the Republic. In addition the Supreme Court hears and determines any recourse by the President of the Republic regarding the compatibility of any law with the constitution enacted by the House of Representatives.

4.4 Ratification of the ECHR

It could be argued that the ECHR as applicable during the colonial regime continued to be so applicable to Cyprus after independence by operation of the principles of succession under Article 8 of the Treaty of Establishment.[525] But as under the principles of the ECHR it ceased to apply to a dependent territory on its independence

[525] Article 8 of the Treaty of Establishment Cyprus Cmd 1093 is as follows: "1. All international obligations and responsibilities of the Government of the United Kingdom shall henceforth, in so far as they may be held to have application to the Republic of Cyprus, be assumed by the Government of the Republic of Cyprus; 2. The international rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of their application to the territory of the Republic of Cyprus shall henceforth be enjoyed by the Government of the Republic of Cyprus".

the ECHR ceased to apply to the Republic of Cyprus since Independence Day, 16th August 1960. Although the Republic of Cyprus became a member of the CoE[526] and it could be argued that the ECHR was applicable to Cyprus such argument could not be of any avail.[527] Fawcett has argued that "the participation to the ECHR as of right is confined to the members of the CoE and, therefore, would not pass simply by way of succession to a state not a member".[528]

The Republic of Cyprus became the sixteenth member of the CoE on 24th May 1961. It signed the ECHR on 16th December 1961 and ratified it by Law No. 39/1962. The instrument of ratification was deposited with the Secretary-General of the CoE on 6th October 1962.[529] Cyprus has subsequently ratified all Protocols to the ECHR.[530]

4.5 Status of the ECHR in domestic law

The ECHR, as an international treaty, is applied in the Cypriot legal order under the constitutional terms and conditions for the application of treaties in general. Consequently, a discussion of the ECHR as a source of Cypriot law must start with the general rules on the status of international law. The relationship between domestic and international law in Cyprus is characterised by its dualist character. The dualist legal tradition was explicitly introduced in the Cypriot legal order in Article 169 of the Constitution of 1960. According to this article, the Republic of Cyprus has the power to conclude international agreements with other states and international organisations. Article 169 deals with both, the means of ratification of treaties, conventions and international agreements and their effect on domestic law.

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[526] On the 24th May 1961.

[527] Tornaritis, C., "The ECHR in the Legal Order of the Republic of Cyprus", Nicosia, 1975 (Reprint from the *Cyprus Law Tribune*), Year 9th, Part II, p.6.

[528] Fawcett, S., E., J., "The Application of the ECHR", Oxford: Clarendon Press, 1969, p.100.

[529] The relevant Ratification Law embodying the Greek translation of the texts and also the English texts was published in the official Gazette of the Republic on 30th March 1962. The Ratification Laws of the Protocols to the ECHR are also published in the Official Gazette of the Republic, embodying the Greek translation and the English texts.

[530] Protocol No. 1 was ratified on 06/10/1962, Protocol No. 2 on 22/01/1969, Protocol No. 3 on 22/01/1969, Protocol No. 4 on 03/10/1989, Protocol No. 5 on 22/01/1969, Protocol No. 6 on 19/01/2000, Protocol No. 7 on 15/09/2000, Protocol No. 8 on 13/06/1986, Protocol No. 9 on 26/09/1994, Protocol No. 10 on 08/02/1994, Protocol No. 11 on 28/06/1995, Protocol No. 12 on 30/04/2002, Protocol No. 13 on 12/03/2003 and Protocol No. 14 on 17/11/2005. See: http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=CYP&MA=3&SI=2&DF=&CM=3&CL=ENG

In addition, Article 169 makes a distinction between two types of international agreements. According to Article 169 (1) international agreements related to "commercial matters", "economic cooperation" and *"modus vivendi"* are concluded under a decision of the Council of Ministers without need of any further formality. This type of international agreement which can be concluded and come into force without the need for any further implementation are "executive agreements" or "agreements in simplified form".[531] On the other hand, according to article 169 (2) any other treaty, convention or international agreement is not considered as concluded unless it is approved by a law made by the House of Representatives.[532]

It has been observed that the drafters of the Constitution used the word "approval" on purpose, to emphasise the fact that this "approval" is a prerequisite for the conclusion of the treaty in international law and not a purely enabling formality".[533] As far as it regards their application and relation to the national law, Article 169 (3) provides that such treaties will have superior force to any municipal law. Obviously, the term "municipal law" refers only to laws made by the legislature and it does not include the Constitution itself. As the former Attorney-General of the Republic of Cyprus Criton Tornaritis pointed out: "a treaty concluded and published as provided in Article 169 shall have superior force to any law in force at the time such publication or enacted subsequently but it cannot have superior force to the supreme law, that is to say the Constitution".[534]

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[531] Tomaritis, C., "The Treaty Making Power especially under the Law of the Republic of Cyprus", Nicosia, 1973, p.14.

[532] The ECHR, the Protocols thereto and other human rights instruments, such as the International Covenant on Civil and Political Rights adopted by the General Assembly Resolution 2200 A (XXI), were signed pursuant to decisions of the Council of Ministers ratified by laws of the House of Representatives and published in the Official Gazette by virtue of Article 169§2 and 3 of the Constitution. The relevant part of Article 169 reads: "(2) Any treaty, convention or international agreement shall be negotiated and signed under a decision of the Council of Ministers and shall only be operative and binding on the Republic when approved by a law made by the House of Representatives whereupon it shall be concluded; (3) Treaties, conventions and agreements concluded in accordance with the foregoing provisions of this Article shall have, as from their publication in the official Gazette of the Republic, superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto".

[533] Tomaritis, C., "The Treaty Making Power especially under the Law of the Republic of Cyprus", Nicosia 1973, p.15.

[534] *Ibid*, p.17.

The requirement of reciprocal application of the ECHR by other parties was rejected by the Supreme Court. In the case of *Toulla Malachtou v Armeftis*[535] the Court held that the condition of reciprocity cannot be invoked in conventions the object of which is not to create any subjective or reciprocal rights for the contracting parties themselves but to promote certain principles of law, moral and legal values which a contracting party signs and ratifies only for the realisation of this objective.[536] Examples are: conventions for the protection of human rights and the improvements and formulation of common rules and the achievement of social justice. It stressed that it would be incomprehensible for a state not to secure the rights and freedoms defined in section 1 of the ECHR on the ground that another party to the ECHR violates the ECHR even against a national of the first state.[537] Further, where there is an international mechanism of control or supervision, the condition of reciprocity cannot validly be raised.

The question of the impact of the ECHR on the Cypriot legal order has to be discussed as part of the general question of the position of treaties in domestic law. Within the domestic norm-hierarchy, validly concluded treaties are situated above ordinary legislation and below the Constitution. It is submitted that a convention is inferior to the Constitution and is subject to judicial review in the sense that the constitutional provisions prevail in case of any inconsistency between them and the provisions of the convention.

Hence, the hierarchy in the Cypriot legal order is (a) the Constitution,[538] (b) the conventions, and (c) the ordinary laws. A convention does not *stricto sensu* repeal the municipal law but has only superior force in the sense that it has precedence in its application. It retains its nature as part of international law. Having regard to its nature, however, and its connection with the international obligations of the State, it cannot be amended or repealed by any posterior law contrary to the provisions of the

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[535] *Ibid.*
[536] *Ibid.*
[537] *Ibid.*
[538] It should be noted, however, that according to article 1A of the Constitution as amended by Law 127(I)2006), no provision of the Constitution is to be considered as invalidating any law, act or measure necessitated by the Republic's obligations a Member State of the EU, nor does any provision prevent EU Regulations, Directives or other acts or legally binding measures of a legislative character from having legal effect in the Republic.

convention or the provisions of the Vienna Convention on the Law of Treaties as ratified under Article 169 by Law No. 62/76.

The ECHR is a self-executing convention and has superior force over any municipal law under the principle of *lex superior derogat inferiori*. The ECHR has superior force not in the sense of repealing the inconsistent domestic law but in the sense of having superiority and precedence in its application. Hence, as from the day of its publication in the Official Gazette the ECHR forms part of the law of the Republic and has superior force to any municipal law. The meaning of law provided by Article 186(1) refers to law enacted after the coming into force of the Constitution. It follows therefore that since "law" under Article 186(1) does not include the Constitution, it can be concluded that a convention even though superior to any municipal law would be subject to the provisions of the Constitution. This argument is fortified by Article 179(1) of the Constitution which declares the Constitution to be the "supreme law of Cyprus". Hence, the ECHR is superior to any law, either prior or subsequent, that to say "law of the Republic", but inferior to the Constitution.[539]

4.6 Recognition of Article 25 of the ECHR[540]

The Republic of Cyprus did not recognise the right of individuals to lodge complaints with the ECommHR the then article 25 (now 34) of the ECHR till 1989. It has been suggested that the reluctance of Cyprus to accept the right of individual petition has partially denied practical force to many of the ECHR's substantive provisions.[541]

In 1962, just before the approval of the ECHR Ratification Law by the House of Representatives, the Republic was faced with the dilemma of accepting article 25 of ECHR. The findings of this thesis indicate that the main reason for refusing it at the

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[539] Tornaritis, C., "The Operation of the ECHR in the Republic of Cyprus", *Cyprus Law Review*, Vol. 3, July-September 1983, p.456; Tornaritis, C., "The Legal System of the Republic of Cyprus", Nicosia, 1984, p.16.

[540] See Clerides, Ph., "Article 25 of the ECHR and Human Rights", *Cyprus Law Review*, Vol.3, July-September 1983, pp.530-532; Loucaides, L., "The Impact of the Recognition of Article 25 of the ECHR on the Cypriot Legal System", *Cyprus Law Review*, Issue 25, January-March 1989, pp.3874-3878.

[541] Polakiewicz, J., & Jacob-Foltzer, V., "The ECHR in Domestic Law: the Impact of Strasbourg Case-law in States Where Direct Effect is Given to the Convention", *Human Rights Law Journal*, Vol. 12, No. 3, 1991, p.73.

time was due to the fact that the three guarantor states, Greece, Turkey and United Kingdom had not yet recognised it themselves and Cyprus was not prepared to diverge on the matter.[542]

Furthermore, it is usually the case that states emerging from colonial rule are reluctant to accept supervision of their affairs by a non-national body to supervise its affairs as compromising its newly won independence.[543] In addition, by allowing the right of individual petition it was thought that the authority of the courts of the Republic would be undermined two years being too short a time to establish a firm basis to award justice. Moreover, due to the special nature of the Cyprus Constitution (i.e. the representation of the two communities, Greek and Turkish, at the fixed ratio of 7:3 in the structure of the state), it was felt that any problems would be more prudently to dealt with within the framework of the Cypriot courts, any further action being likely contribute to an increase in friction between the two communities. Finally, following the events of 1974 it would appear that the Cypriot government was worried that the legal status of Turkish-Cypriot properties[544] could amount to a violation of Article 1 of the Protocol No. 1 to the ECHR.

In 1989, Cyprus accepted the competence of the ECommHR to consider individual petitions (under the then article 25 of the ECHR) for a period of three years.[545] However, this notification contained a declaration that "the competence of the Commission by virtue of article 25 of the Convention is not to extend to petitions concerning acts or omissions alleged to involve breach of the ECHR or its Protocols, in which the Republic of Cyprus is named as the Respondent, if the acts or omissions relate to measures taken by the Government of the Republic of Cyprus to meet the needs resulting from the continuing invasion and military occupation of part of the territory of the Republic of Cyprus by Turkey".[546] In a letter dated 12 September 1988, the Secretary General recalled that according to the general rules, the

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[542] Achilleas Demetriades, practicing lawyer in Cyprus, 8th October 2006, Nicosia, interview by author, recording, Nicosia, Cyprus.
[543] Achilleas Demetriades, practicing lawyer in Cyprus, 8th October 2006, Nicosia, interview by author, recording, Nicosia, Cyprus.
[544] There was no legislation regulating the property rights of the Turkish Cypriots within the spirit and provisions of the ECHR.
[545] The declaration was renewed in the same terms on 2 January 1992.
[546] CoE, Human Rights, H/INF (89)2, Information sheet No. 24, (November 1988-5 May 1989), Strasbourg 1989, p.4

notification made pursuant to Article 25(3) in no way prejudged the legal questions that might arise concerning the validity of the Cypriot declaration.[547] It is interesting to note that the ECtHR did not have the opportunity to decide whether the declaration of Cyprus was valid which was later withdrawn.[548]

It cannot be claimed that Cyprus's acceptance of the individual petition mechanism was unrelated to its efforts/intention towards full EU membership. Clearly such a move would be favourably received in Europe and soon after, on 4th July 1990, the Cyprus Government submitted a formal application to join the European Community under Article 237 of the EEC Treaty.[549] Therefore it can be said that the desire for EU membership (and thus the need for a better "image" in Europe) was one of the motivating factors for recognition of the then Article 25 of the ECHR.

4.7 Individual applications against Cyprus

The ECHR has been successfully described as "a law-making treaty".[550] It empowers the ECtHR to review the legislative and administrative arrangements of member states, and where they are found wanting, to require changes in the law and procedure of the national system concerned.[551] Following Cyprus recognition of the right of individual petition in 1989, Cypriot law could finally be questioned before the ECommHR and the ECtHR. The opportunity for Cypriot litigants to rely on the ECHR and to apply to Strasbourg undoubtedly constituted a truly novel element in Cypriot law on civil liberties. Indeed, the ECHR has become a source of Cypriot law together with the Constitution and statute law. In this section, the chapter engages in a detailed analysis of the impact and the effects of the ECtHR's judgments upon Cypriot law and practice and the domestic legal order in general and, more precisely, the remedial action taken by the Cypriot authorities will follow. In each case, the impact on judicial decisions and legislation will be assessed. Space precludes

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[547] *Loizidou v Turkey*, No. 15318/89 (preliminary objection), 23/03/1995, para.31.
[548] By letter of 22 December 1994 it was renewed for a further period of three years without the restrictions *ratione materiae* set out above. (*Loizidou v Turkey*, No. 15318/89, Preliminary objection, 23/03/1995, para. 32).
[549] Article 237 of the EEC Treaty has been repealed by the Treaty on European Union. Accession of new Member States is covered by Article O of the Treaty on European Union.
[550] *Wemhoff v. Germany*, No. 2122/64, 27/06/1968.
[551] Blackburn, R., "The United Kingdom", in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, p.1003.

assessing this impact in all legal areas and choices had to be made. Thus it appears legitimate to present a synopsis of the Cypriot key cases in Strasbourg.

4.7.1 Modinos v. Cyprus[552][553]

The applicant, the President of the Liberation Movement of Homosexuals in Cyprus, complained that the prohibition under Cyprus law of male homosexual conduct in private between adults,[554] placed him, as an individual involved in a homosexual relationship, "under strain, apprehension and fear of prosecution" and constituted a breach of his right to private life as guaranteed by Article 8 of the ECHR.

The Government of Cyprus argued that the prohibition was in fact no longer in force;[555] although it had not been formally removed from the statute book, no prosecutions were brought under it as it violated the right to private life as enshrined in Article 8 of the ECHR. The Government also pointed to the policy of the Attorney-General since 1981 not to prosecute homosexual acts in private between consenting adults.

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The ECtHR rejected this approach. It attached importance to the existence of the prohibition on the statute book, to remarks made by the Supreme Court in 1981, suggesting that the prohibition did not infringe the Constitution or the ECHR and to remarks by politicians which suggested the prohibition was still in force. In its view, the Attorney-General's policy of non-prosecution might change in the future. The ECtHR concluded that the existence of the prohibition on the statute book constituted an interference with the applicant's rights under Article 8 of the ECHR. The Government made no attempt to justify the prohibition and, in the light of its

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[552] *Modinos v. Cyprus*, No. 15070/89, 22/04/1993.

[553] *See* Sherlock, A., "Prohibition of Homosexual Relations in Private and the Convention", Case comment, *European Law Review*, Vol. 19(1), 1994, pp.112-113; "Cyprus" in "The ECHR at 50", Human Rights Information Bulletin (special issue), p.12.

[554] Article 171 of the Criminal Code completely prohibited (male) homosexual acts between consenting adults. Under this article, gay men faced prosecution with a sentence of 2 to 14 years imprisonment. "Attempts to commit" homosexual acts between men could be punished with up to three years' imprisonment.

[555] This was also the essence of the dissenting opinion of Judge Pikis, the judge of Cypriot nationality.

decisions in *Dudgeon*[556] and *Norris*[557], the ECtHR went on to hold that there had been a breach of Article 8 without re-examining the issue afresh.

In January 1995, the Cyprus Government, in order to comply with the judgment of the ECtHR, introduced a bill in the Cyprus Parliament to abolish the ban on homosexuality under the then Article 171 of the Criminal Code. The bill was referred to the Parliament's Legal Affairs Committee, where it became stalled in the face of strong opposition particularly from the Greek Orthodox Church.[558] As a result of the intense opposition the Government postponed the vote on the bill despite arguments that failure to change the law would have a negative impact on the image of the country in Europe and might even get it expelled from the CoE.[559]

A deadline for compliance was set by the CoM (29th May 1998)[560] and in the face of continued church opposition,[561] the House of Representatives finally voted (21 May 1998) in favour of the bill decriminalising homosexuality between men. Law No. 40(1) of 1998 was adopted amending the impugned section 171 of the Cyprus Criminal code. However, the new law contained extensive discriminatory provisions,[562] apparently as concessions to opponents of the reform.[563] As a result, a

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[556] *Dudgeon v. The United Kingdom*, No. 7525/76, 22/10/1981.
[557] *Norris v. Ireland*, No. 10581/83, 26/10/1988.
[558] In the meanwhile, the ECommHR had declared admissible a second challenge to the law, by Stavros Marangos, while the CoE had warned the Cyprus Government repeatedly that it must conform to the ECtHR's ruling.
[559] Cyprus Mail, 05/11/1997.
[560] The Deputy Secretary-General of the CoE, Hans Kruger, commented: "Cyprus has no choice, no real choice in fact. This is an international obligation which the country has and must comply with ... You can prolong it here and there, but not in the long run....There is an urgent need now to come to some rapport..." "I really don't know what would happen if the law is not changed," said Kruger, referring to some news reports that the island could even face expulsion from the CoE if it fails to comply with the court ruling." (Reuters, 14/05/1998).
[561] Archbishop Chrysostomos, leader of the Greek Orthodox Church in Cyprus said only "enemies of our nation" would endorse decriminalisation of homosexual acts. "If we don't stand firm and tell Europe this does not conform, not only to Christ's religion, but also to the moral standpoint of our nation, eventually they will come and tell us to be homosexuals in order to be accepted into Europe," Chrysostomos said. "If you go and say it's all right to be a homosexual you will encourage it and the place will be full of homosexuals".
[562] See Amnesty International calls for amendments to legislation on homosexuality, News Service 117/98, AI INDEX: EUR 17/02/98, 18/06/1998.
[563] Cyprus Mail, 22/05/1998.

further amendment[564] came into force on 16th June 2000 (Amending Law 77 (1)/2000) introducing further clarifications as to the limits of the individual's private sphere.[565]

Modinos illustrates that in some instances the judgments of the ECtHR demand radical social change concerning deeply ingrained prejudices which could prove difficult to dislodge. The process of enforcement of a judgment can become problematic as diverse social groups may be either unprepared or unwilling to accept such "dramatic" change. In this instance, it would appear that Cypriot society then (1990s) could not easily accept the decriminalisation of homosexuality, and a certain period of time had to elapse before social norms adjusted sufficiently in such a novel direction.

The process of enforcement of this judgment is indicative that certain pressure from the CoE bodies together with the understanding that a member state has to achieve the "minimum standards" under the ECHR could prove decisine in the successful enforcement of the ECtHR judgment. At the same time this thesis argues that a non-compliant country is in danger of becoming a pariah in Europe and the fall-out may be too high.

4.7.2 Larkos v. Cyprus[566][567]

The applicant in *Larkos* rented a state-own house in 1967 and when asked to surrender the property he refused, arguing that having lived in the house for 20 years and having spent large sums of money maintaining it, he was a "statutory tenant". The

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[564] See Resolution ResDH(2001)152 concerning the judgment of the ECtHR of 22nd April 1993 in the case of Modinos against Cyprus (adopted by the CoM on 17th December 2001 at the 775th meeting of the Ministers' Deputies).

[565] The new statutory definition given by the Criminal Code in section 171 now reads as follows:*(1) Sexual intercourse between males constitutes a felony punishable with five years imprisonment if it is performed in public, or, where one of the persons is under the age of eighteen, whatever the place of its performance; (2) Sexual intercourse between males constitutes a felony punishable with imprisonment for seven years, if it is performed by abusing a relationship of dependency derived from any service, or by an adult seducing a person under the age of eighteen, or for the purposes of gain or by profession. (3) For the purposes of this section the term "in public" means a place that can be viewed by the public or to which the public are entitled or permitted to have access with or without any condition.*

[566] *Larkos v. Cyprus*, No. 29515/95, 18/02/1999.

[567] See "Statutory protection of Residential Occupiers-State-Owned Residences", Case comment, *European Human Rights Law Review*, 1998, Vol.5, pp.653-654.

Government instituted proceedings for possession arguing that as a civil servant the applicant was allocated the house by means of an administrative order. In 1992, the District Court of Nicosia ordered the applicant to vacate the premises, ruling that under the Rent Control Law[568] statutory tenancy applied only to privately owned properties. The applicant appealed to the Supreme Court claiming that his rights as a tenant were "property rights" under Article 1 of Protocol No. 1, and that he was being discriminated against in violation of Article 14. The appeal was dismissed.

The ECtHR held unanimously that there had been a violation of Article 14 in conjunction with Article 8 in that the applicant had been unlawfully discriminated against in the enjoyment of his right to respect for his home.[569] The applicant maintained that, unlike a private tenant living in accommodation such as his rented from a private landlord, he was not protected from eviction by the State at the end of his lease by the Cyprus law of 1983.

The ECtHR held that a difference in treatment is discriminatory if there is no objective and reasonable justification. Differences in treatment might amount to a violation of Article 14 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Contracting States may enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations may justify a different treatment.

The ECtHR concluded that the tenancy had not been granted to the applicant in his capacity as a civil servant and the Government had not acted in a public-law capacity when signing the tenancy agreement. The Government contended that they could not be equated to a private landlord when dealing with State property but the ECtHR noted that the authorities had leased the house to the applicant in what was a private-law transaction. The decision to exclude Government tenants from the 1983 law had

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[568] Law 23/83.

[569] The applicant complained to the ECommHR of a violation of Article 14, taken in conjunction with Article 8 and Article 1 of Protocol No. 1 to the ECHR. The ECommHR concluded unanimously that there had been a breach of Article 14 taken in conjunction with Article 8 of the ECHR. It was not necessary to consider whether there had been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the ECHR.

not been justified; the Government had adduced no reasonable or objective justification for it.

Following the judgment in *Larkos* the House of Representatives, on 11th July 2002, adopted amendments[570] to the provisions of the Rent Control Law 1983[571] providing, inter alia, that the provisions of the Rent Control Law of 1983 concerning the protection from eviction should be equally applicable to both the tenants of State-owned dwellings such as the applicant and other private tenants renting from private landlords.[572] Furthermore, the amended Rent Control Law provides that the domestic courts should not deliver new judgments or orders contrary to Section 2A of Law No. 150 (I) of 2002 and that the judgments or orders already pending enforcement which concern the eviction of the tenants of the State-owned dwellings should not enforced.

These amendments thus effectively remedied both the applicant's situation and prevented new similar violations. It is submitted that the prompt adoption of appropriate general measures by properly amending legislation following a finding of violation by the ECtHR depends on the state's will and preparedness to fully remedy an existing violation. It is further submitted that were states to speedily enact and implement legislation to prevent subsequent violation, as above the ECtHR would be relieved of its excessive burden, especially in the case of repetitive cases.

4.7.3 Egmez v. Cyprus and Denizci and others v. Cyprus[573]

The ECtHR in the case of *Egmez v. Cyprus*[574] found that the rights of the applicant, a Turkish Cypriot living in the north of Cyprus, had been violated under Article 3 of the ECHR because of inhuman treatment in the hands of the police. The ECtHR by its

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[570] The Rent Control (Amendment) Law No. 150 (I) of 2002.
[571] See Resolution CM/ResDH(2007)5 concerning the judgment of the ECtHR of 18th February 1999 in the case of Larkos against Cyprus (Adopted by the CoM on 28th February 2007 at the 987th meeting of the Ministers' Deputies).
[572] Section 2A of Law No. 150 (I) of 2002.
[573] See Andrews, J., A., "Article 2: Right to Life", Case Comment, *European Law Review*, 2002, 27 Supp, p.84.
[574] *Egmez v. Cyprus*, No. 30873/96, 21/12/2000 (See "Police: Arrest by Security Forces –Ill-Treatment of Detainee- Degrading Treatment- Right to Liberty and Security- Right to a Fair Trial", Case Comment, *European Human Rights Law Review*, 2001, Vol.4, pp.456-459; Andrews, J.,A., *Egmez v. Cyprus* (30873/96), (Unreported, December 21, 2000) (ECHR), Case Comment, *European Law Review*, 2001, 26 Supp, pp.155-156).

judgement in the case of *Denizci and others v Cyprus*[575] established that the Republic had violated Article 3 (prohibition of inhuman treatment), Article 5 (1) (right to liberty and security) and Article 2 of Protocol No. 4 to the ECHR (freedom of movement) of certain Turkish Cypriots and was ordered to pay compensation. In both these cases the ECommHR had held fact-finding hearings in Cyprus to determine the relevant facts.[576]

These cases prompted the Cypriot Government to introduce Legislative amendments in order "to enhance arrested and detained persons' protection from torture or inhuman or degrading treatment by members of the police and prosecution in such cases".[577] The "Rights of Persons under Arrest and Detention Law 2005", which entered into force on 30th December 2005, includes a series of provisions for the effective protection from torture and inhuman or degrading treatment or punishment.

Whenever the rights enshrined in the "Rights of Persons under Arrest and Detention Law 2005" are allegedly, detainees can lodge an action for damages against the state and members of the police force as well as the detention centre; this would not prejudice any existing right to see compensation under the law.

By virtue of these legislative amendments, where allegations of ill treatment at police stations are made, officers in charge, as well as the perpetrators of these acts, maybe held criminally liable. The new law also provides for contemporaneous medical examination to establish whether detainee suffered from injuries not present at the time of admission.

By introducing the right of detainees to initiate proceedings and allowing for the possibility of holding the higher ranking officers responsible in cases of alleged

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[575] *Denizci and others v. Cyprus*, Nos. 25316-25321/94 and 27207/95, 23/05/2001.

[576] Such proceedings are relatively rare within the ECHR system, with most fact-finding hearings taking place in Turkey in the 1990s. The post-Protocol No. 11 ECtHR has continued to engage in fact-finding hearings, although it is understood that the ECtHR is extremely conscious of the time and cost of such proceedings. Nevertheless, given that the burden is on an applicant to establish an ECHR violation beyond reasonable doubt, it is critical that such hearings do continue to take place, where domestic proceedings have been ineffective.

[577] See Resolution ResDH(2006)13 concerning judgments of the ECtHR in cases relating to actions of police forces in Cyprus (Egmez against Cyprus, judgment of 21 December 2000; Denizci and others against Cyprus, judgment of 23 May 2001, final on 23 August 2001) *(Adopted by the CoM on 12 April 2006, at the 960th meeting of the Ministers' Deputies).*

violations of Articles 3 and 5, the object of the legislation is to prevent the development of a culture of impunity within the police force. However, in practice proper and consistent implementation of the legislation is essential in order to ensure that the rights of detainees are observed and all violations committed by members of the police do not go unpunished. Such implementation should be accompanied by series of measures to inculcate compliant mentality in the police force. Regular training sessions and distribution of materials to all members of the police force should form a central part of the effort to practically implement the new legislation.

4.7.4 Selim v. Cyprus[578]

The applicant, a Turkish Cypriot, complained that he had been denied the right to marry and found a family because the section 34 of the Marriage Law of Cyprus, at the time did not provide for the possibility of Moslem Turkish Cypriots to conduct a marriage. Consequently, the applicant was forced to marry in Romania without his family or friends being able to attend. The applicant applied to the ECtHR, claiming a violation of Articles 8, 12, 13 and 14 of the ECHR and the case was settled through the friendly settlement procedure of the ECtHR.

This case prompted the Government to introduce the new Marriage Law [L.104 (I)/2003] and the Application of the Civil Marriage Law 2003 to the Members of the Turkish Cypriot Community Law 120 (I)/2003.[579] Under these provisions every person regardless of origin, nationality or religion can conduct a civil marriage.

Although Law 104(I) 2003, makes provision for Moslem Turkish Cypriots and other Moslems resident in Cyprus to conduct valid religious Moslem weddings, there is no Marriage officer registered by the Minister of Interior (as required by Sections 3(2) and 40 (3)(a)) to preside over such a ceremony. As there is no such impediment to the conduct of religious weddings involving members of the Greek Orthodox Church or any other religion, the issue arises whether the differential treatment required by the

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[578] *Selim v. Cyprus*, No. 47293/99, 16/07/2002.

[579] See Resolution ResDH(2003)49 concerning the judgment of the ECtHR (Friendly Settlement) of 16 July 2002 in the case of Selim against Cyprus *(Adopted by the CoM on 24 April 2003 at the 834th meeting of the Ministers' Deputies).*

provisions of Law 104 (I)/ 2003 is legitimate and does not constitute unjustified discriminatory treatment.

Section 3 (1) of The Marriage Law 2003 defines "marriage" as the agreement towards the union in marriage concluded between a man and a woman and executed by a Marriage Officer or by a Registered priest according to the Regulations of the Greek Orthodox Church or of the dogmas of the Religious Groups recognised by the Constitution, i.e. Latins, Armenians and Maronites. By virtue of Law 120 (I) of 2003 providing for the application of the Marriage Law 2003 to the Turkish Cypriot Community, the provisions of the Turkish Family Law (Marriage and Divorce) Law (Cap.339) and the Turkish Communal Courts Law are suspended due to the "irregular situation" created by the Turkish invasion of 1974. In their place the provisions of Law 104 (I) of 2003 shall apply.

Consequently, there arises a vacuum in regards to the execution of valid religious marriages between Moslem Turkish Cypriots within the area of the Republic of Cyprus. It is expected that domestic courts will be examining the issue in the near future.

4.7.5 Aziz v Cyprus[580][581]

The applicant, a Turkish Cypriot, applied to be registered in the electoral law in order to be able to exercise his voting rights in the parliamentary elections. He was refused on the grounds that under the Constitution members of his community could not be registered on the Greek-Cypriot electoral roll. The applicant applied to the Supreme Court arguing that the Cypriot Government had failed to set up two electoral lists in order to protect the electoral rights of members of both communities.

The Supreme Court dismissed the appeal, holding that under the Cypriot Constitution and relevant electoral legislation, members of the Turkish Community residing in the Republic of Cyprus could not vote in parliamentary elections and that it could not

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[580] *Aziz v. Cyprus,* No. 69949/01, 22/06/2004.
[581] Zwaak, L., & Haeck, Y., "*Aziz v. Cyprus*", Case Comment, *Netherlands Quarterly of Human Rights*, Vol. 22(3), 2004, pp.449-500.

intervene to fill a legislative gap which existed in this respect. The applicant complained under Article 3 of Protocol No. 1 to the ECHR that he had been prevented from exercising his voting rights. The applicant complained under Article 14 in conjunction with Article 3 of Protocol No. 1 to the ECHR that he was prevented from exercising his voting rights on the grounds of national origin and/or association with a national minority.

The ECHR noted that although states have a wide margin of appreciation in this sphere of the protection offered by Article 3 of Protocol No. 1 to the ECHR and considerable latitude in establishing rules governing parliamentary elections, such rules should not be such as to exclude some persons from participating in the political life of the country, in particular, in the choice of the legislature. As a result of the anomalous situation in the country that began in 1963 and the occupation of northern Cyprus by Turkish troops "the relevant constitutional provisions have been rendered ineffective" and therefore "there is a manifest lack of legislation resolving the ensuing problems".[582]

Consequently, the applicant as a member of the Turkish-Cypriot community residing in the government-controlled area of Cyprus had been deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives of which he is a national and where he has always lived.[583] In such circumstances, the very essence of this right to vote had been denied.[584] The ECHR decided unanimously that a violation of Article 3 of Protocol No. 1 to the ECHR had taken place.

The ECtHR pronounced that as the "difference in treatment in the present case resulted from the very fact that the applicant was a Turkish Cypriot",[585] as well as from the constitutional provision regulating voting rights between members of the Turkish-Cypriot and Greek-Cypriot communities, which had become impossible to implement, there was a clear inequality of treatment in the enjoyment of the right in question. Arguments advanced by the Government could not justify this difference on reasonable and objective grounds, particularly in the light of the fact that Turkish

[582] *Aziz v. Cyprus,* No. 69949/01, 22/06/2004, para.29.
[583] *Ibid*, para.29.
[584] *Ibid*, para.30.
[585] *Ibid*, para.36.

Cypriots in the applicant's situation were prevented from voting at any parliamentary election. Therefore a clear violation of Article 14 conjunction with Article 3 of Protocol No. 1 to the ECHR in had been shown.

In execution of the judgment of the ECtHR in the *Aziz* case,[586] the Human Rights Sector of the Legal Service has prepared legislation under which Turkish Cypriots living in the Government-controlled area of the Republic and satisfying the same qualifications as Greek Cypriots can register in the Electoral List and can therefore exercise the right to vote in all elections, that is, parliamentary, presidential and local elections. The relevant bill has been approved by the Council of Ministers. Law 2(I) of 2006 on "the exercise of the right to vote and to be elected by members of the Turkish community with habitual residence in free territory of the Republic" entered into force on 10th February 2006. In conformity with the ECtHR's judgment (as noted in the introduction to the Law), this Law gives effect to the right to vote and to be elected in parliamentary, municipal and community elections of Cypriot nationals of Turkish origin habitually residing in the Republic of Cyprus, thus preventing new, similar violations. In addition, Cypriot nationals of Turkish origin now have the right to vote in presidential elections. As a consequence, in the parliamentary elections of 21st May 2006 two hundred and seventy (270) Turkish Cypriots cast their ballot while one Turkish Cypriot was a candidate MP.

The findings of this thesis indicate the inability of Cypriot courts and legislature to transcend the letter of the 1960 Constitution where it is clear that the relevant provisions have been rendered ineffective as a result of first the 1963 withdrawal of the Turkish-Cypriot community and the subsequent *de facto* partition of the island following the 1974 invasion. In both *Selim* and *Aziz* there was a clear disregard of Strasbourg jurisprudence on the matter and an uncritical and inconsistent adherence to a lame Constitution with the result that ECHR rights are continually been violated.[587] In addition even when there has been amending legislation this thesis argues that the legislature itself, because of its loyalty to the Constitution has introduced amendments

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[586] See Resolution CM/ResDH(2007)77 concerning the execution of the judgment of the ECtHR Aziz against Cyprus (Application No. 69949/01, judgment of 22/06/2004, final on 22/09/2004) (*Adopted by the CoM on 20 June 2007 at the 997th meeting of the Ministers' Deputies).*

[587] At the time of writing a number of individual applications submitted by Turkish Cypriots against Cyprus on the issue of property rights are pending before the ECtHR.

that do not adequately remedy the existing violations. Therefore, it is apparent were Turkish Cypriots alleged human rights violations the Republic of Cyprus may not be in a position to fully comply with the relevant standards.

4.8 Effect of the ECtHR judgments at national level

As discussed above the incorporation of the ECHR into the domestic law of Cyprus was made subject to the Constitutional provisions, the latter to prevail in case of inconsistency. The Cypriot courts employ the jurisprudence of the ECHR as an aid for the interpretation of the corresponding articles of the Constitution, with a consequent harmonising effect.

The Supreme Court is primarily responsible for interpreting the ECHR and clarifying its position in domestic Cypriot law. It must be added that the ECHR plays an important role in the case-law of the Supreme Court which often refers to the ECtHR's judgments when dealing with alleged human rights violations.[588] It has been suggested that this may be explained by the fact that part of the Constitution is actually an "adaptation" of some of the ECHR's substantive provisions.[589] As Drzemczewski has succinctly pointed out "the [Cypriot] courts apply the Constitution as highest law, using the Convention and decisions of the Convention organs as guidelines".[590]

It should be noted that between 1964 and 1987, the ECHR had been referred to in 50 cases, in 47 of which there was reference to the case-law of the ECommHR and ECtHR.[591] Hence, it can be said that the ECHR is not only part of the domestic Cypriot law, but is also in practice an integrated part of Cypriot Constitutional law.

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[588] Christos Artemides, President Cyprus Supreme Court, 9th October 2006, interview by author, Nicosia, Cyprus.

[589] Polakiewicz, J., "The Implementation of the ECHR in Western Europe" in Alkema, E., Bellekom, T., Drzemczewski, A., Schokkenbroek, J., "The Domestic Implementation of the ECHR in Eastern and Western Europe", Proceedings of the Seminar held in Leiden 24-26 October 1991 under the patronage of the Secretary General of the CoE, N.P. Engel, Publisher/ Kehl/ Strasbourg/ Arlington/ p.19.

[590] Drzemczewski, A., "European Human Rights Convention in domestic law", Clarendon Press-Oxford, 1983, p.168.

[591] Eissen, M.-A., "L' interaction des jurisprudences constitutionelles nationals et la jurisprudence de la Cour europeenne des Droits de l'homme", in Rousseau, D., & Sudre, F., (eds), Conseil constitutionnel et Cour europeene des droits de l'homme, Paris, 1990, p.137.

An overview of the case-law of the Supreme Court shows that the ECHR and the jurisprudence of the ECtHR are both understood and accepted. The Supreme Court has on a number of occasions applied the ECHR.[592] Domestic courts, and especially the Supreme Court have engaged in the clarification of ambiguous parts of the Constitution in light of the ECHR and the case-law of the ECtHR. The Supreme Court regularly takes the Strasbourg practice into account in interpreting specific human rights guarantees or in outlining the preconditions of the limitation on human rights in general.

As early as June 1961 the then Supreme Constitutional Court in the case of *Attorney-General v. Afamis*[593] explicitly invoked the ECHR in aid of the interpretation of Article 11 of the Constitution. In this case a comparison was made between the word "alien" in Article 11(2)(f) of the Constitution on the one hand and of the word "person" used in Article 5(1)(f) of the ECHR on the other hand. It was held that it was intended to restrict the power of arrest or detention to "aliens", with the inevitable result that extradition also was limited to "aliens". The case is remarkable in the following ways: First, reference to the ECHR was made in order to interpret an article of the Constitution. This is in itself noteworthy since Cyprus had not ratified the ECHR at that time. Secondly, since then the Cypriot courts invoke the case-law of the ECHR as an aid to the interpretation of the corresponding constitutional provisions and the ECHR.[594] According to Loizou:[595] "this is imperative because the international supervision envisaged by the ECHR, and the commitments undertaken thereunder, may lead to a finding by the ECHR, even if the conduct complained of is not contrary to the Constitution".[596]

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[592] See for example *Pilavachi and Co v. International Chemical Co Ltd*, 1965, 1 C.L.R. 97; *Kannas v. Police*, 1968, 2 C.L.R. 29 at pp 35-37; *Tsirides v. The Police*, 1973, 2 C.L.R. at p. 207; *Police v. Georghiades,* 1983, 2 C.L.R. 33; *Police v. Yiallourou*, 1992, 2 C.L.R. 147; *Merthodja v. Police*, 1987, 2 C.L.R. 227; *President of the Republic v. House of Representatives*, 1994, 3 C.L.R. 1; *Kyriakides and Others v. The Republic*, Nos. 298/96, 299/96, 300/96 - 26.11.1997; *Sigma Radio T.V. Ltd and others v. Cyprus Broadcasting Authority,* Cases No. 320/99,809/00 and others, 24/02/2004; *Attorney-General v. Odyssea Kanari*, Criminal Appeal Number 7716, 04/03/2005.

[593] *Attorney-General v. Afamis,* 1 R.S.C.C 121 at 125-126.

[594] Tornaritis, C., "The Operation of the ECHR in the Republic of Cyprus", *Cyprus Law Review*, Vol. 3, July-September 1983, p.464.

[595] Former President of the Cypriot Supreme Court, Former Judge of the ECtHR.

[596] Loizou, A., "Cyprus", in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, p.220.

In the case of *Yiallourou v. Evgenios Nicolaou,*[597] which concerned a civil claim for damages brought by an individual against another individual, for violation of his right to private life contrary to Articles 15(1) and 17 of the Constitution, the Supreme Court established a court remedy for human rights violations. The Supreme Court held that claims for human rights violations were actionable rights that can be pursued in civil courts, by instituting civil proceedings for recovering damages and for other appropriate relief for the violation either against the State or private individuals. Civil proceedings can result in a judgment regarding the alleged violation and in adequate redress.[598] Such a judgment is based on Article 35 of the Constitution, which is analogous to Article 1 of the ECHR. It places a duty on the legislative, executive and judicial authorities in Cyprus, to secure within the limits of their respective competence, the efficient application of the constitutional provisions safeguarding fundamental rights and liberties.

The Supreme Court held that the effect of Article 35 is to render the protection and effective application of fundamental rights and liberties, a primary obligation of the State in all its functions, and that the ascertainment of violation of rights and the grant of a remedy, falls within the ambit of the functions of the judiciary, without any need to resort to any statutory provisions. In determining the matter, the Supreme Court took into account the case-law of the ECtHR,[599] and applied ECHR criteria concerning the interpretation of Article 13 of the ECHR. It added that district courts also have a duty under Article 13 of the ECHR, which forms part of the domestic law, to provide an effective remedy for violation of human rights provisions corresponding to those of the ECHR. As a result of the judgment, district courts can apply Article 35 of the Constitution in civil proceedings, to secure the effective application of fundamental rights and liberties safeguarded by the Constitution and the ECHR. The practical effect of this ruling is that claims of violation of human rights can be pursued

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[597] *Takis Yiallouros v. Eugeniou Nicolaou*, 08/05/2001.

[598] The Supreme Court stated: "provisions of [the ECHR] Article 13 constitute part of domestic law; they safeguard the right to an effective remedy for violations of human rights safeguarded by the ECHR (which, to a great extent, are equivalent to the rights safeguarded in Part II of the Constitution), from an appropriate court. So, besides the nature of these rights, which encompasses the element of judicial protection, the provisions of Article 35 of the Constitution, which impose an obligation regarding the matter, so too Article 13 of the ECHR enshrines the right to an effective remedy for all fundamental rights that are equivalent to those in the ECHR".

[599] Reference was made particularly to the case of *Klass and others v. Germany*, No. 5029/71, 06/09/1978.

in civil courts in the absence of additional legislation creating specific private law causes of action for the particular violation.

The authority responsible for the implementation of judgments of the ECtHR in the Cypriot domestic legal order is the Government Agent, who is also the Attorney-General. The Attorney-General[600] is the legal adviser of the Republic,[601] and in that capacity he represents the Republic of Cyprus in all domestic and international proceedings and acts as Government Agent for proceedings before Strasbourg and Luxembourg.

It should be noted that the Republic of Cyprus following the Recommendations adopted by the CoM in May 2004 deemed it necessary to set up the Human Rights Sector within the Office of Attorney-General. The Sector consists of a counsel from the legal service who is familiar with the ECtHR case-law and human rights issues, and deals with individual applications against Cyprus before Strasbourg under the Government Agent.[602] The Counsel in the Human Rights Sector is also responsible for the monitoring on behalf of the Attorney-General/Government Agent, of the implementation of the ECtHR's judgments.[603] The Counsel advises the administration on behalf of the Attorney-General, on the legislative and/or administrative measures which must be adopted in light of the ECtHR's judgments in order to ensure implementation. The legal advice is given at the same time that the judgment is communicated and explained by the Sector to the Ministry/Government Department concerned. In addition the adoption of administrative measures is monitored and coordinated by the Sector. The same body also advises and carries out the necessary follow up, on measures for the implementation of other human rights recommendations of the CoM and the PACE, and of human rights committees/bodies operating in the CoE or other international organisations.[604]

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[600] See Part VI of the Constitution entitled "The Independent Officers of the Republic", Articles 112-122.
[601] See Loukaides, L., "The Institution of Attorney-General in Cyprus", Nicosia, 1974.
[602] CDDH(2006)008 Addendum III Bil, Information submitted by member states with regard to the implementation of the five recommendations mentioned in the Declaration adopted by the CoM at its 114th session (12 May 2004), Strasbourg, 7 April 2006.
[603] DH-PR(2006)007rev Bil, CDDH, 27 November 2006.
[604] A Bill prepared by the Human Rights Sector makes all organs, authorities and persons in the Republic liable to criminal sanctions for contempt of court, when they do not fulfil their constitutional obligation to give effect and act upon judgments of the Supreme Court. The jurisdiction of the Supreme

It is important to note that where the advice given requires the adoption of legislative measures, the Sector also drafts the necessary legislation[605] and transmits the bill to the Ministry concerned for processing it to the Council of Ministers and Parliament.[606] An Explanatory Memorandum accompanying all bills, also prepared and signed by the Attorney-General, explains the particular bill's provisions, and that its purpose is Cyprus' compliance with the ECtHR's judgment.

All follow-up relevant to the implementation process and to the supervision carried out by the CoM is done by the Human Rights Sector, and usually by the lawyer who has also dealt with the particular individual application. All questions/clarifications required by the CoM are transmitted by the Permanent Representation to the Sector, which does the follow-up and prepares and transmits to the Representation the replies/clarifications, for communication to the CoM.[607]

Attorney-General/Government Agent is also responsible for the payment of just satisfaction. Payment is effected by the Legal Service's Accounts-Department, following internal instructions to it by Counsel from the Human Rights Sector who has been dealing with the corresponding application.[608] The Accounts-Department obtains from the Treasury the relevant cheques and contacts the applicants concerned and/or their counsel for payment. It would appear that where the ECtHR awards damages against the Republic of Cyprus, the Cypriot Government usually pays the award sums in a timely fashion. The same holds true for friendly settlements, where agreement has been reached before the ECtHR.

Court to declare null and void acts, decisions or omissions of the administration is afforded by the Constitution and embraces acts, decisions and omissions contrary to the human rights provisions of the Constitution, and of laws, including the laws ratifying European and United Nations Human Rights Conventions. The Bill has been approved by the Council of Ministers and has been presented in Parliament in October 2004 (Demetriades, A., Cariolou, L., Christodoulidou, T., "Report on the Situation of Fundamental Rights in Cyprus in 2004", E.U. Network of Independent Experts on Fundamental Rights, Reference: CFR-CDF/CY/2004 , 03/01/2005, p.91).

[605] See the example of *Aziz v. Cyprus,* No. 69949/01, 22/06/2004.

[606] In Cyprus all bills emanating from the Government are tabled in Parliament by the competent Ministry following their approval by the Council of Ministers.

[607] DH-PR(2006)007rev Bil, CDDH, 27 November 2006.

[608] *Ibid.*

This thesis argues that the Human Rights Sector has a crucial role to play in the process of the effective implementation of the ECHR and the ECtHR's judgments in the domestic legal order of Cyprus and thus carries serious responsibilities. Although the establishment of the Sector is a forward step this mechanism needs to be strengthened. A more structured approach needs to be adopted so that measures such as those taken in response to the case of *Hirst v. United kingdom*[609] (as it will be discussed) are implemented in a more systematic manner. It is submitted that there is a need for centralised monitoring of the ECtHR case-law and consequently for a specific mechanism for monitoring new Strasbourg case-law concerning other member states.

The Sector is, at the time of writing, staffed by one person. It is evident that a department with such a broad and varied mandate requires more resources. It is difficult to imagine that this department carry out its mission effectively and sufficiently with such limited resources. Moreover, the findings of this thesis show that as far as the implementation of judgments is concerned the Sector has yet to be faced with a truly challenging case such as *Modinos*.

As discussed earlier the findings of violation against Cyprus have in the majority of cases led to the adoption of legislative measures for preventing new similar violations. For instance, amendment of the Criminal Code to abolish discrimination in penal provisions concerning homosexuals, amendments to the Rent Control Law to afford protection from eviction to tenants of homes owned by the Government and not only to tenants of privately owned homes, introduction of legislation to enable the celebration of civil marriage of Turkish Cypriots in the free areas of the Republic (friendly settlement), legislation which enables Turkish Cypriots to exercise the right to vote in all elections.

It should be noted that following the adoption of the relevant general measures by the Cypriot Government there have been no further similar applications to the ECtHR. This thesis argues that the adoption of the appropriate general measures by member states is essential to lighten the caseload of the ECtHR as it prevents systemic

[609] *Hirst v. The United Kingdom,* No. 74025/01, 06/10/2005.

problems from arising and puts a stop to the generation of any "repetitive" or "clone" cases. Though it appears that it is generally the intent of the Cypriot Government to take appropriate remedial action, this has sometimes been done with considerable delay[610] and/or without fully remedying the situation.

4.9 Implementation of the Recommendations referred to in the 2004 Declaration of the CoM

A central aim of this thesis is to analyse the set of the five Recommendations referred to in the 2004 Declaration of the CoM concerning various measures, underpinned by the principle of subsidiarity, to be taken at national level in order to strengthen the domestic implementation of the ECHR. As already outlined in Chapter 2, these Recommendations endeavour to prevent violations at the national level and improve domestic remedies, including, requiring states to ensure continuous screening of draft and existing legislation and practice in light of the ECHR and the ECtHR case-law; and also by requiring states to increase provision of information, awareness-raising, training and education in the field of human rights. In this section the chapter engages (as in the chapter on Turkey) in a detail analysis of the implementation of these Recommendations in the Cypriot legal order. More specifically this section seeks to evaluate the effectiveness of these Recommendations and to critically assess their implementation at national level.

4.9.1 Recommendation Rec(2004)4

The European Convention on Human Rights in university education and professional training

It is imperative that the ECHR is generally known in the domestic legal order of member states. In Cyprus, the acceptance of the right of individual petition in 1989 has clearly been an effective incentive for both judges and the Government to devote more attention to the ECHR. However, neither Cypriot lawyers nor private citizens were really aware of this new international remedy. It should be noted that the

[610] See the example of *Modinos v. Cyprus*, No. 15070/89, 22/04/1993.

judgment in *Loizidou v. Turkey* was the decisive factor in making the ECHR well known in Cyprus. The publicity given to the successful application of Mrs Loizidou against Turkey has had a "snowball effect" among the legal profession and the public in general. This encouraged, to a certain degree, litigants to argue more often and more accurately on the basis of the ECHR.

However, a significant problem in Cyprus is the lack of basic familiarity with procedures for protecting fundamental rights and freedoms guaranteed by the ECHR, in professional milieus, state institutions and society in general. There is a certain consensus[611] that the ECHR is not used as much as it could be, partly because of persistent ignorance on the part of litigants, lawyers, and judges.

The ECHR is taught in two private higher-education institutions in Cyprus, as part of the curriculum of other subjects; in Philips College[612] and at Nicosia University.[613] Unfortunately, the ECHR is taught as an optional subject in the relevant institutions. It is matter of great concern that the procedures before the ECtHR and execution mechanisms are not the subject matter of courses in Cyprus.[614] It is imperative that courses on human rights in general and specifically on the ECHR should be introduced at university level. The ECHR should also be taught in the context of courses domestic law so that law students are made aware that the ECHR is relevant to the domestic law and learning about ECHR should form part of the obligatory curriculum at the Law Faculty of the University. In addition students should be able to

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[611] Interviews with Cypriot experts Korinna Georgiades, Dr Christos Clerides, Achilleas Demetriades.

[612] Human Rights and Civil Liberties I seeks to enable the student to understand the main human rights treaties and the procedures for implementing them in the United Nations. Specific attention is given to the ECHR. The course adopts a critical and contextual approach to the subject of civil liberties and human rights. Human Rights and Civil Liberties II seeks to enable the student to build on the understanding acquired in Human Rights and Civil Liberties I and to see the issues from a wider, international aspect. Available at: http://www.philips.ac.cy/cgibin/hweb?-A=843&-V=degrees

[613] Human Rights Law I seeks "to place the development of human rights law, internationally, within its philosophical context. The early attempts by the League of Nations to codify a limited, albeit, set of standards pertaining to human rights with the unleashing of an entire jurisprudence under the United Nations system will be examined. However, human right is not exclusive to the UN, nor does it rely, necessarily on a "Eurocentric" state/condition. Therefore, the impact of human rights regionally, will also be emphasized". Human Rights Law II seeks to "examine the role of international/regional institutions in "institutionalizing" human rights. However, sight should not be lost of the importance of individual state actors. Multi-state institutions can only provide a safeguard/monitor, but the state itself has the facility to ensure that the human rights axiom is smoothed. States have the opportunity to be protectors and enforcers of human rights, but often fail in this regard. The course will conclude with examination of some topical issues in modern human rights jurisprudence". Available at: http://www.intercol.edu/nqcontent.cfm?a_id=530.

[614] DH-PR (2006)004 rev Bil.

choose human rights as their special subject in all faculties, or to have the opportunity to write a dissertation in that field.

Furthermore, there is no training of lawyers for acquainting them with the ECHR and its control mechanisms, and no training for trainers of lawyers.[615] This seems to be a common problem at European level, since most member states do not appear to feel the need to train specialised trainers.[616] While there is an increasing tendency to set up specialised human rights research centres and university chairs (which in Cyprus do not exist either), teaching on the ECHR system still relies frequently on generalist teachers, even for teaching courses for target sectors such as police officers and prison staff[617]. It seems that in Cyprus there is insufficient knowledge about the ECHR and the Strasbourg Court's case-law and the ensuing inability to apply this case-law in dealing with specific cases.

The ECHR should be considered as a subsidiary instrument, after the Constitution, in the protection of individual rights. There is no doubt that judges are the main actors in the implementation of the ECHR in Cypriot law; they frame national decisions so as to prevent adverse judgments by the ECtHR and generally contribute to the judicial dialogue that is a certain sign of successful domestic implementation. Judges also contribute to the diffusion of knowledge pertaining not only to the ECHR but also to the ECtHR's judgments. Nevertheless, the law of the ECHR has to date commonly remained outside the training, which lawyers undertake to become judges. Nor are ECHR issues part of a systematic and nation-wide professional training for judges. Hence Cypriot judges tend to refer more to the national case-law than the case-law of the ECtHR[618] and remain generally reluctant to base their reasoning on international law and on the ECHR in particular.

As it is the judges of at appeal level and above that concern themselves with the impact of the ECHR on the Cypriot legal order, inevitably judges at lower level are less accustomed to applying the ECHR. And it is probably true to state that they are

[615] DH-PR (2006)004 rev Bil.
[616] CDDH(2006)008 Addendum I, p.32.
[617] CDDH(2006)008 Addendum I, p.32.
[618] Dr Christos Clerides, Practising lawyer in Cyprus, 8th October 2006, Nicosia, interview by author, recording, Nicosia, Cyprus.

not familiar with the spirit of the ECHR and the case-law of the ECtHR. There is no doubt that the ECHR provisions should be attended to more closely than they currently are when a simple reference or a superficial indication of the relevant case-law seems to suffice. The text of the ECHR and the ECtHR's case-law should become standard tools of the Cypriot judge.

The importance of systematic training of judges and lawyers for effective implementation of the ECHR was stressed in the Recommendation Rec(2004)4 of the CoM in which the states were called upon to "ascertain that adequate university education and professional training concerning the Convention..".

Furthermore, the implementation of the ECHR by the judiciary cannot be hindered by insufficient access of national courts to the ECtHR's case-law. While the Strasbourg judgments are instantly available through Internet and the more important admissibility decisions are also available within a few days of their adoption, they exist only in the ECtHR's official languages namely English and French. As such they are available to a restricted section of the Cypriot judicial profession. Consequently judges are left to their own devices in finding relevant literature. The case-law of the ECtHR in the official languages of the CoE is certainly not sufficient. In Cyprus, despite the fact that the English language is commonly spoken there is an immediate priority to make this case-law accessible as widely as possible in the Greek language. The fact that some judgments are now available only in French will make invocation of this case-law more difficult or even impossible, since many Cypriot judges do not read French. It has been pointed out that the judges' attentiveness to ECtHR judgments is of paramount significance since it contributes to the achievement of one of the greatest aims of the CoE, that of bringing European legal systems closer together.[619]

Lawyers are directly involved in the implementation of the ECHR in their participation in the ECHR system, by bringing complaints to the ECtHR, and framing the legal arguments that assist the court in its decision-making. Therefore, an important role in the process of society's "familiarisation" with the ECHR falls to

[619] Meriggiola, E., "Italy", in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, p.479.

lawyers who must learn to use the ECHR in their daily work. It must be said that the use of the ECHR in Cyprus remains in the hands of a relatively small number of advocates who are familiar with the ECHR system and have knowledge/expertise of the ECtHR case-law.[620] The ECHR's real legal value before domestic courts depends to a large extent on the legal practitioner, his determination and expertise in formulating appropriate arguments based on substantive norms found in the ECHR. An appropriate assessment by competent practicing lawyers as to whether a court decision or conducted procedures violate the ECHR enables potential applicants to undertake an appropriate decision in relation to an application.[621] Furthermore, when lawyers advance sensible ECHR related arguments a court will have to answer them. On the other hand, when they invoke the ECHR without any foundation courts obviously will be annoyed. Another (potentially) important role of the practising lawyer is his ability to plead a case before the Strasbourg organs as a representative of an applicant. This is a relatively new and difficult task for the Bar, which is just as unprepared to "perform" in Strasbourg, as are lawyers in general.

In this context, it is recommended that an initiative should be undertaken by the Cyprus Bar Association and the Legal Council to introduce the teaching of the ECHR and the ECtHR case-law as part of essential legal training. The objective of this course would be to facilitate new advocates in gaining a basic understanding of key human rights issues/ECHR issues (arising from law, policy and practice), so that they can effectively integrate human rights in their daily work. In addition, the initiation of a special project to prepare lawyers to appear as applicants' representatives in Strasbourg should also be considered especially as the vast majority of the Cypriot applications submitted to the ECtHR are prepared by lawyers.[622] It would appear that Cypriot lawyers have difficulty in appreciating not only the necessity to exhaust domestic remedies but also the need to afford the opportunity to national authorities to respond to allegations. For instance, in many cases which are declared inadmissible, the applicants' complaints are based on the initial grounds of appeal before the

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[620] Dr Christos Clerides, Practising lawyer in Cyprus, 8th October 2006, Nicosia, interview by author, recording, Nicosia, Cyprus.

[621] Wardynski, T., "Education in Human Rights as an Important Element of Reform of the European Human Rights Protection System", in Machinska, H.,M., (ed) "The ECtHR, Agenda for the 21st Century", Warsaw, 2006, p.70.

[622] Korinna Georgiades, Registry of the ECtHR, lawyer, 30th November 2006, Strasbourg, interview by author, recording, ECtHR, Strasbourg, France.

Supreme Court which were withdrawn before due consideration could be given to them.[623]

Training in human rights is incorporated in the curriculum of the Cyprus Police Academy, where educational programmes, lectures and seminars on human rights are also organised. The Police Human Rights Office, (established in 1998) also organises lectures on human rights, and has translated into Greek and circulated to all members of the police and to the public relevant CoE Editions, such as the "Discussion Tools-Police and Human Rights Manual", the "Pamphlet for the Police Human Rights and their Protection under International law" and the "European Code of Police Ethics, Recommendation (2001) 10 adopted by the CoM on 19 September 2001". Immigration Police officers undergo initial and ongoing training with regard to asylum/refugee issues, and the application of relevant ECHR's and domestic legislation. Even though all of these developments constitute steps in the right direction it should not be forgotten that the need for effective education requires systematic training. It would appear that the training in police is often provided only on an occasional basis by means of short-term activities (seminars-lectures) and that there are no tests to asses what the participants have learnt.

Human rights NGOs can play a vital role in the protection of human rights within the domestic legal orders of the member states of the ECHR. They can help in promoting and explaining the ECHR, providing training, organising conferences and seminars, preparing manuals and publications. Their educational activities can have a significant impact on the national process of teaching the society about the rights and instruments of their protection. In addition, NGOs have a role to play in professional counseling. They can help improve the application of domestic remedies, leading to the reduction of applications lodged with the ECtHR. This could be achieved by providing advice to people who feel aggrieved, inform them about the conditions of admissibility of cases, the scope of the ECHR and show them arguments against lodging the application. Marek Nowicki argues that: "it is particularly in this sphere that well prepared local organisations can be a valuable strategic partner for the CoE".[624]

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[623] *Ibid.*

[624] Nowicki, M,, A., "The Role of Non-Governmental Organisations in Proceedings Before the ECtHR" in Machinska, H.,M., (ed) "The ECtHR, Agenda for the 21st Century", Warsaw, 2006, p.70.

Unfortunately, there is a marked absence of NGOs[625] seriously engaging in human rights work or a human rights research institute, working on issues relating to the ECHR in Cyprus. The author notes that there is an urgent need for the gap to be filled, thus providing the much-needed awareness raising activities, legal assistance to individuals in need and a voice for Cypriot civil society at the regional and international *fora*. Additionally, NGOs are of paramount significance in assisting the government in ensuring that human rights are safeguarded at national level.

4.9.2 Recommendation Rec(2002)13

Publication and dissemination in the Member States of the text of the European Convention on Human Rights and of the case-law of the ECtHR

The modes of the implementation of the ECHR in the domestic legal order are at least partly related to the ways in which knowledge about the ECHR, and more particularly the ECtHR's judgments are disseminated and understood. This broader knowledge and understanding are important, as they have an influence on the incentives and disincentives facing national officials when they consider how to respond to the challenges of the ECHR regime.

It is evident that the study of the text of the ECHR does not suffice and to appreciate its (potentially) profound significance the judgments of the ECtHR must be regularly; it is this very case-law that gives the ECHR its nature of a "living instrument", with an ever-changing content and re-adjustment to present day conditions.[626]

It would appear that in Cyprus the ECtHR's case-law concerning other states is not disseminated to the public. However, the Human Rights Sector communicates to the Supreme Court, and to Ministries/Government Departments concerned, paper copies or press releases of judgments, which constitute new developments or established

[625] The only active NGO which, at the time of writing, exists is The International Association for the Protection of Human Rights in Cyprus (see www.humanrightscyprus.org). However, its main activity seems to be the organisation of an annual conference on issues relating to the ECHR.

[626] Nowicki, M., & Drzemczewski, A., "The Impact of the ECHR in Poland: a Stock-taking After Three Years", *European Human Rights Law Review*, 1996, Vol. 3, p.281.

case-law.[627] In appropriate cases, the Sector also requests by the same letter, information from the Ministry/Government Department concerned, as to applicable administrative practice/legislation in the matter covered by the judgment, for ascertaining whether this is in conformity with the judgment, and advising them accordingly. This practice covers judgments in the light of which domestic administrative practice/legislation may need to be reviewed. Press releases of judgments which may be of particular interest to the legal profession are also communicated to the Cyprus Bar Association.

On the other hand, in cases of judgments against Cyprus, paper copies of judgments are always communicated by the Human Rights Sector to the Ministry/Government Department concerned. Such Ministry/Government Department is at the same time extensively advised on the measures, which need to be adopted concerning execution[628].

The translation into Greek of judgments against Cyprus and also judgments and decisions, which constitute case-law developments, is assigned by the Human Rights Sector to private translators.[629] The translations are published in the Law Journal of the Cyprus Bar Association. The Law Journal is published by the Bar Association four-monthly, and has a wide circulation in the legal community of Cyprus.[630] It contains legal articles and important domestic and other judgments with commentaries by practicing lawyers and academics. It should be noted that all Supreme Court judgments are published in Law Reports. Civil, criminal, and administrative law judgments are published in separate issues of the Law Reports. However, there is no separate issue concerning judgments implementing the ECHR, nor are there any other public or private publications of such judgments.

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[627] The letter transmitting the press release/judgment gives a short account of the facts and rational of the judgment.

[628] Paper copies are in addition distributed to the Registrar of the Supreme Court, the Ministries of Foreign Affairs and Justice, the President of the Cyprus Bar Association, the Ombudsman, and the chairmen of the Human Rights and Legal Affairs Parliamentary Committees. The communication letters again give a short account of the facts and basic rational of the judgment.

[629] The completion of translation of judgments against Cyprus, which is assigned to private translators by the Sector, takes about one to two months.

[630] Therefore the time of publication of a judgment varies depending on how near to publication of the next issue is the time of communication of the judgment to the Association.

Unfortunately, there is currently no co-operation between Cyprus and other states for translating and disseminating the ECtHR's case-law in a common language although this could be easily done in collaboration with Greece. It would appear that Cyprus disseminates to public authorities, (and sometimes translates) only those judgments concerning other states, which may have a bearing on its own domestic administrative practice and/or legislation.

Paper copies of judgments against Cyprus are disseminated (by counsel of the Human Rights Sector who have dealt with the case) to the Supreme Court of Cyprus, the Ministry of Justice, the President of the Cyprus Bar Association, the Ombudsman, the Chairmen of the Human Rights and Legal Affairs parliamentary committees, and the Ministry of Foreign Affairs. In the letters transmitting the judgments a short account is given of the facts of the case and basic rational of the judgment. Within the same time-span paper copies are also transmitted by separate letter to the Ministry/Government Department concerned. In the letter transmitting the judgment, the Ministry/Government Department is extensively advised on the measures, which need to be adopted.

It is for the Human Rights Sector to trace, discern, and communicate those judgments against other States, which may be relevant to domestic administrative practice and legislation, or in the light of which it is possible that administrative practice may need to be reviewed on the advice of the Attorney-General. In the light of the judgment of the ECtHR in the case of *Hirst v The United Kingdom,*[631] the Electoral Law of Cyprus was amended following legal advice from the Sector on behalf of the Attorney-General, so as to give the right to prisoners to vote in elections (parliamentary, presidential and local elections).[632] The Law was enacted before the Parliamentary elections held in May 2006 and prisoners were able to vote under the amended law.

Doctrinal scholarship is also relevant with to the domestic implementation of the ECHR, to the extent that national officials and judges in particular consult it, and to the extent that lawyers and students learn from it. However, the Cypriot scholarship on ECHR seems to be relatively poor. Unfortunately, it is difficult for the legal

[631] *Hirst v. The United Kingdom,* No. 74025/01, 06/10/2005.
[632] DH-PR (2006)004 rev Bil.

community to find serious analyses of Cypriot law and practice *vis-à-vis* the rights and freedoms guaranteed in the ECHR, as interpreted by the ECtHR.[633] The only Cypriot legal journal is the Law Journal of the Cyprus Bar Association which very seldom publishes articles on human rights and the ECHR, although its impact is considerable within the Cypriot legal community. It must be also added that no legal review has embarked upon a systematic presentation of the ECHR and analysis of its impact in the Cypriot legal order.

It is interesting to note that the official translations are almost exclusively translations of judgments. While, admittedly, judgments as a final judicial product of the ECtHR's work are what the ECtHR essentially is there for, a systematic omission of translation of admissibility decisions in Cypriot cases- both those declaring cases inadmissible and admissible- is to be deplored. There is no doubt that important lessons can be drawn from both admissible and inadmissible cases. For the former, knowledge that the ECtHR found an issue arising under the ECHR in a given set of circumstances might serve as a warning sign for judges, or other public officials, that in similar circumstances a similar treatment/behaviour meted out to a party to a case might at least serve the purpose of informing public officials why the ECtHR considered that a given case does not raise a human rights issue. From a pedagogical point of view this information could also be valuable.

Besides ECtHR's judgments, one should note the difficulties to access and luck of visibility of important texts issued by the CoM in the course of its execution supervision; these may explain the delays experienced in retrospective compliance with the ECtHR's case-law. Finally, it is imperative that national remedial measures, whether legislative, judicial or practical, should be made systematically available to victims of infringements, but also to the general public.

The media are undoubtedly a crucial link between the judiciary and the ECtHR on the one hand and the Cypriot public, on the other. As a result, they have an important role to play in the implementation of the ECHR and in particular as a catalyst of what

[633] Mention can be made to Loizou, N., A., "The Constitution of the Republic of Cyprus" in Greek (Σύνταγμα Κυπριακής Δημοκρατίας),Nicosia, Cyprus, 2001.

Cypriot authorities are expected to do in reaction to the ECtHR's judgments. It is worth mentioning that the media coverage of new ECtHR's judgments has been irregular. Cases pertaining to Cyprus and Turkey are usually covered in an often inaccurate way. However, cases pertaining to other European countries are not usually reported.

Finally, it should be pointed out that the ECHR is a separate convention, with a separate Court, set up by the "CoE" that has nothing to do with the similarly-named EU bodies (the "Council of the European Union" and the "European Council"). Although the ECHR and the ECtHR, are not formally connected to the EU in any way, the Cypriot press and media constantly confuse the two!

4.9.3 Recommendation Rec(2004)5

on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR

According to Recommendation Rec(2004)5 member states should have mechanisms for the systematic verification of ECHR compatibility, which should also ensure adequate follow-up in the form of prompt modification of laws and administrative practices in order to make them compatible with the ECHR.

In Cyprus Ministers and Members of the House of Representatives introduce bills and Government Bills[634] are examined by the office of the Attorney-General. They are vetted as to the conformity and consistency with the Constitution and international conventions including the ECHR and other human rights instruments ratified by virtue of Article 169 of the Constitution. Furthermore, every bill following its introduction in the House of Representatives is referred to in the first instance to the relevant/appropriate Parliamentary Committee. Bills are also referred to the Legal Committee of the House. The conformity with the human rights conventions is the responsibility of the Legal Committee of the House.

[634] All laws/regulations emanating from the Government are either drafted or vetted by counsel of the Republic's Legal Service headed by the Attorney-General. Following their drafting/vetting, bills are introduced in parliament by the Ministry concerned after approval by the Council of Ministers.

A permanent Human Rights Committee of the House was set up responsible for observing the prevention of human rights violations by the executive, administrative and law enforcement organs of the State. It examines the conformity of bills with the ECHR and other conventions or human rights international instruments. It takes, if required, the necessary action for harmonising bills with the ECHR.

According to Article 140 of the Constitution the President or the Vice-President of the Republic, or the two jointly, may, at any time prior the promulgation of any law or decision of the House of Representatives, refer to the Supreme Constitutional Court[635] for its opinion on the question as to whether such law or decision or any specified provision thereof is repugnant to or inconsistent with any provision of the Constitution. In case the Supreme Court is of the opinion that such law or decision or any provision thereof is repugnant to or inconsistent with any provision of the Constitution such law or decision or such provision is not promulgated by the President.

Furthermore, according to Article 144 of the Constitution, any party to any judicial proceedings may raise the question of the unconstitutionality of any law or decision, or of any provision Thereupon the court must reserve the question for the decision of the Supreme Constitutional Court and stay further proceedings until the question has been determined. Since 1964,[636] however, such issues of unconstitutionality of laws are determined in the first instance by the trial court concerned as questions of law. The principles governing the constitutional review[637] by the Supreme Court can be

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[635] After 1964, Administration of Justice Law (Law 33/1964), the Supreme Court.
[636] See Administration of Justice Law (Law 33/1964).
[637] These principles can be summarised as follows: (a) a rule of precautionary nature is that no act of legislation will be declared void except in a very clear case or unless the act is unconstitutional beyond alt reasonable doubt. In other words a law is presumed to be constitutional until proved otherwise "beyond reasonable doubt"; (b) another maxim of constitutional interpretation is that the courts are concerned only with the constitutionality of legislation and not with its motives, policy or wisdom, or with its concurrence with natural justice, fundamental principles of government or spirit of the Constitution; (c) it is a cardinal principle that if at all possible the courts will construe the statute so as to bring it within the law of the Constitution; (d) the judicial power does not extend to the determination of abstract questions viz the courts will not decide questions of a constitutional nature unless absolutely necessary to a decision of the case; (e) in cases involving statutes, parts of which are valid and other parts invalid the courts will separate the valid from the invalid and throw out only the latter unless such parts are inextricably connected.

found in the leading case of *The Board for the Registration of Architects and Civil Engineers v. Christodoulos Kyriakides*.[638]

Following the May 2004 Recommendations, the Attorney-General has set up the Human Rights Sector within the legal service of the Republic. The Sector is, among others, responsible for the implementation of these Recommendations. It also carries out the necessary follow up, on measures for the implementation of any other recommendations of the CoM and the PACE, and of human rights committees/bodies operating within the CoE or other international organisations.[639]

It is worth mentioning that the powers exercised by the Attorney-General in his dual capacity both as the legal adviser of the Republic and as Government Agent, and the legal service's operation at the centre of the government machinery, should enable the Human Rights Sector to act effectively and promptly concerning the implementation of the ECHR and the ECtHR's case-law at domestic level. Hence, it could be said that the establishment of such a Sector within the legal service of the Republic is a positive development as it could, by virtue of its integration within the government legal structure, play a crucial role in the efforts for more effective domestic implementation of the ECHR in the legal order of Cyprus.

A number of the functions exercised by the Attorney-General as the Republic's legal adviser, are of particular relevance to the implementation of Recommendation (2004)5[640] of the CoM for the compatibility of draft legislation or existing laws with the ECHR. These include the giving of legal advice to Ministries and Government Departments on the legality of proposed or already adopted action/measures and

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[638] The Board for the Registration of Architects and Civil Engineers v Christodoulos Kyriakides, (1966)3 CLR 640, pp. 654-655.

[639] A Bill prepared by the Human Rights Sector makes all organs, authorities and persons in the Republic liable to criminal sanctions for contempt of court, when they do not fulfil their constitutional obligation to give effect and act upon judgments of the Supreme Court. The jurisdiction of the Supreme Court to declare null and void acts, decisions or omissions of the administration is afforded by the Constitution and embraces acts, decisions and omissions contrary to the human rights provisions of the Constitution, and of laws, including the laws ratifying European and United Nations Human Rights Conventions. The Bill has been approved by the Council of Ministers and has been presented in Parliament in October 2004 (Demetriades, A., Cariolou, L., Christodoulidou, T., "Report on the Situation of Fundamental Rights in Cyprus in 2004", E.U. Network of Independent Experts on Fundamental Rights, Reference: CFR-CDF/CY/2004 , 03/01/2005, p.91).

[640] Recommendation Rec(2004)5, Verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR.

administrative practices. Such advice invariably entail the examination of issues in the light of domestic and ECtHR's jurisprudence, treaties and conventions ratified by Cyprus as integrated in the domestic legal order.

Of particular relevance to the Human Rights Sector and the implementation of the above Recommendation is also the fact that in Cyprus all legislation proposed by the Government is either drafted or vetted by counsel of the legal service.[641] Therefore, it could be said that the compatibility of all proposed legislation with the Constitution and Cyprus' international obligations (including the ECHR and the ECtHR's case-law) falls under the supervision of the Attorney-General as the Republic's legal adviser and the Law Office/legal service of the Republic.[642] Furthermore, parliamentary committees regularly ask the legal service for advice concerning private bills introduced by Members of the House. Counsel from the legal service attends and participates in parliamentary committees' discussions of all bills, and there is close cooperation between the legal service and the committees. It is not unusual for private bills introduced in Parliament by Members of the House to be redrafted by counsel from the legal service to ensure compatibility as above, following communication to the committee of counsel's legal advice/opinion.

Pursuant to Article 146 of the Constitution, the Supreme Court has the power to declare decisions, acts, and omissions of the administration null and void if it finds them unconstitutional or illegal or if it considers that they have been taken in excess or abuse of power, provided an application is lodged with the Supreme Court.[643] Therefore, the Supreme Court can make declarations of nullity when decisions, acts or omissions of the administration contravene human rights provisions in the Constitution, the ECHR or other laws. The Supreme Court's decisions are binding for all bodies, authorities and courts of the Republic and must be given effect to and acted upon by the administration.

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[641] All bills are either tabled in Parliament by Ministries following approval by the Council of Ministers, or are private bills introduced in the House by members of Parliament.
[642] Legislation drafted/vetted as above, is always accompanied by a short explanatory memorandum signed by the Attorney-General, setting out its aim and giving a brief summary of its basic provisions.
[643] Article 146 of the Constitution.

Concerning administrative practice, the Human Rights Sector advises Ministries/Departments on behalf of the Attorney-General, whether an existing or proposed mode of action is compatible with the ECHR and the ECtHR's case-law, and on how they can act without violating the ECHR. Legal advice is given by the Sector (concerning both administrative practice and the compatibility of existing and draft laws)[644] either in response to a request for legal advice by the administration, or on the Sector's own initiative. In the latter case, the legal advice follows information obtained from the administration concerning their administrative practice on a matter covered by the case-law of the ECtHR which is communicated to the administration for this purpose by the Sector.

This thesis shows that in Cyprus there are mechanisms in place designed to ensure the compatibility of laws and administrative practice with the ECHR and the Strasbourg Court's case-law. There are "filters" such as the office of Attorney-General and in particular the Human Rights Sector that have the ability and capacity to carry out this task successfully. Parliamentary committees also play an important role in "Strasbourg-proofing". In addition, the compatibility of draft legislation or existing laws with the Constitution, and consequently with the ECHR, is assessed by the domestic courts according to Articles 140 and 144 of the Constitution respectively.

4.9.4 Recommendation Rec(2000)2

on the re-examination or reopening of certain cases at domestic level following judgments of the ECtHR

This research shows that the re-opening of proceedings[645] the in Cyprus has not yet been adequately considered. There was no judgment of the ECtHR against Cyprus to

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[644] Specifically, the sector has given advice to the administration concerning compatibility with the ECHR of the monitoring of telephone calls of prisoners, installing cameras in prison cells, registering changes in birth certificates and other public documents following sex-change operations, the right of adopted children to information concerning their natural parents, the right to a lawyer of persons arrested, and the right of societies to be registered under relevant legislation (DH-PR(2006)004 rev Bil).

[645] The difference in "reopening" and "re-examination" of cases has been explained as follows in Explanatory Memorandum to Rec(2000)2 on the re-examination or reopening of certain cases at a domestic level following judgments of the ECtHR: "5. As regards the terms, the recommendation uses "re-examination" as the generic term. The term "reopening of proceedings" denotes the reopening of court proceedings, as a specific means of re-examination. Violations of the ECHR may be remedied by

date, necessitating for its implementation the reopening at national level of proceedings in which a final judgment had been issued. Consequently, this issue has not come for examination before domestic courts. There is neither legislation specifically dealing with the issue, nor specific legislation excluding the possibility of such reopening.[646] There is no precedent in Cyprus of proceedings for damages against the State on account of an established violation of the ECHR. Although there is nothing in the domestic legal order to exclude re-examination in the context of such proceedings, the usual course is for the adoption of necessary administrative/legislative measures following advice from the Attorney-General, without institution of proceedings for damages.

Although there is case-law by the Supreme Court of Cyprus to the effect that the Supreme Court cannot set aside a final judgment issued by it as this would be tantamount to a third level appeal jurisdiction not foreseen by the Constitution, there are also dissenting judgments pointing to the opposite direction.[647] The matter remains undetermined and it will have to be dealt with by case-law if a judgment of the

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different measures ranging from administrative re-examination of a case (e.g. granting a residence permit previously refused) to the full reopening of judicial proceedings (e.g. in cases of criminal convictions)". However, as has been noted in the CDDH Progress Report of 2005, para. 21, there has been some confusion in the two concepts on the part of member states. A further explanation is provided in Doc CDDH(2006)008 Addendum I, 07.04.2006, p. 3, entitled *Follow-up on the implementation of the five recommendations*: "For the purposes of the follow-up of the recommendation, re-examination is understood as a re-assessment, normally by the same decision-making body, of the situation which gave rise to a violation of the ECHR, which may also lead to the granting of what was at issue in the original proceedings. Other situations involving *restitutio in integrum* are therefore not included in the present exercise. The same holds true for situations where re-examination is not the main object of the proceedings or where what was originally at stake can no longer be granted but must be replaced with monetary damages. Reopening is reserved for judicial proceedings challenging the validity of an earlier decision qualifying as *res iudicata*."

[646] CDDH(2006)008 Addendum III Bil.

[647] Such a dissenting judgment was issued in 1999 by three Supreme Court Judges in an application for certiorari (*Korellis* Application for Certiorari, No. 53/99) seeking to set aside an appeal judgment of the Supreme court on the ground of apparent lack of impartiality of one of the appeal judges owing to the fact that when he was holding the post of attorney at the Attorney-General's Office, he had taken part in the prosecution process against the applicant. The dissenting judgment of the three judges followed as correct the principles enunciated in the judgment of the House of Lords in the English case of *Ex. P. Pinochet* (No. 2), 1999, 1 ALL ER 577). It is stated in the dissenting judgment that the crux of the matter must the necessity of upholding the rules of natural justice, one of which is trial by an impartial tribunal which is required both by Article 6(1) of the ECHR and also by Article 30(2) of the Cyprus Constitution. According to the dissenting judgment the Supreme Court's jurisdiction to set aside judgments on the ground of lack of impartiality is not limited to judgments of inferior courts, but extends also to its own judgments. It derives authority to do so from the inherent powers with which courts are vested, and which are non-exhaustive. The conclusion reached in the dissenting judgment was that the Supreme Court of Cyprus has inherent jurisdiction to set aside its own judgments if it ascertains that they were reached with the participation of a judge who ought to have been precluded on grounds of apparent lack of impartiality.

ECtHR against Cyprus, necessitates for its implementation the reopening of proceedings. It must also be mentioned that concerning criminal proceedings a sentence can be remitted, suspended, or commuted by the President of the Republic on the recommendation of the Attorney-General, under Article 53 (4) of the Constitution.

Nevertheless, it should be noted that unlike the majority of the member states of the CoE where legislation provides for the possibility for the applicants to request reopening of criminal proceedings following a judgment of the ECtHR, in Cyprus there is no such legislation. It should be noted that compliance with the Recommendation in the area of re-opening has been important. More than a dozen member states have adopted legislation providing for the re-opening of criminal proceedings.[648] It may be concluded that important progress has been achieved in ensuring that member states provide adequate opportunities for re-opening of proceedings.[649] It would, therefore, be recommended that the Republic of Cyprus should pass such legislation since many states have undertaken the necessary reforms without the state having first to execute a specific ECtHR judgment.[650]

Re-examination of cases by the administration following ECtHR judgments involves the Attorney-General advising the administration on measures to be taken to give full effect to the judgment. The Attorney-General/Government Agent advises the administration on both administrative and legislative measures that need to be adopted in execution/enforcement of judgments of the ECtHR against Cyprus. Such advice is invariably acted upon.

Larkos v. Cyprus[651] the only judgment to date, entailing "re-examination" for its enforcement, illustrates how re-examination by the administration on the advice of the Attorney-General/Government Agent can be effected. Following the judgment of the ECtHR the legal service advised the Ministry concerned not to execute the eviction order against the applicant.[652] It also advised all other Government Ministries with

[648] CDDH(2006)008 Addendum I, p.7.
[649] CDDH(2006)008, p.13.
[650] CDDH(2006)008 Addendum I, p.7.
[651] *Larkos v. Cyprus*, No. 29515/95, 18/02/1999.
[652] CDDH(2006)008 Addendum III Bil.

tenants of houses belonging to the Government, to refrain from taking steps for their eviction.[653] This was necessary until the relevant amendment to the law was enacted which when entered into force would afford to all persons renting homes from the Government the same protection from eviction as to other tenants, and would not permit the eviction of those who like the applicant, had eviction orders/proceedings already pending against them at the time of entry into force. The advice was acted upon by the Government so that the legal service the Ministry concerned and other Ministries did not proceed with execution of judgments they had obtained in their favor from domestic courts, or with other eviction steps, so as to give effect to the judgment of the ECtHR.

4.9.5 Recommendation Rec(2004)6

on the improvement of domestic remedies;

It has already been discussed (see Chapter 1) how a particularly high number of applications lodged before the ECtHR alleged that the length of the domestic criminal, civil or administrative court proceedings has exceeded the "reasonable time" stipulated in Article 6 (1) of the ECHR.[654] Delay in the administration of justice seems to be a common phenomenon in most European legal systems.[655] In the CoE Commissioner for Human Rights Report it is observed,[656] that: "the Cypriot judicial system is not unaffected by the problem of delays in the administration of justice.... However it should be acknowledged that the problem has not reached such proportions as to demand a radical reform of the judicial apparatus or of civil and criminal procedure. The measures taken by the Minister of Justice seem adequate in

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[653] *Ibid.*
[654] Evaluation Group Report to the CoM on the ECtHR, 29 September 2001, para.27.
[655] See CDL-AD(2006)036 Or. Engl., "Study on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings", Study No. 316/2004, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 22 December 2006; "Applying and Supervising the ECHR- The Improvement of Domestic Remedies With Particular Emphasis on Cases of Unreasonable Length of Proceedings", Workshop held at the initiative of the Polish Chairship of the CoE's CoM, Directorate General of Human Rights, CoE, 2006.
[656] See also CDL(2006)026, "Study on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings- Replies to Questionnaire", Study No. 316/2004, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 15 February 2007, pp.53-56.

this respect: new posts for judges have just been created and the computer equipment of the courts is being modernised."[657]

Under a Practice Directive[658] issued by the Supreme Court of Cyprus[659] for preventing delays in the determination of a case, and for the conduct of trial without intermission, whenever it is informed either through the Registry of the court in which the case is pending, or by any person interested in its speedy determination, that there is a delay or that there is a possibility of ensuing delay transpiring from arrangements for its determination, or that its trial is not being carried out without intermission as required by Supreme Court Circulars. The Practice Directive covers civil and criminal cases, and assigns to the Registrars of the Supreme Court the responsibility for the follow up on cases and for keeping the Supreme Court informed.

In a number of cases pending before the ECtHR concerning the length of civil proceedings, and the availability of an effective domestic remedy under Article 13, the applicants lodged their application without first instituting civil proceedings at domestic level, and the Government has raised the issue of non-exhaustion of domestic remedies relying on the judgment of the Supreme Court in the case of *Yiallourou v. Evgenios Nicolaou.*[660] The Government also contended since the adoption of the above judgment a number of persons had filed civil actions against the Republic claiming damages for human rights violations; they referred to a civil action[661] pending before the District Court of Nicosia, in which the plaintiffs had complained of a violation of their right to a fair hearing due to the protracted length of proceedings under Articles 30 of the Cypriot Constitution and 6 (1) of the ECHR.[662]

However, the ECtHR did not accept the position of the Cypriot Government and (January 2006) in 8 length of proceedings cases against Cyprus it found violations of

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[657] Report by Mr Alvaro Gil-Robles, The Commissioner for human rights, on his visit to Cyprus, 25 - 29 June 2003, to the attention of the CoM and of the Parliamentary Assembly, CommDH(2004)2, Strasbourg, 12/02/2004, para.6.
[658] Directive No. 88, Supreme Court of Cyprus, Nicosia, 23rd July 2001.
[659] The Supreme Court may issue such directions as it deems fit.
[660] *Yiallourou v. Evgenios Nicolaou* (8 May 2001, civil action No. 9931)
[661] Civil action No. 3216/02.
[662] *Paroutis v. Cyprus*, No 20435/02, 19/01/2006, para.22.

article 6 of ECHR,[663] in two of them[664] also found a violation of Article 13. The ECtHR also decided in all these cases that the applications could not be dismissed for non-exhaustion of domestic remedies.

In *Clerides & Kynigos v. Cyprus* the ECtHR noted that: "although the examples cited by the Government illustrate the possibility of recourse before the domestic courts in respect of allegations concerning violations of rights protected under the Cypriot Constitution and the Convention, they do not indicate whether the applicants in the present case could in reality obtain relief – either preventive or compensatory – by having such recourse in respect of his length complaint. Furthermore, the Government have not made reference to specific, established case-law on the availability of adequate damages for delays already suffered and their consequences, or on the possibility of such an action being preventative of further delay (...). In these circumstances, the Court considers that the Government have failed to show that an effective domestic remedy was available to the applicants in respect of the length of the domestic proceedings. There has accordingly been a breach of Article 13."[665]

Consequently, the Attorney-General advised the administration that legislation must be enacted for providing an effective domestic remedy specifically for length of proceedings cases. This legislation is, at the time of writing, being prepared by the Human Rights Sector. At the same time the Government is proceeding to settle the length of proceeding cases before the ECtHR. It is worth mentioning that friendly settlements were reached between the parties in 16 length of proceedings cases which concerned Cyprus in 2006.[666]

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[663] In cases of *Cichowicz v. Cyprus*, No. 6470/02, 19/01/2006, *Papakokkinou v. Cyprus*, No. 20429, 19/10/2006, *Paroutis v. Cyprus*, No 20435/02, 19/01/2006, *Tsaggaris v. Cyprus*, No. 213222/02, 19/01/2006, *Josefides v. Cyprus*, No. 2647/02, 19/01/2006, *Kyriakidis and Kyriakidou*, No. 2669/02, 19/01/2006, *Clerides & Kynigos v. Cyprus*, No. 35128/02, 19/01/2006 and *Waldner v. Cyprus*, No. 38775/02, 19/01/2006.

[664] In cases of *Paroutis v. Cyprus*, No 20435/02, 19/01/2006, *Clerides & Kynigos v Cyprus*, No. 35128/02, 19/01/2006.

[665] *Clerides & Kynigos v. Cyprus*, No. 35128/02, 19/01/2006, para.32-33.

[666] In cases of *Solomonides & Co. Ltd v. Cyprus*, No. 28049/03, 04/05/2006, *Clerides v. Cyprus*, No. 30350/03, 04/05/2006, *Pancyprian Insurance Co. Ltd v. Cyprus*, No. 1615/04, 04/05/2006, *Michaelides v. Cyprus*, No. 11138/04, 04/05/2006, *Sergidou v. Cyprus*, No. 28064/03, 23/05/2006, *Nikolaou v. Cyprus*, No. 10240/03, 08/06/2006, *Riga & Kapnoulla v. Cyprus*, No. 24623/03, 08/06/2006, *Christophi v. Cyprus*, No. 24612/03, 15/06/2006, *Official Receiver and Provisional Liquator of Loucos Trading Co Ltd and Others v. Cyprus*, No. 40766/2005, 11/07/2006, *Georgiades v. Cyprus*, No. 30504/03, 29/06/2006, *Genemp Trading Ltd v. Cyprus*, No. 35150/02, 29/06/2006, *Indjirjian v. Cyprus*, No. 37806/04, 29/06/2006, *Official Receiver and Provisional Liquator of Loucos Trading Co Ltd and*

It is appropriate to note that the Supreme Court of Cyprus recognised that delays in hearings of criminal cases constitute a mitigating factor, which may reduce the prison sentence imposed.[667] Additionally, when there are delays in the hearing of criminal cases, the trial may be discontinued, but only as an exceptional measure and only when the interest of justice so requires.[668]

4.10 Conclusion

This chapter analytically discussed the issue of the domestic implementation of the ECHR in the legal order of the Republic of Cyprus as well as critically evaluated the response of the Republic to the May 2004 Recommendations.

Following the ratification of the ECHR in Cyprus it forms part of the law of the Republic and is superior to all municipal law subject to the provisions of the Constitution. An overview of the case-law of the Cypriot Supreme Court shows that in Cyprus the ECHR and its interpretation by the ECtHR are in general known and accepted. In particular, the ECHR has influenced legislation and judicial decisions, but it is also a framework for the administrative authorities.

The Supreme Court has frequently applied the jurisprudence of the ECHR as a means of interpretation of the rights protected in the Constitution and has on a number of occasions discussed and adhered to the ECHR's jurisprudence with great loyalty. Hence, it can be argued that the ECHR constitutes an important part of Cypriot Constitutional law and a significant parameter of the domestic legal order.

The findings of violation by the ECtHR against Cyprus have to date in the majority of cases led to the adoption of legislative measures aimed at preventing further similar violations. In each of the cases where there was a violation, the Cypriot Government

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Others v. Cyprus, No. 22491/05, 11/07/2006, *Official Receiver and Provisional Liquator of Loucos Trading Co Ltd and Others v. Cyprus*, No. 19372/05, 11/07/2006, *Ioannou & Paraskevaides v. Cyprus*, No. 9071/05, 21/09/2006, *Pavlou v. Cyprus*, No. 13010/03, 28/09/2006.

[667] See *Demetris Mehris v. Police*, Criminal Appeal No. 67/2005 and 80/2005, 24/03/2005.

[668] See *Attorney-General v. George Gabriel, Andreas Ioannides and George Afxentiou*, Criminal Appeal No. 7691, 12/01/2005, and *Attorney-General v. Costas Meliou Menelaou*, 14/04/2004.

has attempted to give effect to the ECtHR judgment by amending the relevant law or policy. It is appropriate to note that following the adoption of the relevant measures by the Government, there have been no cases of similar violations brought to the ECtHR. The obligation of the member states to take general measures to eliminate the causes of the violation in order to prevent its repetition has been repeatedly emphasised and was one of the crucial aims of the Recommendations.[669]

In trying to implement effectively the Recommendations of 2004, the Government's chief measure was undoubtedly the establishment of the Human Rights Sector within the office of the Attorney-General. However, this move certainly needs to be further strengthened. Furthermore, it should be noted that the Sector cannot be the answer and the panacea for the implementation of all the Recommendations. Although it undoubtedly has a crucial role to play in their implementation it is practically impossible for it to accomplish it alone. The implementation of the relevant Recommendations concerns issues, which touch upon the whole spectrum of society and require the participation of all sectors/factors including, media, universities, Bar Associations, long-term policies, and education. Therefore, the Human Rights Sector cannot be seen as the only "antidote" for the effective implementation in the domestic legal order of Cyprus either.

In conclusion, the ECHR has been influential in the domestic legal order of the Republic of Cyprus. It forms part of the Constitutional law of the country and it is taken seriously into account by the domestic courts. With reference to the Recommendations of 2004 there have been serious attempts in order to implement them.

[669] See Recommendation (2004)6 of the CoM to member states on the improvement of domestic remedies.

CHAPTER 4: The domestic implementation of the ECHR in the legal order of Turkey

"The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy".

Martin Luther King

5.1 Introduction

The aim of this chapter is as with the previous one on Cyprus, to assess the implementation of the ECHR in the domestic legal order of Turkey and to critically analyse the response of Turkey to the set of five Recommendations referred to in the 2004 Declaration of the CoM.

This chapter provides a general introduction to the constitutional system of the Turkish Republic; addresses the position of the ECHR within its legal system; and examines the impact of the ECHR on the Turkish domestic legal order and the changes/reforms, which have been made in order to comply with the judgments of the ECtHR.

The remainder of this chapter, as the one on Cyprus, seeks to assess the implementation of the 2004 Recommendations in Turkey. The ways in which Turkey has sought to respond to the Recommendations for improved domestic implementation of the ECHR will be critically evaluated in the final section.

5.2 Historical context and development

Turkey is a constitutional parliamentary democracy with a wide range of human rights, fundamental freedoms, civil liberties and social rights entrenched in the 1962 and the present Constitution of 1982.[670] Turkish law follows the Civil Law tradition of continental Europe with its origin in Roman law, based on statutory or legislative enactments. Following the foundation of the Turkish Republic (1923), Turkey initiated a programme of law reform as part of the Westernisation[671] and modernisation process of the country and thus the basic codes were imported from various European countries, including Switzerland, Germany, France and Italy.[672]

The 1961 Constitution following the 1960 military coup, was a reaction to past events and the majoritarian form of democracy embraced by the 1924 Constitution. It introduced extensive innovations including a Constitutional Court[673] charged with the judicial review of the legislation.[674] The 1961 Constitution was amended seven times during the nineteen years it was in force in response to political and social events. Towards the end of the 1970s, the Turkish political system faced a serious crisis brought about by political polarisation, violence and terrorism. This instability led to the military coup of 12 September 1980 and the establishment of a National Security Council. From the earliest days of its rule, the National Security Council publicly committed itself to the restoration of the democratic system. Thus, a new Constitution was drafted to solve the problems blamed on the 1961 Constitution. It has been suggested that just as the 1961 Constitution was a reaction to certain problems encountered by its predecessor, so is the 1982 Constitution.[675]

The Turkish Republic is founded on the principle of the unitary state. The organisation and functions of the administration are based on the principles of

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[670] Orucu, E., "The Turkish Experience With Judicial Comparativism in Human Rights Cases" in Orucu, E., "Judicial Comparativism in Human Rights Cases", British Institute of International & Comparative Law, 2003, p.131.

[671] The Turkish constitutional vision was expressed in terms of the "six arrows of Kemalism"- nationalism, secularism, republicanism, populism, statism and reformism.

[672] Unal, S., "Turkish Legal System and the Protection of Human Rights", SAM Papers No 3/99, Ankara-April 1999, p.2

[673] See among others Ozbudun, E., "Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy", *European Public Law*, Vol.12, Issue 2, 2006, pp. 213-223.

[674] The Constitutional Court was established by the 1961 Constitution and started working on 25 April 1962. The structure and functions of the Constitutional Court envisaged in 1961 were, to a great extent, maintained by the 1982 Constitution.

[675] Ozbudun, E., "Constitutional Law" in Ansay, T., & Wallace, D., "Introduction to Turkish Law", Kluwer Law International, 2005, Fifth Edition, p.25.

centralisation and local administration. The 1982 Constitution includes provisions for the protection of civil and political rights. Like the Constitution of 1961, the Constitution of 1982 includes a schedule of human rights which is almost identical to the provisions of the ECHR and other related international legal instruments. However, it appears that the "letter and spirit" of the constitution remains restrictive even after the series of reforms undertaken by the Turkish Government. Drafted in 1982, only two years after the military *coup d'état*, at the request of the military junta, the main preoccupation of the Constitution is to protect the state *vis-à-vis* the individual and not the other way round.[676] Towards that end, the Constitution subjugates the exercise of the rights and freedoms that it grants to a doctrinal hierarchy, whereby the principles of laicism on one hand and national and territorial unity on the other seek to keep the expression of political dissent under control.[677]

Article 2 of the Constitution describes the characteristics of the Republic as a "... democratic, secular, and social state governed by the rule of law; bearing in mind the concept of public peace, national solidarity, and justice; respecting human rights." Under Article 4 of the Constitution the provisions of Articles 1[678], 2 and 3[679] shall not be amended, nor shall their amendment be proposed.

Article 12 of the Constitution recognises the inherent character of human rights by stating, "Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable." The Constitution devotes its first chapter to fundamental rights and freedoms by using the same classifications as the International Human Rights Covenant, i.e. personal, political, economic, social and cultural rights and liberties.[680]

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[676] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.4, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

[677] *Ibid*, p.4.

[678] Article 1 establishes the form of the state as a Republic.

[679] Article 3 guarantees the indivisible entity of the Turkish State with its territory and nation and provides for Turkish as the official language.

[680] Rumpf, C., "The Protection of Human Rights in Turkey", Human Rights Law Journal, 31 December 1983, Vol. 14, No. 11-12, p.394.

Furthermore, the Constitution ensures that the Turkish military plays a key role in enforcing the rule of law and by safeguarding Ataturk's ideals of Turkish nationalism quash all opposing views.[681] Under Article 118 of the Constitution the armed forces have the duty to protect the "integrity and indivisibility of the country, and the peace and security of society."[682] It has been argued that the Turkish military had used this constitutional mandate to set up various state security tribunals dealing with political and terrorist charges included at least one military judge appointed by the Executive.[683] To a great extent, these courts had usurped the traditional functions of independent judicial courts by having members of the executive branch-specifically, military officers- deciding certain judicial proceedings, which seemed to be of fundamental importance to human and civil rights, including the right to freedom of expression, movement, and association.[684]

The Turkish military continues to perceive itself as the guardian of "Kemalism", the official state ideology. "Kemalism" (named after Kemal Atatürk, founder and father figure of the Turkish Republic) is the static ideology of modernization, progress and secularism which has shaped Turkey's western orientation in the period since the founding of the Republic in 1923.[685] It has been argued that the Turkish military maintains a substantial influence over Turkish politics that is unique in comparison with other European democracies.[686] In order to justify its interference with the political decision-making process, the military adopts a broad understanding of Turkish national security. The Commission of the European Communities has pointed out that the armed forces continue to exercise significant political influence. Individual military members of the National Security Court as well as other senior members of the armed forces have continued to regularly express their opinion on domestic and foreign policy issues through public speeches and press briefings. In

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[681] See Yuksel, E., "Cannibal Democracies, Theocratic Secularism: The Turkish Version", Cardozo J. Int'l & Comp. L., Vol. 7, 1999, pp.423, 432.
[682] Article 118 of the Constitution.
[683] See Muller, M., "Nationalism and the Rule of Law in Turkey: The Elimination of Kurdish Representation during the 1990", reprinted in The Kurdish Nationalist Movement in the 1990's: Its Impact on Turkey and the Middle East 173, 178 (Robert Olson ed., 1996).
[684] *Ibid.*
[685] Rumford, C., "Resisting Globalisation? Turkey-EU Relations and Human and Political Rights in the Context of Cosmopolitan Democratisation", International Sociology, Vol.18, No. 2, June 2003, pp.381-382.
[686] Greer, St., "The ECHR, Achievements, Problems and Prospects", Cambridge University Press, 2007, p.99.

particular the Commission underlined that while "Turkey should work towards greater accountability and transparency in the conduct of security affairs [to be] in line with [other EU members] … statements by the military should only concern military, defence and security matters and should only be made under the authority of the government".[687] It has been suggested that the military's role in the democratisation process is "an ambivalent one: supportive in principle but highly conditional on certain issues".[688]

[687] CommEC, 2005 Regular Report on Turkey's Progress Towards Accession, Brussels, Brussels, 09/11/2005, p.14. This view regarding military statements was repeated verbatim in the 2006 Progress Report which concluded that limited progress had been made in aligning civil-military relations with EU practices (CommEC, 2006 Regular Report on Turkey's Progress Towards Accession, Brussels, 08.11.2006, p.8).

[688] Turkmen, F., "The European Union and Democratisation in Turkey: The Role of the Elites", *Human Rights Quarterly*, Vol.30, 2008, p.155.

5.3 The Court System

The Turkish legal system establishes a two-tiered judicial system comprised of both ordinary and administrative courts. The Court of Cassation is the supreme civil and criminal court (Article 154 (1) of the Constitution) and the Council of State is the supreme administrative court (Article 155(1) of the Constitution). In addition, the Constitution establishes the Military Court of Cassation and the Supreme Military Administrative Court. The former is the final court to review the decisions of military courts (Article 156(1) of the Constitution); the latter is the first and final court to review administrative actions involving military personnel or relating to military service, even if such actions have been carried out by civilian authorities (Article 157(1) of the Constitution).

Article 125 of the Constitution states that "... Recourse to judicial review shall be open against all actions and acts of the administration." Special consideration should be given to the role of the Turkish Constitutional Court. The 1961 Constitution created the Constitutional Court to strengthen the constitutionally defined legal order and the observance of the principles of equality before the law and of the citizen's rights and liberties. The Court's application of judicial review concerns the consistency of statutory law and other acts of the executive and legislative organs with all provisions of the Constitution, including those provided in international conventions, which Turkey has ratified.

5.4 Ratification of the ECHR

Turkey has ratified a number of major international human rights conventions[689] and a number of the human rights instruments under the auspices of the CoE.[690] However, it

[689] Among the major human rights instruments of the United Nations that Turkey has ratified, there are International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women, and Convention on the Elimination of All Forms of Racial Discrimination. Turkey ratified the Convention against Torture (CAT) on 2nd August 1988, including the recognition of the competence to receive and process individual communications of the Committee against Torture under article 22 of CAT; the treaty entered into force on 1st September 1988; the Committee for the Elimination of Discrimination Against Women (CEDAW) on 20th December 1985, entry into force 19th January 1986 and its optional protocol ratified on 29th October 2002; International Convention on the Elimination of All forms of Racial Discrimination (CERD) on

has made substantial reservations to them and declarations to the effect that its obligations under several key articles have been interpreted in accordance with its national law. Most reservations concern minority rights, especially with regard to the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child. A number of European governments have lodged objections to the Turkish reservations based on their concern that such reservations raised doubts about the commitment of the Turkish government to the objectives and purposes of the conventions in question.[691] It could be said that Turkey's foreign policy with respect to human rights treaties is based on ratification with reservations in respect to those provisions, which grant additional rights to individuals belonging to minorities.[692]

Turkey is a founding member of the CoE, having become the thirteenth member state of the organisation in 1949 when the organisation was founded.[693] Turkey participated in drafting the ECHR and signed it on 4 November 1950 and the First Additional Protocol on 20 May 1952. It ratified both simultaneously on 18 May 1954. The Turkish Grand National Assembly approved/ratified the ECHR with a 1954 Act[694] under the 1924 Constitution. Turkey's only reservation concerned the "Fundamental

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16th September 2002; Convention on the Rights of the Child (CRC) on 4th April 1995 and its optional protocol on the sale of children, child pornography and child prostitution (CRCOPSC) ratified on 19th August 2002 (the optional protocol).Turkey had signed but not yet ratified the International Covenant on Economic, Social and Political Rights (CESCR) signed on 15th August 2000; The International Convention on Civil and Political Rights (ICCR) signed on 15th August 2000; The CRC optional protocol on the involvement of children in armed conflict (CRCOPAC) signed on 8th September 2000; International Convention on the Protection of all Migrant Workers and their families signed on 13th January 1999.

[690] In addition to the ECHR, Turkey is a party to the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. On 27 September 2006, it ratified the revised European Social Charter with reservations.

[691] For the Irish objection to the Turkish government's reservations to the Convention on the Rights of the Child, see "Objections,"www.unhchr.ch/tbs/doc.nsf/73c66f02499582e7c1256ab7002e2533/a5f0c573fa009561c1256b91003bc1de?OpenDocument.

[692] This is the case for Article 27 of the ICCPR; Articles 17, 29 and 30 of the Convention on the Rights of the Child; Article 13(3) and (4) of the ICESCR; as well as various instruments of the Organization for Security and Cooperation in Europe pertaining to the protection of minorities. For more on Turkey's foreign policy on international instruments relating to minority rights, *see* Kurban, D., "Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union," *Columbia Human Rights Law Review,* Vol.35, 2003, pp. 180-188.

[693] Turkey ratified the statute of the CoE on 12 December 1949 through Law No. 5456, which put into effect Turkey's retrospective membership in the organization as of 8 August 1949.

[694] Act No. 6366, 10 March 1954, Official Gazette No. 8662, 19 March 1954. The instrument of ratification was deposited with the Secretary-General of the CoE on 18 May 1954.

Act of Public Education".[695] With some intervals, it has made use of the right under Article 15 of the ECHR to derogate from the rights and freedoms laid down in the ECHR- in so far as they are not excepted in the second paragraph – in cases of public emergency threatening the life of the nation. It did so for the period from 16 June 1970 to 5 August 1975, from 26 December 1978 to 26 February 1980, and from 12 September 1980 to 19 July 1987. Over time, Turkey has also ratified Protocols Nos. 2,3,5,6,8,13 and 14 to the ECHR.[696] It has yet to ratify Protocols No. 4, 7, 9, 10 and 12.[697]

Although Turkey ratified the ECHR as early as 1954, it appears that for decades it did not play an important role and did not attract attention in the protection of human rights and civil liberties. At the time, the ratification of the ECHR did not raise much interest amongst Turkish public opinion and no coverage was given to it in the press.[698] On the contrary, in the second half of the 1950s, the National Assembly passed a series of statutes that were incompatible with both the Constitution and the ECHR, and were used to provide a certain degree of legitimacy to the military junta that took power on 27 May 1960.[699]

With regard to the official motives for the ratification, it has been argued that it is clearly related to the integration policy of Turkey with the West. In other words, Turkey followed the policy of economic, political and military integration with the

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[695] Turkey attached its reservations to Article 2 of Protocol No. 1 on the right to education since Law No. 430 of 3 May 1924 prohibited the establishement of religious private schools. Reservation: "Having seen and examined the Convention and the Protocol (First), we have approved the same with the reservation set out in respect of Article 2 of the Protocol by reason of the provisions of Law No. 6366 voted by the National Grand Assembly of Turkey dated 10 March 1954. Article 3 of the said Law No. 6366 reads: Article 2 of the Protocol shall not affect the provisions of Law No. 430 of 3 March 1924 relating to the unification of education." (18 May 1954 – present).

[696] Protocol No. 2 was ratified on 25/03/1968, Protocol No. 3 on 25/03/1968, Protocol No. 5 on 20/12/1971, Protocol No. 6 on 12/11/2003, Protocol No. 8 on 19/09/1989, Protocol No. 11 on 11/07/1997, Protocol No. 13 on 20/02/2006 and Protocol No.14 on 02/10/2006. See: http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=CYP&MA=3&SI=2&DF=&CM=3&CL=ENG

[697] Turkey has signed the Protocol No. 4 on 19/10/1992, the Protocol No. 7 on 14/03/1985 and the Protocol No. 12 on 18/04/2001 but it has not yet deposited the instrument of ratification with the Secretary-General of the CoE for none of these Protocols.

[698] Tuğcu, T., "The Place of the ECHR in Turkey", Solemn hearing of the ECtHR on the occasion of the opening of the judicial year Friday, 20 January 2006.

[699] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey" in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.455.

West during this period and ratification of the ECHR was an integral part of this policy.[700]

5.5 Status of the ECHR in domestic law

The status of international agreements in general and the ECHR in particular within the hierarchy of the Turkish legal order has been a matter of great debate among scholars in Turkey.[701] Article 26 of the 1924 Constitution, which was in force when Turkey ratified the ECHR, laid down that treaties shall be concluded by the Grand National Assembly. Nevertheless, the Constitution contained no explicit references to the domestic status of international agreements in the Turkish legal order.

The 1961 and 1982 Constitutions stipulated[702] that the ratification of treaties concluded with foreign states and international organisations is dependent upon the approval of the Grand National Assembly through the enactment of a statute. Upon ratification and promulgation by the President of the Republic, international agreements were incorporated into domestic law and became directly enforceable by domestic courts.[703] Although there is no clear statement on the adoption of the monist system in the Turkish Constitutions, there is some degree of consensus that, both the 1961 and the 1982 Constitutions established a monist relationship between international and national law.[704]

The 1961 and 1982 Constitutions provided that international treaties that were duly put into effect have "the force of law" and that no appeal to the Constitutional Court

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[700] Ozdek, Y., & Karacaoglu, E., "Turkey" in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, p.880.

[701] Tuğcu, T., "The Place of the ECHR in Turkey", Solemn hearing of the ECtHR on the occasion of the opening of the judicial year Friday, 20 January 2006.

[702] Article 65 of the 1961 Constitution and Article 90 of the 1982 Constitution contained the same provisions on the status of international agreements in domestic law. Both embodied two basic principles: the first is that international agreements duly put into effect carry the force of law and the second, no appeal to the Constitutional Court can be made with regard to these agreements on the ground of unconstitutionality.

[703] See, in detail, Ozdek, Y., & Karacaoglu, E., "Turkey" in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, p.882.

[704] See Gozubuyuk, A., "The ECHR in the Legal Order of Turkey" in "The Domestic Application of International Human Rights Norms", Judicial Colloquy September 3-14 1990, Interights & The Ankara University Human Rights Centre, Ankara University Press, Ankara 1992, p.25.

can be made on the grounds that these treaties are unconstitutional.[705] Due to the ambiguous nature of the phrase "having the force of law", there was a lack of consensus in Turkish literature on the issue of the hierarchy of international agreements in domestic legal order until the 2004 constitutional amendments.[706] Some scholars argued that international treaties have the force of an ordinary statute whereas others maintained that international treaties have a supra-legislative status, either an intermediate rank between ordinary statutes and the Constitution, or a constitutional or even supra-constitutional status.[707]

The findings of this thesis show that there have been three main different approaches of interpretation to the meaning of the phrase "having the force of law". The first adopts a literal approach whereby treaties are considered to have equal standing with domestic legislation.[708] Thus the supporters of this approach, hold that had the Constitution intended to grant treaties a superior position *vis-a-vis* national legislation this would have been made clear as it is in many European Constitutions.

As to the second approach, literal interpretation of the last paragraph of Article 90 is obscure and void. The implication of the denial of judicial review by the Constitutional Court suggests that international treaties are superior to national laws. Consequently, in the case of conflict between international and national provisions international treaties should prevail.[709] Under no circumstances does the *lex posterior* principle come to the fore and the phrase "having the force of law" indicates a monist approach.

As for the third approach, theoretical and doctrinal disputes on the meaning of "having the force of law" have often had a largely verbal character and frequently no practical significance. Since Article 2 of the Constitution defines the Republic as "a state governed by rule of law ... respecting human rights", treaties relating to

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[705] Article 90 of the Constitution deals with international treaties.
[706] See, Orucu, E., "The Turkish Experience With Judicial Comparativism in Human Rights Cases" in Orucu, E., "Judicial Comparativism in Human Rights Cases", 2003, p.135.
[707] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey" in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.468.
[708] Tuğcu, T., "The Place of the ECHR in Turkey", Solemn hearing of the ECtHR on the occasion of the opening of the judicial year Friday, 20 January 2006.
[709] *Ibid.*

fundamental rights and freedoms should be distinguished from other treaties and they should be given superior status over national laws.[710]

Despite this debate, most scholars have distinguished between human rights treaties and other international agreements on the basis of the constitutional provisions concerning the suspension or limitations of constitutional rights that require compliance with international law (Articles 15, 16, 42 of the Constitution).[711] It is evident that the status of international human rights agreements has tended to be considered as an exception to the general system governing the status of international agreements in domestic law.[712]

The debate has certainly had practical importance because different interpretations on this issue caused the Turkish courts to adopt different views on the status of international law in the domestic legal order. While the Court of Cassation accorded to international conventions principally the force of statute, the Constitutional Court did not follow a consistent line.[713] The Constitutional Court in theory assigned international treaties a supra-legislative status and sporadically qualified them even as supra-constitutional norms.[714] Nevertheless, in practice, invoking exceptional circumstances, the Constitutional Court maintained on several occasions that international conventions only have the force of an ordinary statute.[715] On the other hand, the Council of State accorded supra-constitutional status to the ECHR so that it could strike down exceptional measures taken by Turkey's military regime on the basis of constitutional provisions.[716] In the course of this, the Council of State emphasised that an international convention did not cease to apply in Turkey, even if

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[710] *Ibid.*

[711] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey" in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.467.

[712] Ozdek, Y., & Karacaoglu, E., "Turkey" in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, p.884.

[713] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey" in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.468.

[714] Turkish Constitutional Court, Judgment, 1991.02.28, R. 1990/15, D. 1991/5, AYMKD, no. 27 Vol. I, 48 et seq. (61).

[715] See, e.g., Turkish Constitutional Court, Judgment, 1997.05.22, R. 1996/3, D. 1997/3, AYMKD, no. 36 Vol. II, 978 et seq. (1020).

[716] Turkish Council of State, Judgment, 1989.07.12, R. 1988/6, D. 1989/4, R.G. no. 20428, 9 February 1990, DD Nr. 78-79, 50 et seq.

it contained an unconstitutional provision.[717] Finally, the Military Administrative Court of Cassation disagreed with the Council of State but did not make any clear statement on the position of the ECHR in Turkish law.[718]

A 2004 constitutional amendment[719] to Article 90 of the Constitution on the status of international law provided that "[i]n the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail." As a result Turkish legal literature and the courts now generally recognise that international human rights instruments such as the ECHR have a superior status to common legislation, but inferior to the Constitution.[720]

Turkish courts of general jurisdiction are now obliged to rely on the ECHR provisions while delivering judgments. There is no doubt that the constitutional amendment of May 2004 reinforces the Turkish judiciary's capacity to give direct effect to the ECHR.[721] Recent judgments of the Court of Cassation and the Council of State show direct application of the provisions of the ECHR and the other international treaties on human rights.[722] However, it remains to be seen what the real impact of this change will be on the judiciary. It has already been noted that it is not possible to speak about a uniform, consistent and principled judicial approach to the direct effect of the ECtHR judgments.[723]

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[717] Turkish Council of State, Judgment, 1991.05.22, R. 86/1723, D. 91/933.
[718] Turkish Military Administrative Court of Cassation, Judgment, 1998.12.15, R. 98/1041, D. 98/1059.
[719] Law on the Amendment of Various Provisions of the Constitution of the Turkish Republic, No. 5170, adopted on 7 May 2004, entered into force on 22 May 2004.
[720] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey" in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.468.
[721] CommEC, 2004 Regular Report on Turkey's Progress Towards Accession, Brussels, 06.10.2004,p.30.
[722] See, *inter alia*, judgment of 25.5.2005 of the Civil Plenary of the Court of Cassation E:2005/9-320, K:2005/355; judgment of 13.7.2004 of 9th Penal Chamber of the Court of Cassation E:2004/3780, K:2004/3879; judgment of 24.5.2005 of Penal Plenary of the Court of Cassation E:2005/7-24, K:2005/56 ; judgment of 08.02.2005 of 13th Chamber of the Council of State E:2005/588, K:2005/692 ; judgment of 29.09.2004 of 5th Chamber of the Council of State E:2004/291, K:2004/3370.
[723] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.5, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

5.6 Recognition of Article 25 of the ECHR

The Turkish Republic recognised the right of individuals to lodge complaints with the ECommHR under the then article 25 (now 34) of the ECHR in 1987.[724] This was followed by the recognition of the compulsory jurisdiction of the ECtHR on 22 January 1990. According to the usual practice of contracting states, the jurisdiction of both organs was initially recognised for three years, this being prolonged subsequently.

During 1987 the Turkish Government accepted the right to individually petition the ECtHR, made a formal application for membership to the EU, and declared a state of emergency in eastern and south-eastern regions of the country. It is evident that Turkey's aspiration to join the EU has influenced its stance toward the CoE's mechanism of protection of human rights.[725] Iain Cameron had suggested that the Turkish declaration was designed to improve the reputation of the country in the field of human rights and it was connected with Turkish negotiations with the European Economic Community.[726]

Apart from the temporary restriction of the individual petition right, the Turkish government promulgated extensive "conditions" that provided, *inter alia*, that the right of petition extends only to allegations concerning public authorities' acts or omissions performed within the territory to which the Turkish Constitution is applicable; the conditions of derogation under Article 15 ECHR and the notion of a "democratic society" in paragraphs 2 of Articles 8, 9, 10 and 11 of ECHR must be understood in conformity with the principles laid down in the Turkish Constitution; the power of the ECommHR shall not comprise matters regarding the legal status of military personnel and the system of discipline in the armed forces; and the provisions of the Turkish Constitution on freedom of association, activities of labour unions and

[724] The jurisdiction of the ECommHR was recognised on 28 January 1987.
[725] Turkmen, F., "Turkey's Participation in Global and Regional Human Rights Regimes" in in Kabasakal Arat, Z, "Human Rights in Turkey", Pennsylvania Studies in Human Rights, University of Pennsylvania Press-Philadelfia, 2007, p.254.
[726] Cameron, I., "Turkey and Article 25 of the ECHR", International and Comparative Law Quarterly, Vol.37, 1988, p.887.

public professional organisations must be understood as being in conformity with Articles 10 and 11 ECHR.[727]

A number of states argued that the Turkish declaration under Article 25 constituted a *de facto* reservation on substantive provisions of the ECHR, contravening the express terms of Article 64 of the ECHR.[728] The ECommHR and ECtHR had the opportunity to consider this question, when they were confronted with a complaint against Turkey. After examining these conditions, the ECommHR found no legal basis for restricting Turkey's declaration under Article 25 ECHR other than the temporal limitations provided for in Article 25(2) of the ECHR.[729] In terms of the territorial restriction to the ECommHR's competence (a restriction aimed primarily at precluding individual petitions relating to the northern part of Cyprus) the ECommHR maintained that Article 1 of the ECHR extends to all persons under the authority of the contracting parties, including the Turkish armed forces in Cyprus.[730] Given Turkey's expressed intention to be bound under Article 25 ECHR, the ECommHR found that this intention must prevail over Turkey's "conditions" that the ECommHR found to be incompatible with the ECHR.[731]

A similar problem arose with respect to Turkey's acceptance of the ECtHR's jurisdiction under the then Article 46 of the ECHR. In its judgment in the *Loizidou* case the ECtHR sought to ascertain the ordinary meaning given to the then Articles 25 and 46 in their context and in the light of their object and purpose. The ECtHR held that if Articles 25 and 46 were to be interpreted as permitting restrictions (other than of a temporal nature) states would be enabled to qualify their consent under optional clauses. According to the ECtHR, this would severely weaken the role of the ECommHR and ECtHR and diminish the ECHR as a constitutional instrument of European Public order. The consequences for the enforcement of the ECHR would be so far-reaching that a power should have been expressly provided for. No such

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[727] The complicating factor was that the reservations had not been made at the time of the ratification of the treaty. Under Article 19 of the Vienna Convention reservations may be made to multilateral treaties only at the time of signature or ratification.
[728] CoE, Information Sheet, No. 21, Strasbourg, 1988, pp.4-13.
[729] *Chrysostomos, Papachrysostomou and Loizidou v. Turkey*, Nos. 15299/89; 15300/89; 15318/89 (Com.), 04/03/1991, para.29.
[730] *Ibid*, paras. 31–34.
[731] *Ibid*, paras. 44–48.

provision was contained in either the then Article 25 or 46. Therefore, the subsequent practice of the Contracting Parties of not attaching restrictions *ratione loci* or *ratione materiae* confirmed the view that these were not permitted.[732]

5.7 Interstate cases in Strasbourg

Under the ECHR, states as well as individuals can take proceedings for alleged violations of the ECHR standards by a Contracting State. While tens of thousands of individuals file complaints are submitted against the CoE member states every year interstate cases are a rare phenomenon. Since its establishment in 1959, the ECtHR has delivered judgment in only three inter-state cases: *Ireland v. the United Kingdom*[733]; *Denmark v. Turkey*[734] and *Cyprus v. Turkey*[735]. A further 17 inter-state applications were dealt with by the former ECommHR. On 26 March 2007 the Georgian authorities lodged an application[736] against the Russian Federation under Article 33 of the ECHR.[737]

Member states are clearly reluctant to commence proceedings directed against other member states to the ECtHR. Such an action has political consequences and it is considered to be an unfriendly act and the publicity surrounding an interstate application can be extremely punishing for the defendant state. However, this should not prevent member states from seeking redress in Strasbourg. On the contrary member states should be willing and able to challenge other states when there are human rights violations.

The findings of this thesis show that in the history of the ECHR system Turkey attracted 6 of the 21 interstate cases.[738] Following Turkey's 1974 invasion of Cyprus

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[732] *Loizidou v. Turkey*, 23/03/1995, No. 15318/89, paras.70-75.
[733] *Ireland v. The United Kingdom*, No. 5310/71, 18/01/1978.
[734] *Denmark v. Turkey*, No. 34382/97, 05/04/2000.
[735] *Cyprus v. Turkey*, No. 25781/94, 10/05/2001.
[736] The application concerns events following the arrest in Tbilisi (Georgia) on 27 September 2006 of four Russian service personnel on suspicion of espionage. On 4 October 2006 the four servicemen were released by executive act of clemency. Eleven Georgian nationals were arrested on the same charges.
[737] ECtHR, Press release issued by the Registrar, "Inter-state application brought by Georgia against the Russian Federation", 27.3.2007.
[738] *Cyprus v. Turkey,* Nos. 6780/74 and 6950/75, (adm.) 26/05/1975; *Cyprus v. Turkey,* No. 8007/77, (adm.) 10/07/1978; *Cyprus v. Turkey,* No. 25781/94, 10/05/2001; *France v. Turkey*, *Norway v. Turkey*,

and the continuing division of the island, the Cypriot government filed four inter-state applications against Turkey.[739]

The first two cases[740] dealt with violations of Articles 1-6, 8, 13 and 17 of the ECHR, Article 1 of Protocol No. 1 and Article 14 of the ECHR in conjunction with all the above articles. Turkey did not participate in the examination of the cases at the merits stage. The ECommHR found serious violations of several ECHR rights and forwarded its (never officially published) report to the CoM, as at the time neither Turkey nor Cyprus had accepted the ECtHR's jurisdiction.[741] However, the CoM limited itself to strongly urging the parties to resume inter-communal talks under the auspices of the United Nations in order to re-establish peace and confidence between the communities.[742]

The third application[743] concerned continuing violations of the same articles as argued in the first two applications. Turkey did not participate in the merits examination again. The ECommHR found violations of Article 5 ECHR (right to liberty and security) because many missing Greek Cypriots remained in Turkish custody, Article 8 ECHR (right to respect for private and family life) due to the displacement of persons and separation of families and Article 1 of Protocol No. 1 (property rights) due to the deprivation of possessions.[744] After several years, the CoM decided to make public the ECommHR report, considering it as completing the consideration of the case.[745]

Finally, concerning the fourth application,[746] the ECtHR found violations of several ECHR provisions because of the failure of the Turkish authorities to effectively

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Denmark v. Turkey, *Sweden v. Turkey*, *Netherlands v. Turkey,* Nos. 9940/82; 9941/82; 9942/82; 9943/82; 9944/82, (adm.) 06/12/83; *Denmark v. Turkey*, No. 34382/97, 05/04/2000.

[739] *Cyprus v. Turkey,* Nos. 6780/74 and 6950/75, (adm.) 26/05/1975; *Cyprus v. Turkey,* No. 8007/77, (adm.) 10/07/1978; *Cyprus v. Turkey,* No. 25781/94, 10/05/2001.

[740] *Cyprus v. Turkey,* Nos. 6780/74 and 6950/75, (adm.) 26/05/1975.

[741] See Coufoudakis, V., "Cyprus and the ECHR: The Law and Politics of Cyprus v. Turkey, Applications 6780/74 and 6950/75", *Human Rights Quarterly*, Vol.4, 1982, pp.450-473.

[742] CoE, CoM, Resolution, 20 January 1979, DH(79)1, YB 22 (1979), 440.

[743] *Cyprus v. Turkey,* No. 8007/77, (adm.) 10/07/1978.

[744] *Cyprus v. Turkey,* No. 8007/77, ECommHR Report, 4 October 1983, EHRR 15 (1993), 509.

[745] CoE, CoM, Resolution, 2 April 1992, DH(92)12.

[746] *Cyprus v. Turkey,* No. 25781/94, 10/05/2001

investigate the fate of Greek Cypriot missing persons and their relatives,[747] the rights of displaced persons to respect for their home and property,[748] the rights of the enclaved Greek Cypriots[749] as well as the Turkish Cypriots living in the northern part of Cyprus.[750][751] The full execution of this ECtHR judgment is still pending.[752]

It could be argued that the inter-state applications had limited effect on the Turkish legal system. In so far as the 2001 Cyprus judgment is concerned, Turkey did not introduce the required measures in order to remedy the numerous violations found by the ECtHR. Subsequently individual applications alleging similar violations as the interstate one were considered by the ECtHR and a number of judgments were issued.[753]

The militarisation of the Turkish political system and its persistent human rights violations resulted in a second group of inter-state applications against Turkey. In June 1982, France, Norway, Denmark, Sweden and the Netherlands filed inter-state applications against Turkey[754] alleging violations of Articles 3, 5, 6, 9, 10, 11 and 15(3) of ECHR. The ECommHR found the applications to be admissible.[755] However, the parties eventually reached a friendly settlement that required, *inter alia*, that the Turkish authorities provide continued information to the ECommHR on human rights issues including the conditions of detention, that they progressively lift martial law and facilitate amnesty or similar measures. While the friendly settlement could not guarantee implementation, the Commission's 1985 Report found that the settlement "was secured on the basis of respect for Human Rights" in the sense of Article 28(b)

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[747] *Cyprus v. Turkey,* No. 25781/94, (GC), 10/05/01, paras. 132-136, 148-150, 157-158 (Articles 2, 3 and 5 ECHR).
[748] *Ibid*, paras. 171-175, 184-189, 193-194 (Articles 8 and 13 ECHR and 1 of Protocol No. 1).
[749] *Ibid*, paras. 245-246, 252-254, 269-270, 277-280, 292-296, 307-311, 324 (Articles 3, 8, 9, 10 and 13 of the ECHR and Articles 1 and 2 of Protocol No. 1).
[750] *Ibid*, paras. 358-359 (Article 6 of the ECHR).
[751] See Loucaides, L., "The Judgment of the ECtHR in the case of Cyprus v. Turkey", Leiden Journal of International Law, Vol.15, 2002, pp.225–236.
[752] See CoE, CoM, Interim Resolution, 4 April 2007, ResDH(2007)25.
[753] *Loizidou* (property cases) see section on *Xenides-Arestis*; *Varnava* (missing persons).
[754] *France v. Turkey,* No. 9940/82; *Norway v. Turkey,* No. 9941/82; *Denmark v. Turkey*, No. 9942/82; *Sweden v. Turkey,* No. 9943/82; *Netherlands v. Turkey,* No. 9944/82.
[755] *France v. Turkey*, *Norway v. Turkey*, *Denmark v. Turkey*, *Sweden v. Turkey*, *Netherlands v. Turkey,* Nos. 9940/82; 9941/82; 9942/82; 9943/82; 9944/82, 06/12/83.

of the ECHR.[756]

Turkey recognised the right of individual petition two years after the friendly settlement was reached. It is not unlikely that the circumstances surrounding the friendly settlement influenced Turkey to finally recognise this right, albeit with a restrictive declaration.

5.8 Individual applications against Turkey before Strasbourg

The subject-matter of the individual applications against Turkey before the ECtHR has been very diverse. It includes killings by "unknown perpetrators", deaths of civilians during security operations, disappearances as well as violations of freedom of expression. Given the large number of cases is not possible to provide a complete chronological or substantive narrative of all the ECtHR's case-law pertaining to Turkey.[757] Therefore, the study of the Turkish cases is selective and concentrates on the areas, which concern the most problematic provisions in Turkish law- not necessarily problematic in the quantity of cases filed, but in their quality and impact on Turkish law. These are the judgments, which had the greatest impact on the Turkish legal order as brought to light by judgments of the ECtHR. The objective (as in the relevant chapter on Cyprus) is to be able to assess the extent to which these judgments have had an impact on Turkish law and practice.

5.8.1 State Security Courts

Under the 1982 Constitution, the military government established State Security Courts to try cases involving crimes against the security of the state, and organised crime. The State Security Courts operating from May 1984 replaced the military

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[756] *France v. Turkey*; *Norway v. Turkey*; *Denmark v. Turkey*; *Sweden v. Turkey*; *Netherlands v. Turkey* (appl. nos. 9940/82; 9941/82; 9942/82; 9943/82; 9944/82), ECommHR Report, 7 December 1985, YB 28 (1985), 150, 158.

[757] With 21240 applications lodged between 1 November 1998 and 31 December 2007, Turkey ranked 3rd among the 47 member states following Russia (46685 cases are pending before the ECtHR against Russia) and Poland (27988 cases are pending before the ECtHR against Poland). In 2007 alone, 2830 new applications were lodged against Turkey (See Survey of Activities, ECtHR, p.60-61). Of the 1503 judgments that the ECtHR delivered in 2007, the highest number (331) concerned Turkey (Survey of Activities, ECtHR, p.57).

courts of the martial law period.[758] The caseload of the State Security Courts concerned offences against the Republic, against the indivisible unity of the State, against the free, democratic system of government and offences directly affecting State security both internal and external.[759] The new courts were not substantially different from the military courts and most judges had gained their experience in the military courts.[760]

Several characteristics of the State Security Court system raised questions regarding the availability of a fair trial to defendants and they failed to meet international standards of independence and impartiality.[761] The State Security Courts often held closed hearings, admitted evidence obtained through secret interrogations and could become martial law courts under emergency rule.[762] The panel of three judges in each State Security Court included a military judge. As officers in the armed forces, such military judges remained dependent on the military for salary and pension, subject to military discipline and therefore it could be said that they continued to be under military influence.

Consequently in its judgments (1998) in *Incal v. Turkey*[763] and *Çiraklar v. Turkey*[764] the ECtHR held that the presence of military judges in the State Security Courts violated the right to a fair trial before an independent and impartial tribunal as guaranteed under Article 6 of the ECHR. Following *Incal* and *Çıraklar*, the Turkish Parliament adopted an amendment[765] to Article 143 of the Turkish Constitution,

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[758] The functioning, jurisdiction and trial procedures of the State Security Courts were specified under Law 2845 of 16 June 1983 on the Establishment and Prosecution Methods of State Security Courts.

[759] According to Article 143 of the 1982 Constitution: "State Security Courts shall be established to deal with security offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the State" at www.tbmm.gov.tr/english/constitution.htm

[760] The main difference was that these courts were not within military compounds and existed only in eight (of then 67 and now 81) provinces.

[761] See in general Report of the Joseph R. Crowley Program/Lawyers Committee for Human Rights: Joint 1998 Mission to Turkey, "Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey", Fordham International Law Journal, Vol. 22, 1999, pp.2129-2243.

[762] Smith, T., "Leveraging Norms: The ECHR and Turkey's Human Rights Reforms", in Kabasakal Arat, Z, "Human Rights in Turkey", Pennsylvania Studies in Human Rights, University of Pennsylvania Press-Philadelfia, 2007, p.270.

[763] *Incal v. Turkey,* No. 22678/93, 09/06/1998.

[764] *Çiraklar v. Turkey,* No. 19601/92, 28/10/1998.

[765] On 18 June 1999.

which concerned the composition of the State Security Courts. This legislation[766] provided in particular that "the National Security Courts should be composed of a president, two regular members and a substitute member".[767] The legislative amendments, following the Constitutional amendment, were made through Law No. 4390, which entered into force in June 1999. This law provided that the functions of the military judges and military prosecutors would end on 22 June 1999.

It has been argued that the removal of military judges from the State Security Courts was prompted primarily by the trial of Abdullah Öcalan, captured leader of the Kurdistan Workers' Party (PKK).[768] Concerned that the ECtHR might also find the trial of Abdullah Öcalan[769] unfair on these grounds, the Turkish government took the step of removing the military judge from the bench.[770]

Subsequently, the State Security Courts were abolished by constitutional amendments (Article 143 of the Constitution) introduced on 7 May 2004 and were succeeded by Heavy Penal Courts.[771] The main aim of the Turkish government was to ensure that all procedural safeguards provided for by ordinary criminal procedure would become applicable in all proceedings without exception.[772] However a report published by Amnesty International in 2006[773] noted that "the new courts have failed to confront some of the most serious violations of the right to fair trial perpetuated in the earlier courts". The report also pointed out that judges and prosecutors of the special Heavy Penal Courts are often the same individuals who presided over the same cases when

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[766] Law No. 4388.
[767] See Resolution DH(99)555 Concerning the Judgment of the ECtHR of 28 October 1998 in the Case of Çiraklar against Turkey (Adopted by the CoM on 8 October 1999 at the 680th meeting of the Ministers' Deputies).
[768] Amnesty International, "Turkey, *Justice Delayed and Denied:* The persistence of protracted and unfair trials for those charged under anti-terrorism legislation", 2006, p.2.
[769] Whose first hearing was on 31 May 1999.
[770] In fact, by the time the military judge had been removed from the trial of Abdullah Ocalan in June 1999, all the prosecution evidence in the case had been heard. The trial of Abdullah Ocalan was found unfair by the ECtHR on this and other grounds: see ECtHR, *Öcalan v. Turkey*, No. 46221/99, (GC), 12/05/2005.
[771] Heavy Penal Courts replaced States Security Courts under Law No. 5190.
[772] See Interim Resolution ResDH(2005)43, Actions of the security forces in Turkey, Progress achieved and outstanding problems General measures to ensure compliance with the judgments of the ECtHR in the cases against Turkey concerning actions of members of the security forces (listed in Appendix III) (Follow-up to Interim Resolutions DH(99)434 and DH(2002)98) *(Adopted by the CoM on 7 June 2005 at the 928th meeting of the Ministers' Deputies).*
[773] Amnesty International, "Turkey, *Justice Delayed and Denied:* The persistence of protracted and unfair trials for those charged under anti-terrorism legislation", 2006, p.2.

they were before the State Security Courts. Furthermore, lawyers have consistently complained to Amnesty International that there has been no change to the panel of judges they encounter during trial hearings.[774]

As shown above, the judgments in *Incal* and *Çıraklar* made it clear that the operation of State Security Courts was irreconcilable with the Article 6 standards relating to a fair trial. Consequently Turkey amended the underlying legislation regarding the composition of these courts and then completely abolished them substituting in their place the Heavy Penal Courts. Nonetheless and despite such recent reforms in law and practice, new Heavy Penal Courts have been criticised as being different only in name from their predecessor State Security Courts. The new Heavy Penal Courts seem to function simply as State Security Courts under a different name with heavy caseload of anti-state activity and with former State Security judges and prosecutors on board.[775] The findings of this thesis demonstrate that further and more comprehensive reforms need to be adopted by Turkey in order to comply with the judgments of the ECtHR on the issue of fair trial.

5.8.2 Dissolution of political parties

On several occasions, the Turkish Constitutional Court has ordered the dissolution of political parties soon after their creation based solely on their political program or declarations made by their leaders.[776] The reasons advanced by the Constitutional Court included the undermining of the territorial integrity and the unity of the nation by references to the Kurdish people or to Kurdish self-determination (breaches of the Constitution and of various Articles in the Law on Political Parties (hereinafter referred to as LPP).

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[774] *Ibid.* p.2.

[775] Turkmen, F., "The European Union and Democratisation in Turkey: The Role of the Elites", Human Rights Quarterly, Vol.30, 2008, p.156.

[776] See in general Koçak. M., & Örücü, E., "Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the ECtHR, *European Public Law*, Vol. 9, No. 3, 2003, pp.399-423; Yuksel, E., "Cannibal Democracies, Theocratic Secularism: The Turkish Version", *Cardozo Journal of International and Comparative Law*, Vol. 7, 1999, p. 423.

The United Communist Party[777] and the ÖZDEP Party[778] were dissolved shortly after their creation because of their very programmes. The Socialist Party[779] was dissolved on account of certain statements made by its chairman, Mr Perinçek. Among the Constitutional Court's reasons for dissolving a political party was the threat to the territorial integrity and the unity of the nation, the use of the term "communist" and the apparent goal to abolish the state's secular character.[780]

Rebutting this case-law, the ECtHR has in 8 cases ruled against Turkey for violating Article 11 of the ECHR, considering that such measures constituted a disproportionate interference and were not in response to a pressing social need necessary in a democratic society.[781] Nevertheless, the ECtHR has tended to uphold the reasoning of the Turkish Constitutional Court when the preservation of the Turkish principle of secularism was at stake.[782] Consequently, in the case of *Refah Partisi v. Turkey* the ECtHR concluded that there had been no violation of the ECHR, considering the dissolution of this party justified on the grounds of the threat it posed to democracy by advocating the establishment of a system based on the Sharia and not excluding the use of force in order to achieve it. In particular the ECtHR held in that case that "a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and

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[777] The United Communist Party of Turkey (TBKP) was dissolved in 1991 for the sole reason that its name contained the word "Communist".

[778] The Constitutional Court dissolved the ÖZDEP party in 1993 because of its view that the Presidency of the Religious Affairs should be removed from the structure of the general administration.

[779] In its decision about the Socialist Party in 1992 the Constitutional Court cited the "Kurdish people"/"Turkish people" distinction and its proposals as among the reasons for closure.

[780] See, e.g., Turkish Constitutional Court, Judgment, 16 July 1991, R.G. no. 21125, 28 January 1992 (United Communist Party of Turkey).

[781] *United Communist party of Turkey and others v. Turkey*, No. 19392/92, 30/01/1998; *Socialist Party and others v. Turkey*, No. 21237/93, 25/05/1998; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, No. 23885/94, 08/12/1999; *Yazar, Karataş, Aksoy and the People's Labour Party (HEP) v. Turkey*, No. 22723/93, 09/04/2002; *Dicle for the Democratic Party (DEP) v. Turkey*, No. 25141/94, 10/12/2002; *Socialist Party of Turkey (STP) and others v. Turkey*, No. 26482/95, 12/11/2003; *Democracy and Change Party and others v. Turkey*, Nos. 39974/98, 39210/98, 26/04/2005; *Emek Partisi and Şenol v. Turkey*, No. 39434/98, 31/05/2005.

[782] See *Refah Partisi (The Welfare Party) and Others v. Turkey*, (GC) Nos. 41340/98, 41342/98 and 41344/98, 13/02/2003.

freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds".[783]

The amendment of the Constitution in 1995 changed the permanent ban on political activities for members of dissolved parties to a 5-year ban and made it applicable only to party leaders. However, further reform is required to remove the power to automatically ban a party, under Article 96 (3) of the Constitution, where its title contains the word "communist" and to prevent the dissolution of parties with political manifestos that do not incite to violence and are in accordance with democratic principles.

Further amendments to the Constitution entered into force on 17 October 2001, which made it possible to comply with the ECHR obligation not to sanction a political party on the sole basis of its manifesto or without any evidence of clearly anti-democratic activity. These amendments have, among other things, introduced a general principle of proportionality and the possibility to resort to less severe sanctions than dissolution of the party in case of violations of the authorised limits of political action,[784] which however remain unchanged in Article 68 of the Constitution.

This thesis shows that as a result of a lengthy process involving findings of violation at the ECtHR necessitating several amendments in the Turkish legal order, a political party cannot be resolved solely on the basis of its program where there is no real evidence of antidemocratic activities. Furthermore, the Constitutional Court can order the dissolution of a party only if there is qualified majority and is obliged to apply the principle of proportionality by considering less severe sanctions such as withdrawal of public financial support. It is interesting to note that the requirement of qualified majority ("three-fifths majority") has been applied in the two judgments of the Constitutional Court concerning the Right and Liberties Party and the AKP. In these two cases the number of judges who voted for the dissolution of the two parties fell below the required three-fifths majority stipulated in the Constitution. In both cases 6 judges voted in favour for dissolution while 5 judges voted against.

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[783] *Refah Partisi (The Welfare Party) and Others v. Turkey*, ECtHR Grand Chamber, Nos. 41340/98, 41342/98 and 41344/98, 13/02/2003, para.98.
[784] Partial or total withdrawal of public financial support, depending on the gravity.

The LPP was amended on 11 January 2003[785] in order to give effect to the constitutional changes of 2001. As a result the ban to membership of a political party if convicted has been lifted.[786] Articles 98, 100, 102 and 104 of the LPP have been amended[787] to bring them into conformity with the constitutional changes regarding both the criteria for imposing penalties and the proportionality of the penalties themselves; political parties have been given a right of appeal against motions for dissolution by the Prosecutor before the Constitutional Court; the majority required for deciding to dissolve a political party has been increased.[788]

It should be noted that following the amendments, the Communist Party was authorised to take part in the 2003 general election even though the prohibition provided in Article 96 (3) of the LPP – which constituted the violation in the United Communist Party case – was still in place.

Mustafa Koçak and Esin Örücü have argued that the judgments of the ECtHR relating to the dissolution of political parties have indeed made a certain impact on the Turkish political and constitutional culture and the views upheld by the Turkish Constitutional Court.[789] However, this thesis argues that the domestic framework governing political parties needs further reforms in order to achieve harmonisation with the ECtHR's case-law. The European Commission suggested that the LLP needs to be amended in order to ensure that political parties are permitted to function in accordance with the standards established by the ECHR and the case-law of the ECtHR.[790]

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[785] Law No. 4748/2002.
[786] Conviction under Article 312 of the Penal Code no longer constitutes a bar on membership.
[787] Following an amendment to Article 100 of the LPP, a case for dissolving a political party may only be filed for "reasons stipulated in the Constitution". Article 102 of the law has also been amended so as to give a right to appeal against the request of the Public Prosecutor of the Court of Appeals to dissolve a party. An amendment to Article 104 provides for the possibility of imposing sanctions other than closure upon political parties. Under the revised Article, political parties can be deprived "partially or fully of state assistance". Furthermore, Article 11 of the law has been amended so as to increase minimum imprisonment sentences for violations of the law, from three to five years (CommEC, 2003 Regular Report on Turkey's Progress Towards Accession, p.34).
[788] In order to dissolve a political party, a "three-fifths majority" in the Constitutional Court is now required. See Resolution CM/ResDH(2007)100, Execution of the judgments of the ECtHR, United Communist party of Turkey (judgment of Grand Chamber of 30/01/1998) and 7 other cases against Turkey concerning the dissolution of political parties between 1991 and 1997.
[789] Koçak. M., & Örücü, E., "Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the ECtHR, *European Public Law*, Vol. 9, No. 3, 2003, p.422.
[790] CommEC, 2005 Regular Report on Turkey's Progress Towards Accession, Brussels, 09/11/2005, p.29.

It is fair to say that the constitutional amendments achieved significant progress by substantially raising the threshold for dissolution of a political party. According to Article 69, the "permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68."[791] The Constitutional Court may not make such a judgment unless it concludes that the party has become "the centre of activities"[792] contrary to the principles laid out in Article 68. Article 69(6) introduced a two-part test in determining this threshold: The actions must be "carried out intensively by the members of that party" and be shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board in the parliament.

It is suggested that despite this significant general measure, contrary to the principle of the hierarchy of laws, the LPP continues to contain several restrictions, which contradict the relevant constitutional provisions as well as the standards established by the ECtHR. Article 96 (3) still prohibits the use of the word "communist" in the name of a political party, notwithstanding the ECtHR's unequivocal ruling in *United Communist Party*. Another problematic provision of the LPP is Article 81, which bans political parties from "arguing" that minorities exist in Turkey, promoting minority languages and cultures, and using minority languages in their written materials, activities and statements.

Nonetheless and despite the progress made in this area, to prevent the arbitrary closure of political parties in Turkey additional practical measures are required. It has been argued that that the Constitutional Court considers dissolution cases by adhering rigidly and exclusively to its own interpretation, ruling out different interpretations of the principles of the "unitary" and "secular" Republic. Such a position inevitably

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[791] Article 68(4): "The statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime."

[792] Article 69(6).

undermines the principle of freedom of political parties in a democratic country.[793] It is therefore submitted that as far as the closure of political parties is concerned, there is an urgent need for the Constitutional Court to amend its general conceptual framework of its decisions on the closure of political parties and take into account the case-law of the ECtHR on these matters.

5.8.3 Freedom of Expression

The main issue of the vast majority of judgments concerning freedom of expression in Turkey is the criminalisation of dissenting opinions on the Kurdish question. An excessively narrow interpretation of the Constitution and other legal provisions[794] concerning the unity of the state, territorial integrity, secularism and respect for formal institutions of the state has regularly caused the charging and sentencing of elected politicians, journalists, writers, trade unionists or NGO workers for statements, public speeches, published articles or books that would be acceptable in EU Member States.[795]

The ECtHR's findings of violation against Turkey concern, for instance, interferences with the applicants' freedom of expression on account of their conviction by the (former) State Security Courts, in *Incal v. Turkey*,[796] a conviction of a party official for disseminating a leaflet that criticised discrimination against citizens of Kurdish origin. The cases of *Erbakan v. Turkey*[797] and *Yarar v. Turkey*[798] concerned the prosecution of individuals with Islamic backgrounds who had expressed critical views of state policies on religion. The case of *Aydın Tatlav v. Turkey*[799] concerned the prosecution of a journalist who had published a book criticising Islam. The issue in the judgment of *Düzgören v. Turkey*[800] was the conviction of a journalist who had distributed leaflets about a conscientious objector. The case of *Tüzel v. Turkey*[801]

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[793] Hakyemez, Y., "Constitutional Court and the Closure of Political Parties in Turkey", SETA, Policy Brief, May 2008, No. 13, p.4.
[794] Articles 7 and 8 of the Anti-Terror Law, Articles 158, 159, 311 and 312 of the Criminal Code.
[795] CommEC, 1998 Regular Report on Turkey's Progress Towards Accession, p.15.
[796] *Incal v. Turkey*, No. 22678/93, (GC), 09/06/1998, para. 59.
[797] *Erbakan v. Turkey*, No. 59405/00, 06/07/2006.
[798] *Yarar v. Turkey*, No. 57258/00, 19/12/ 2006.
[799] *Aydın Tatlav v.* Turkey, No. 50692/99, 02/05/2006.
[800] *Düzgören v. Turkey*, No. 56827/00, 09/11/2006.
[801] *Tüzel v. Turkey*, No. 71459/01, 31/10/2006.

concerned the suppression of dissenting views by the left, the printing of a party poster containing a slogan against the IMF and the issue in *Öztürk v. Turkey*[802] was the publication of the bibliography of the founder of an extreme left-wing group. The case of *Özgür Gündem v. Turkey*[803] concerned a failure to protect a newspaper's freedom of expression from noumerous attacks on journalists, prosecutions and convictions. The rest of the cases concerned the prosecution of individuals who had published materials critical of Turkey's policies towards the Kurds[804] or expressed dissenting views on the issue.[805]

The charges in the above cases were brought under former Article 312 of the Penal Code and former Article 8 of the Anti-Terror law,[806] which criminalised separatist propaganda against the unity and integrity of the state as well as incitement to hatred and hostility on the basis of race, social class or region. In its judgments, the ECtHR stressed the essential role that political parties and the media play in the proper functioning of democracy, the indispensability of the freedom of expression, even where the ideas offend, shock or disturb, the severity of bringing the weight of criminal law on opinions, and the incompatibility of state security courts whose bench included a military judge with the right to fair trial.[807]

On 3 October 2001, a number of constitutional amendments, concerning *inter alia* the provisions on freedom of expression and information, were adopted and are directly applicable. In particular, the Constitutional Preamble indicates now that only anti-constitutional "activities" (instead of "thoughts or opinions") can be restricted and,

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[802] *Öztürk v. Turkey,* No. 22479/93, 28/09/1999.
[803] *Özgür Gündem v. Turkey*, No. 23144/93, 16/03/2000, para. 71.
[804] *See e.g. Sürek v. Turkey*, 24122/94, 08/07/1999; *Sürek and Özdemir v. Turkey*, No. 23927/94, 08/07/1999; *Erdoğdu and İnce v. Turkey,* No. 25067/94, 08/07/1999; *Erdoğdu v. Turkey,* No. 25723/94, 15/06/2000; *Şener v. Turkey,* No. 26680/95, 18/06/2000.
[805] *See e.g. Polat v. Turkey*, No. 23500/94, 08/06/1999; *Karataş v. Turkey*, No. 23168/94, 08/06/1999; *Gerger v. Turkey*, No. 24919/94, 08/06/1999; *Ceylan v. Turkey*, No. 23556/94, 08/07/1999; *Okçuoğlu v. Turkey*, No. 24246/94, 08/07/1999; *Incal v. Turkey*, No. 41/1997/825/1031, 08/07/ 1999.
[806] According to the original version of the first paragraph of Article 8: "Regardless of method and intent, written or oral propaganda along with meetings, demonstrations and marches that have the goal of destroying the indivisible integrity of the state with its territory and nation of the Republic of Turkey cannot be conducted". The phrase "Regardless of method and intent" was deleted from the text of the Article in 1995.
[807] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.15, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

according to the new Article 13, such restrictions should respect the principle of proportionality and be based on the specific grounds listed in the relevant articles of the Constitution. Accordingly, the new Article 26 on freedom of expression and information provides that "the formalities, conditions and procedures to be applied in the exercise of the right to freedom of expression and information shall be prescribed by law" and indicates as grounds for restrictions those prescribed by paragraph 2 of Article 10 of the ECHR, with however one addition: the "protection of the fundamental characteristics of the Republic and the protection of the indivisible integrity of the State with its territory and nation".[808]

In March 2001, the Turkish authorities presented the National Programme containing information on the reforms planned for the "short term" and the "medium term" (respectively 2002 and 2003-2004). Consequently, a series of packages of laws have been adopted and entered into force respectively on 19/02/2002 (Law 4744); on 09/04/2002 (Law 4748); on 09/08/2002 (Law 4771), on 11/01/2003 (Law 4778), on 04/02/2003 (Law 4793), on 19/07/2003 (Law 4928) and on 07/08/2003 (Law 4963).

These laws have modified Article 159 of the Criminal Code on insulting and deriding public bodies by reducing maximum and minimum sanctions and by making them applicable only if the courts consider that there was an "intention" to insult or deride; modified Article 312 of the Criminal Code, on incitement to hatred, by limiting its scope to expression constituting an explicit threat to public order and by reducing its maximum penalties; modified Article 7 of the Anti-Terrorism Law No. 3713 by specifying that propaganda on behalf of terrorist organizations will incur sanctions if carried out in a manner that encourages resorting to violence or other terrorist means; abrogated Article 8 of the Anti-Terrorism Law No. 3713[809]; erased penalties of imprisonment from the Press Law No. 5680 and introduced provisions prescribing respect for the confidentiality of journalists' sources.[810]

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[808] AS/Jur (2005) 32, "Implementation of judgments of the ECtHR", Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group, 9 June 2005, p.31.

[809] Article 8 of the Anti-Terrorism Act was first amended by Law No. 4744 of 19 February 2002, entailing only the reduction of penalties in the Article. Then, as a more radical step, the TGNA abrogated Article 8 of the Anti-Terrorism Act by Law No. 4903 on 19 June 2003.

[810] AS/Jur (2005) 32, "Implementation of judgments of the ECtHR", Committee on Legal Affairs and Human Rights, Parliamentary Assembly, CoE, Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group, 9 June 2005, p.32.

Although these amendments are designed to improve the exercise of freedom of expression, it has been noted that they do not seem to resolve all the problems highlighted in the ECtHR's judgments.[811] Examples of the case-law of the Court of Cassation and Security courts, relating to the criterion of "threat to public order" and the criterion of "intention" show that the Turkish courts' construction of the relevant Articles 312 and 159 of the Criminal Code as amended follows, to some extent, that of the ECtHR and may thus assist in preventing, notably as far as Article 312 is concerned, new violations of the ECHR.

In 2004 non-violent expression of opinion was still being prosecuted and punished in Turkey.[812] The amended articles of the Penal Code and Anti-Terror Law, as well as other provisions, were still used to prosecute and convict those who exercised their freedom of expression. In some cases, prosecutors had reviewed convictions based on the repealed Article 8 of the Anti-Terror Law in order to examine whether the indictment contained grounds to reconvict under alternative provisions.[813] The revised Article 159 continued to be used to prosecute those who criticised the state institutions in a way that is not in line with the approach of the ECtHR.[814]

The new Penal Code narrows the scope of some articles that have been used to convict those expressing nonviolent opinion. The new Article 216 (which largely corresponds to the current 312) states that individuals can be convicted only if their "incitement to enmity and hatred" constitutes a "clear and close danger". Article 305, which penalises those who receive pecuniary benefits from abroad for "activities in contravention of fundamental national interests" has also been limited in scope as compared with Article 127 in the current Code. However, it is of concern that in the accompanying reasoning, the examples of activities which could be considered in contravention of national interests go well beyond what would be acceptable under the ECHR. The minimum sentence for defamation is reduced in the new Code. Other relevant articles, such as the current 159 and a provision criminalising religious

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[811] *Ibid*, p.32.
[812] CommEC, 2004 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.10.2004 p.37.
[813] *Ibid*, p.37.
[814] *Ibid*, p.37.

personnel for criticising the state, appear virtually unaltered in the new Code and the penalty for discouraging people from performing military service has been increased.

The findings of this research demonstrate that overall the new Penal Code represents limited progress in the area of freedom of expression. In practice, articles that have been frequently used to restrict freedom of expression and have been assessed as potentially conflicting with Article 10 of the ECHR, have been maintained or changed only slightly.[815]

In June 2004, the CoM adopted an Interim Resolution[816] on freedom of expression in which it welcomed the many general measures, including the relevant constitutional reforms, which had been adopted. Nevertheless, it encouraged Turkey to take further steps towards bringing its domestic legislation in line with Article 10 of the ECHR and to further enhance the direct effect of the ECHR and of the judgments of the ECtHR in the interpretation of Turkish law.[817]

In May 2005 several amendments to the new Penal Code were adopted,[818] which improved certain provisions relating to freedom of expression.[819] However, a number of articles which have been used to restrict freedom of expression in the past, and remained virtually unchanged in the new Code, were not addressed in the May 2005 amendments. According to the CommEC these and other articles still constitute a potential threat to freedom of expression given their broad margin of appreciation.[820] This is particularly the case with regard to a number of vaguely worded articles, which refer to offences against symbols of state sovereignty, the reputation of state organs and national security. The ways that Article 301 of the new Penal Code

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[815] *Ibid*, p.37.
[816] Interim Resolution ResDH(2004)38 Freedom of Expression cases concerning Turkey: General Measures (Adopted by the Com on 2 June 2004 at the 885th meeting of the Ministers' Deputies).
[817] The resolution noted in particular that violations of freedom of expression found as a result of the application of Article 6 of the Anti-Terror Law (which criminalises *inter alia* the printing or publication of "leaflets and declarations of terrorist organisations") had yet to be specifically addressed.
[818] The aggravated sentences envisaged for a number of offences committed through the media were removed from many, but not all, of the articles including such provisions. Moreover, according to the amendments, acts of expression which have the purpose of providing information and/or which aim at criticism should not be criminalised. The scope of Article 125 on defamation was narrowed slightly. The reasoning associated with Article 305 (offences against fundamental national interests) was deleted.
[819] CommEC, 2005 Regular Report on Turkey's Progress Towards Accession, Brussels, Brussels, 09/11/2005, p.25.
[820] *Ibid*, p.25.

(formerly Article 159, "insulting the State and State institutions") has been applied raises serious concerns about the capacity of certain judges and prosecutors to make decisions in accordance with Article 10 ECHR and the relevant case-law of the ECtHR.[821]

It is evident that the constitutional amendments of 2001 removed from Articles 26 and 28 the restriction on the use of any "language prohibited by law" in the expression of thought and in broadcasting, respectively. However, they left untouched the restrictions attached to the exercise of these rights for the purposes of, *inter alia,* safeguarding "the indivisible integrity of the State with its territory and nation." Legislative reforms bolstered the constitutional amendments. Nevertheless, in some cases the legislature effectively re-enacted the restrictive provisions of the code under new names. For example, Articles 301 and 216 effectively replaced Articles 159 and 312, respectively.

A new Law on the Amendment of the Law on the Fight Against Terrorism was passed in June 2006.[822] Although considerable progress had been also made in lifting some of the restrictions in the Anti-Terror law, it has been claimed that "the June 2006 amendments constitute a serious setback".[823] The new law retains the over-inclusive and purpose-based definition of terrorism of the 1991 law, and introduces a wide and long list of "terrorist offences"[824] and "offences committed for terrorist purposes."[825] It introduces new restrictions on free speech,[826] creates new expression offences such as carrying the emblem or signs of a "terrorist organisation" or chanting slogans deemed to support such organization,[827] criminalizes "praise of terrorist offences and

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[821] In practice, Article 301 of the new Penal Code has been used by some in the judiciary to prosecute and, in some cases, convict, individuals. This is despite the fact that the article has been amended in such a way as to permit criticism.

[822] Law on the Amendment of the Law on the Fight Against Terrorism, No. 5532, 29 June 2006, Official Gazette No. 26232, 18 July 2006.

[823] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.29, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

[824] Law on the Amendment of the Law on the Fight Against Terrorism, No. 5532, 29 June 2006, Official Gazette No. 26232, 18 July 2006, Art. 2.

[825] *Ibid.* art. 3.

[826] *Ibid.* art. 5.

[827] *Ibid.* art. 6.

offenders or making the propaganda of the terrorist organization"[828] and imposes severe sanctions on the media such as heavy fines for owners and editors of media organs[829] and prison sentences for journalists.[830] Most disconcertingly, the law reintroduces the temporary closures of publications without a formal hearing and even at times upon the order of a prosecutor.[831]

Freedom of expression is undoubtedly one of the preconditions for a functioning democracy. The ECtHR has noted that the "effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection".[832] This thesis argues that the prosecutions and convictions for the expression of non-violent opinion under certain provisions of the new Penal Code are a cause for serious concern and do not comply with the ECHR standards. It has been noted that judicial proceedings and threats against human rights defenders, journalists and academics have had a chilling effect leading to self-censorship in the country, including in the academic arena.[833] As already mentioned above, Article 301 specifically penalises insulting Turkishness, the Republic as well as the organs and institutions of the state. Although this article includes a provision that expression of thought intended to criticise should not constitute a crime, it has repeatedly been used to prosecute non-violent opinions expressed by journalists, writers, publishers, academics and human rights activists.[834]

The CommEC noted that the restrictive jurisprudence established in 2006 by the Court of Cassation on article 301 remains in force.[835] It concluded that the prosecutions and convictions for expressing non-violent opinions, and actions against newspapers illustrate that the Turkish legal system does not fully guarantee freedom

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[828] *Ibid.* art. 5.
[829] *Ibid.* art. 5.
[830] *Ibid.* art. 6.
[831] *Ibid.* art. 5.
[832] *Özgür Gündem v. Turkey*, No. 23144/93, 16/03/2000, para.43.
[833] CommEC, 2007 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.11.2007, p.14.
[834] CommEC, 2006 Regular Report on Turkey's Progress Towards Accession, Brussels, 08.11.2006, p.14.
[835] In July 2006, the General Assemblies of the Civil and Penal Chambers of the Court of Cassation established restrictive jurisprudence on Article 301. The Court confirmed a six-month suspended prison sentence for journalist Hrant Dink. This was on the basis of Article 301 of the new Penal Code for insulting "Turkishness" in a series of articles he wrote on Armenian identity.

of expression in line with European standards.[836] Finally, the Commission urged Turkey that Article 301 and other provisions of the Turkish Criminal Code that restrict freedom of expression[837] need to be brought into line with the ECHR and case-law of the ECtHR.[838]

5.8.4 South East Turkey- Security Forces

A systemic problem involving the abuse of different types of human rights has emerged with respect to the troubled region of South East Turkey. The vast majority of individual petitions were filed by Kurds on grounds of human rights abuses committed by security officers during the state of emergency. Since 1996 the ECtHR has regularly delivered judgments detailing very serious breaches of the ECHR in respect of this region.[839] It should be noted that the ECHR bodies, when faced with the task of establishing the facts in a significant number of these cases, regularly undertook fact-finding missions for the purpose of taking depositions from witnesses, in addition to assessing the parties' observations and the documentary evidence submitted by them.[840] Such proceedings are relatively rare within the ECHR system. The post-Protocol No. 11 ECtHR has continued to engage in fact-finding hearings, although it is understood that the ECtHR is extremely conscious of the time and cost of such proceedings. Nevertheless, given that the burden is on an applicant to establish an ECHR violation beyond reasonable doubt, it is critical that such hearings do continue to take place, where domestic proceedings have been ineffective.

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[836] CommEC, 2007 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.11.2007, p.15.

[837] Articles 215, 216, 217 and 220 of the Turkish Penal Code criminalising offences against public order have been applied to Kurdish issues. Comments by journalists, human rights defenders and lawyers on court decisions have also led to prosecution under Article 288 (attempt to influence a fair trial).

[838] CommEC, 2007 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.11.2007, p.15.

[839] See among others Reidy, A., Hampson, F., & Boyle, K., "Gross Violations of Human Rights: Invoking the ECHR in the Case of Turkey", Netherlands Quarterly of Human Rights, Vol. 2, 1997, pp.161-173; Buckley, C., "Turkey and the ECHR", KHRP, 2000; Buckley, C., "The ECHR and the Right to Life in Turkey", Human Rights Law Review, Vol.1, No. 1, 2001, pp.35-65.

[840] *Imakayeva v. Russia,* No. 7615/02, 09/11/2006, para.117.

The cases concern violations of Articles 2[841], 3[842], 5[843], 6, 8 and of Article 1 of Protocol No. 1[844] notably in respect of undue destruction of homes by the *gendarmerie*, disappearances, infliction of torture and ill-treatment during police custody and killings committed by members of security forces. More specifically many cases highlighted the widespread lack of effective domestic remedies capable of redressing violations of the ECHR (violations of Article 13).[845]

From 1996 onwards the CoM started to monitor execution of this type of judgments and in June 1999 faced with an increased flow of such judgments from the ECtHR, it took the step of issuing an Interim Resolution addressing the general problem.[846] It has been noted that the violations found are due to a number of structural problems: General attitude and practices of the securities forces, their education and training system, the legal framework of their activities and, most importantly, serious shortcomings in the finding at the domestic level, of administrative, civil and criminal liability for abuses.

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[841] See for example *Kaya v. Turkey*, No. 22729/93, 19/02/1998 (Violation of Article 13); *Güleç v. Turkey*, No. 21593/93, 27/07/1998; *Ergi v. Turkey*, No. 23818/94, 28/07/1998 (Violations of Articles 13 and former 25(1); *Oğur v. Turkey*, No. 21594/93, 20/05/1999.

[842] See for example *Aydin v. Turkey,* No. 23178/94, 25/09/1997 (Violation of Article 13); *Tekin v. Turkey*, No. 22496/93, 09/06/1998 (Violation of Article 13); *Ilhan v. Turkey*, No. 22277/93, 27/06/2000 (Violation of Article 13).

[843] See for example *Kurt v. Turkey*, No. 24276/94, 25/05/1998 (Violations of Articles 3 and 13 and former 25); *Berktay v. Turkey*, No. 22493/93, 01/03/2001 (Violations of Articles 3 and 13); *Aksoy v. Turkey*, No. 21987/93, 18/12/1996 (Violations of Articles 3 and 13).

[844] *Selçuk and Asker v. Turkey*, Nos. 23184/94 & 23185/94, 24/04/1998 (Violations of Articles 3, 8, 13); *Bilgin v. Turkey*, No. 23819/94, 16/11/2000 (Violations of Articles 3, 8, 13 and former 25); *Dulaş v. Turkey*, No. 25801/94, 30/01/2001 (Violations of Articles 8, 13).

[845] See Interim Resolution DH (99) 434, Human Rights Action of the Security Forces in Turkey: Measures of a General Character (Adopted by the CoM on 9 June 1999 at the 672nd meeting of the Ministers' Deputies; Interim Resolution ResDH(2002)98, Action of the security forces in Turkey, Progress achieved and outstanding problems, General measures to ensure compliance with the judgments of the ECtHR in the cases against Turkey listed in Appendix II (Adopted by the CoM on 10 July 2002 at the 803rd meeting of the Ministers' Deputies); Interim Resolution ResDH(2005)43, Actions of the security forces in Turkey, Progress achieved and outstanding problems, General measures to ensure compliance with the judgments of the ECtHR in the cases against Turkey concerning actions of members of the security forces (listed in Appendix III) (Follow-up to Interim Resolutions DH(99)434 and DH(2002)98) (Adopted by the CoM on 7 June 2005 at the 928th meeting of the Ministers' Deputies; CM/Inf/DH(2006)24 revised 2, 10 October 2007, 1007th DH Meeting, 15-17 October 2007, Actions of Security Forces in Turkey: Progress achieved and outstanding issues, General measures to ensure compliance with the judgments of the ECtHR in 143 cases against Turkey (The list of cases can be obtained from the Secretariat)(Follow-up to Interim Resolutions DH(99)434, ResDH(2002)98 and progress achieved and outstanding issues since the adoption of ResDH(2005)43 in June 2005), Document prepared by the Department for the Execution of the judgments of the ECtHR, DG-HL.

[846] On 9 June 1999, the Committee adopted Interim Resolution DH(99)434.

At issue was not so much domestic legal protection against the types of flagrant violations that were being identified, but, above all, tackling a culture of impunity that was allowed to develop along with the occurrence of the serious violations of human rights preventing the proper enforcement of the law.[847] A raft of reforms was suggested by the CoM[848] though particular attention was drawn to the absence of effective judicial remedies available against members of the security forces, the need for reorganisation of the security forces training,[849] and proposals for improvement the independence and effectiveness of the domestic judicial process.

The CoM insisted in particular, first, on the necessity to reorganise the training of the security forces personnel, through the implementation of the reforms found to be necessary within the Police and Human Rights 1997-2000 programme. Secondly, the CoM stressed the urgent need to reform the system for the criminal prosecution of the members of the security forces to ensure effective punishment in case of abuses. In this respect, the CoM called upon Turkey to vest in prosecutors the sole responsibility and discretion for criminal proceedings against the agents of the security forces, to reform the prosecutor's office to that effect and to increase the minimum sentences for abuses so as to ensure effective punishment.[850]

The CoM noted in 2001 that there had been "no significant reorganisation of the security forces training", the only proposal appeared to be to translate human rights training materials into the local language. In 2002 a further Interim Resolution condemned the lack of reform and noted the persistence of serious shortcomings in the criminal-law protection against abuses highlighted in the ECtHR's judgments and that new complaints of torture were being received by the ECtHR and the CoE's Committee of the Prevention of Torture.[851]

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[847] Bates, E., "Execution of Judgments Delivered by the ECtHR", in Christou, Th. & Raymond, J.,P., "ECtHR, Remedies and Execution of Judgments", British Institute of International and Comparative Law, 2005, p.85.

[848] The first requests formulated in Interim Resolutions DH(99)434 and ResDH(2002)98 were the following: improvement of the legal framework concerning police custody; establishment of a system of effective accountability of members of security forces that committed abuses; the training of judges and prosecutors; instituting the possibility to obtain a better reparation for the victims of human rights violations.

[849] Interim Resolution DH(99)434.

[850] *Ibid.*

[851] Interim Resolution ResDH(2002)98, Action of the security forces in Turkey, Progress achieved and outstanding problems, General measures to ensure compliance with the judgments of the ECtHR in the

It was not until 2003[852] that the CoM were finally able to state that the requirement of prior administrative authorisation to institute criminal proceedings against members of the security forces for acts of torture or ill-treatment had been abolished. At the same time they also observed that penalties imposed could be converted into fines or suspended altogether.

Nevertheless, despite repeated criticism and demands of Interim Resolutions in 2001 and 2002 a number of issues remained unsolved, the most notable of which were: "The global reform of basic, in-service and management training of Police and Gendarmerie; the continuation of the reform of the criminal procedure so as to allow effective prosecutions, including the abrogation of the prior administrative authorisation in all cases of alleged abuse [ie not just torture and ill-treatment] (homicide, disappearance, destruction of property...); [and] the introduction of effective deterrent minimal sanctions".[853]

On 7 June 2005, the CoM adopted a new Interim Resolution ResDH(2005)43 assessing further progress in the implementation of the relevant judgments.[854] They welcomed the numerous measures adopted by the authorities in response to the ECtHR's judgments and two previous Interim Resolutions of 1999 and 2002, the authorities' "zero tolerance" policy against torture and ill-treatment, as evidenced in particular by the introduction of additional procedural safeguards and of deterrent minimum prison sentences for torture and the recent constitutional reform reinforcing the status of the ECHR and of the ECtHR's judgments in Turkish law. At the same time, the CoM stressed the need for strict implementation of the new legislation.

The President of the CoE's Committee for the Prevention of Torture (CPT) stated in October 2004 with regard to the prevention of torture and ill-treatment that "it would be difficult to find a CoE Member State with a more advanced set of provisions in this

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cases against Turkey listed in Appendix II, (Follow-up to Interim Resolution DH(99)434), *(Adopted by the CoM on 10 July 2002 at the 803rd meeting of the Ministers' Deputies).*

[852] CoM "Written Question No. 428 to the Chair of the CoM by Mr Jurgens: Execution of the EctHR's judgments by Turkey, Reply of the Chair of the CoM", CM/AS (2003), Question 428 final, 5 September 2003.

[853] DH(2002) 98.

[854] A group of 74 pending cases relating to the actions of the Turkish security forces.

area" while adding that, it is nevertheless "right to underline that Turkey needs to pursue vigorously its efforts to combat torture and other forms of ill-treatment".[855] In particular, further efforts are required to ensure full implementation of existing legislation and to reinforce the fight against impunity.

The new Penal Code, the new Code of Criminal Procedure and their implementing regulations contain provisions, which strengthen the fight against torture and ill-treatment.[856] The new Regulation on Apprehension, Detention and Statement Taking, issued in June 2005, introduces additional safeguards, in particular in the context of medical examinations and the right of defence. Furthermore, the Penal Code increases the term of imprisonment for those convicted of torture or ill-treatment and the statute of limitations, which in the past has allowed cases against alleged perpetrators of torture or ill-treatment to be dropped, is increased from ten to fifteen years.

The CPT noted[857] that "new Criminal and Criminal Procedure Codes, as well as a revised version of the Regulation on Apprehension, Detention and Statement Taking[858] had consolidated improvements which had been made in recent years on matters related to the CPT's mandate. It is more than ever the case that detention by law enforcement agencies (police and gendarmerie) is currently governed by a legislative and regulatory framework capable of combating effectively torture and other forms of ill-treatment by law enforcement officials". [859]

The CPT's findings confirmed that progress continues to be made as regards the implementation in practice of the safeguards against ill-treatment, including the length of detention in police custody and proper keeping of custody records. However, the CPT noted that problems still remained in certain areas, notably as regards the

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[855] CommEC, 2005 Regular Report on Turkey's Progress Towards Accession, Brussels, Brussels, 09/11/2005, p.22.
[856] *Ibid*, p.22.
[857] Report of the Committee of Prevention of Torture (CPT) of 06/09/2006 on the visit to Turkey from 7 to 14 December 2005.
[858] Entered into force on 1 June 2005.
[859] Report of the Committee of Prevention of Torture (CPT) of 06/09/2006 on the visit to Turkey from 7 to 14 December 2005, (see, para.12).

implementation of the legislation concerning the right to access to a lawyer and confidentiality and quality of medical examinations of detainees.[860]

The legislation adopted to reinforce the procedural safeguards in police custody in order to eradicate torture and ill-treatment appears sufficient in remedying the shortcomings identified in the relevant judgments.[861] It should be underlined, however, that the strict implementation of the above mentioned legislation and earlier regulations is necessary.

Human rights as a subject seem now to be part of the curriculum in the training of members of the security forces.[862] It also appears that there are ongoing efforts to ensure in-service training of members of security forces on human rights.

The changes introduced in the Law on Duties and Legal Powers of the Police (Law No. 2559)[863] and the instructions given to members of the security forces appear to align Turkish legislation with ECHR standards. It has to be underlined that the strict implementation of this legislation is of crucial importance to prevent, in the future, similar violations as those identified already by the ECtHR. The Circulars[864] of the Minister of Justice are also encouraging in ensuring that effective and adequate investigations are carried out into allegations of abuse by members of the security forces.

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[860] See, in particular, paras. 21 – 29. For further information, including the recommendations of the CPT, see http://www.cpt.coe.int/documents/tur/2006-30-inf-eng.htm.

[861] 1007th DH Meeting, 15-17 October 2007, Actions of Security Forces in Turkey: Progress achieved and outstanding issues, General measures to ensure compliance with the judgments of the ECtHR in 143 cases against Turkey, (Follow-up to Interim Resolutions DH(99)434, ResDH(2002)98 and progress achieved and outstanding issues since the adoption of ResDH(2005)43 in June 2005), Document prepared by the Department for the Execution of the judgments of the ECtHR, DG-HL.

[862] There are specific courses on the ECHR and the case-law of the ECtHR where the judgments of the ECtHR concerning the actions of security forces, in particular the gendarmerie, are examined in depth. In those courses the attention of the participants is drawn to the shortcomings identified by the ECtHR in its judgments against Turkey.

[863] Changes introduced on 2/6/2007 to Law No. 2559 on the duties and legal powers of the police, which now provides that the police are not entitled to use force unless confronted with resistance. According to the amended Article 16 of the law, the use of force should be directed to break the resistance and should be proportionate.

[864] Concerning the direct effect given by prosecutors and judges to the *ECHR*, the Minister of Justice issued a series of Circulars on 01/06/2005 drawing the attention of the former to the newly enacted legislation, as well as the shortcomings identified by the ECtHR in its judgments against Turkey.

The practice of the judicial authorities concerning the effective prosecution of the crimes allegedly committed by members of the security forces is developing. The establishment of the JİHİDEM[865] and the effective functioning of the Regional and Local Human Rights Councils are also welcome developments. It appears that these bodies provide non-judicial recourse for those who claim that they had been subject to torture or ill-treatment. Information is nevertheless awaited on the effective functioning of the monitoring to be carried out by Regional and Local Human Rights Councils.[866]

However clarification is necessary in so far as the investigation of serious crimes other than torture and ill-treatment allegedly committed by members of the security forces. It is acknowledged that there are examples of decisions of courts and public prosecutors where prosecutions had been brought against members of the security forces without an administrative authorisation. It has still not been demonstrated that the legal framework and its implementation in practice fully comply with ECHR standards in order to ensure enhanced accountability by members of the security forces, in particular in situations where prosecutors decide to bring charges against members of the security forces of all ranks, including high ranking members.[867]

Even though the Turkish legal framework includes a comprehensive set of safeguards against torture and ill-treatment[868] such incidents still occur, especially during the pre-detention period[869] and combating impunity remains an area of great concern. There is a lack of prompt, impartial and independent investigation into allegations of human rights violations by members of the security forces.[870] Furthermore, in 2007 there were a number of controversial court judgments in cases concerning military

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[865] On 26/04/2003 a new body was introduced with the aim of receiving and examining complaints about alleged human rights violations committed by gendarmes ("JİHİDEM") which is reachable 24 hours per day by internet, telephone or in person.

[866] See paragraph 28 of the above mentioned CPT report for the concerns raised on the effective functioning of this monitoring mechanism.

[867] 1007th DH Meeting, 15-17 October 2007, Actions of Security Forces in Turkey: Progress achieved and outstanding issues, General measures to ensure compliance with the judgments of the ECtHR in 143 cases against Turkey, (Follow-up to Interim Resolutions DH(99)434, ResDH(2002)98 and progress achieved and outstanding issues since the adoption of ResDH(2005)43 in June 2005), Document prepared by the Department for the Execution of the judgments of the ECtHR, DG-HL.

[868] CommEC, 2007 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.11.2007, p.14.

[869] *Ibid*, p.14.

[870] *Ibid*, p.14.

personnel for human rights violations committed in the "fight against terrorism" in eastern and south-eastern Turkey. Human Rights Watch noted that: "Turkish courts are notoriously lenient towards members of the security forces who are charged with abuse or misconduct, contributing to impunity and the persistence of torture and the resort to lethal force. Many allegations of torture or killings in disputed circumstances never reach the courts and are not investigated".[871]

In addition, judicial proceedings into allegations of torture and ill-treatment are often delayed by the lack of efficient trial procedures or abuse of such procedures. There are concerns that prosecutors still do not conduct timely and effective investigations against those accused of torture.[872] It is submitted that Turkey needs to investigate more thoroughly allegations of human rights violations by members of the security forces.

5.9 Effect of the ECtHR judgments at national level

While Turkish Courts started citing the ECHR soon after ratification, they have not used the ECtHR case-law as a source of reference before the last decade and remain extremely hesitant to rely on the ECHR as an independent standard of scrutiny. The Turkish Constitutional Court has used the ECHR as a norm of reference since 1963. Nevertheless, it can be said that the Constitutional Court refers to ECtHR case-law only in exceptional circumstances. Despite citing the ECHR in 38 judgments from 1963 to 2003, it has invoked Strasbourg jurisprudence only on five occasions.[873] In fact, the Turkish Constitutional Court started citing ECtHR case-law only in 1992 and most references are limited to one or two sentences.[874] In a report of an advisory visit to Turkey published by the European Commission in 2003 it was observed that many complaints had been received from lawyers and human rights defenders that "judges were insufficiently sensitive to arguments based upon provisions of the ECHR and did

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[871] Human Rights Watch, "Turkey-Events of 2007", 31 January 2008, available at: http://www.hrw.org/legacy/englishwr2k8/docs/2008/01/31/turkey17727.htm

[872] CommEC, 2005 Regular Report on Turkey's Progress Towards Accession, Brussels, Brussels, 09/11/2005, p.23.

[873] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey" in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.504.

[874] See, e.g., Turkish Constitutional Court, Judgment, 1999.12.29, R. 1999/33, D. 1999/51.

not cite the case-law of the ECtHR within their own judgments".[875] In the same report it was noted that in 2004, following a training programme on the ECHR involving all judges and public prosecutors the members of the judiciary had the feeling that "they were now more aware of the ECHR and better equipped to apply it".[876]

Despite some progress in recent years in judges' consideration of the ECHR and its case-law, it has been argued that especially at the level of the Constitutional Court, Turkish social and political needs and cultural context continue to carry more weight than the judgments of the ECtHR or even the ECHR.[877] It is evident that the prevalent mentality of Turkish judges remains that of the preservation of state interests above the protection of individual rights. The founding ideology of Turkey which rests, as discussed, on the dual principles of "territorial integrity and national unity" and "laicism" is strongly embedded in the legal and political culture in the country. This ideology plays a critical role in the formal and professional education and training of civil and military bureaucrats as well as the judiciary.

Turkey has developed a coordination system for the implementation of the ECtHR judgments involving a number of ministries.[878] This is due to the fact that implementation of the ECtHR's judgments is a process which *de facto* requires the harmonious cooperation of different branches and/or departments of the administration. It is important to note that the Ministry of Foreign Affairs (MFA) has a central role within the relevant structure. More specifically, there is a specialised unit within the MFA responsible for the coordination of the implementation of the ECtHR judgments. In addition, this unit is also responsible for the defense of the Turkish Government before Strasbourg. Thus, upon the notification of admissibility decision to the Turkish Permanent Delegation in Strasbourg this unit begins to prepare

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[875] Richmond, P. and Björnberg, K., "The Functioning of the Judicial System in the Republic of Turkey", Report of an Advisory Visit, 11 – 19 July 2004, European Commission, Brussels, p.132 available at: http://www.xs4all.nl/~ingel/ankara/advisory%20report%20II.pdf

[876] *Ibid*, p.132.

[877] Orucu, E., "The Turkish Experience With Judicial Comparativism in Human Rights Cases" in Orucu, E., "Judicial Comparativism in Human Rights Cases", British Institute of International & Comparative Law, 2003, p.157.

[878] Kurban, D., Erözden, O., & Gülalp, H., "Supranational rights litigation, implementation and the domestic impact of Strasbourg Court jurisprudence: A case study of Turkey", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, pp.11-13 available at: http://www.juristras.eliamep.gr/wp-content/uploads/2008/10/casestudyreportturkeyfinal.pdf

the Government's defense and explores the possibilities for concluding a friendly settlement.[879] The lawyers working in this unit (specialized on the ECHR system) defend Turkey before the ECtHR and are responsible to collect all the relevant information for the preparation of the defense.

This same unit is also responsible for the coordination of the efforts for the implementation of judgments in which a violation of the ECHR was found. The unit communicates the outcome of the ECtHR's judgment and recommends the adoption of the appropriate necessary measures so as to comply with the judgment. In the case of an ECtHR judgment which requires not only the payment of compensation but also the enactment of new legislation, the relevant bodies of the government are notified in order to start drafting the new law.[880] It must be understood however, that certainly the decision for the enactment of a new legislation or for the changing of a certain policy lies within the hands of the political actors, and does not depend on the officials of this unit (or of the bureaucracy in general), no matter if they themselves consider it necessary. This Ministry of Foreign Affairs unit is also responsible for translating all ECtHR decisions into Turkish, which are published on the Ministry of Justice website for use by all law practitioners.

The closest collaborator of the MFA regarding both defending Turkey before the ECtHR and implementing its judgments is housed in the MoF. This is not only due to the fact that the implementation of an ECtHR judgment generally requires the payment of compensation, which in the end is a financial matter. Additionally, this unit represents all branches of the Turkish Government in all domestic legal cases. Therefore, based on their experience, the lawyers employed in this division give substantial legal assistance to the MFA and they are also fully involved in friendly settlements.

There is a lack of consensus among the relevant academic literature on the impact of the ECHR and the ECtHR's case-law on the Turkish domestic legal order. While Gündüz suggests that the ECtHR "exercises a decisive, if indirect, influence on the

[879] *Ibid.*
[880] *Ibid*, p.12.

Turkish legal and political system"[881] Ozdek and Karagaoglu argue that as far as the prevention of human rights violations is concerned it cannot be said that the ECHR has had a "notable function".[882] They further state that some improvements in the domestic legal system as a result of judgments of the ECtHR were mostly "too little and ineffective" and were aimed at changing the state's image rather than genuinely seeking to address real human rights needs.[883]

It can be concluded that a major factor in creating the impetus for human rights reform in Turkey has been the desire of successive governments for closer political and economic integration with Europe, and for membership in the EU.[884] It is quite clear in fact that, notwithstanding the high number of judgments the ECtHR has issued against Turkey over the years, their execution begun only after the initiation of the EU reform process. Since the declaration of Turkey as an official candidate for accession in 1999, the EU has played a central role in monitoring the Turkish Government's execution of the ECtHR case-law, documenting the progress achieved in that regard and the outstanding issues, and providing training to key judicial and administrative authorities in tandem with the CoE.[885] It is evident that the annual progress reports of the European Commission have become a very important assessment tool for the advancement of human rights protection in Turkey. It should be noted that national human rights groups cooperate with the European Commission by providing information for the latter's annual progress reports on Turkey's accession to the EU.

It has been claimed that since 1999 the country has been undergoing a profound transformation in terms of democratisation.[886] Two series of constitutional amendments and eight reform packages, comprising more than 490 laws were adopted

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[881] Gündüz, A., "Human rights and Turkey's future in Europe", Orbis- Philadelfia, Vol.45, 2001, p.18.
[882] Ozdek, Y., & Karacaoglu, E., "Turkey" in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, p.889 and 905.
[883] *Ibid*, p.906.
[884] Hicks, N., "Legislative Reform in Turkey and European Human Rights Mechanisms", Human Rights Review, October-December 2001, p.81.
[885] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.32, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf
[886] Turkmen, F., "The European Union and Democratisation in Turkey: The Role of the Elites", *Human Rights Quarterly*, Vol.30, 2008, p.147.

or amended by the Turkish Parliament since then.[887] As a result, the EU Council, welcoming "the decisive progress made by Turkey in its far-reaching reform process" has concluded that Turkey sufficiently fulfilled the political criteria formulated in the Accession Partnership document presented by the EU in December 2001. It therefore decided on 17 December 2004, to open accession negotiations on 3 October 2005.[888] Steven Greer claimed that it is "hard to deny that the EU has had a much greater impact than the CoE on the position of human rights in Turkey".[889]

The Turkey-EU relationship demonstrates how both the legislation and the implementation of human rights reforms in the legal order of Turkey occur as a result of the former's wish to participate in the latter. This raises the question of the Turkish Government's motivation in accepting human rights reforms required for entry into the EU: Is this only a rhetorical acceptance to satisfy the European demands for an eventual EU membership or the start of a cascade effect? It is difficult to draw any conclusions regarding the motivating factor driving these reforms. It can be said however that complying with the ECtHR's judgments and implementing the ECHR is a condition precedent in the EU accession process and therefore a failure to respect the ECHR system seriously undermines a successful outcome for the country concerned.

Turkey seems to have an effective mechanism of defence before the Strasbourg Court and for the implementation of its judgments. It can be argued that the development of such a mechanism was essential for Turkey in order to comply with the judgments in high number of individual applications reaching Strasbourg. This mechanism might be effective in implementing a number of judgments but it has been argued that the ways in which the ECtHR judgments have made a difference in the Turkish legal order seem to depend on various factors, such as the type of violation in question, the commitment of the government to executing the judgment concerned, the political

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[887] *Ibid*, p.147.
[888] Presidency Conclussions, Brussels European Council, para. 18,22, 16-17 December 2004 available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf
[889] Greer, S., "The ECHR, Achievements, Problems and Prospects", Cambridge University Press, 2007, p.102.

nature of the issue, the number of judgments and the amount of compensation Turkey was required to pay.[890]

This thesis has established that this mechanism is not effective in reaching the right decisions or in introducing the appropriate measures in areas which are considered sensitive or of crucial importance for Turkey. It is clear that the enactment of legislations and policy changes require political will as outlined above. However, it should be remembered that the armed forces in Turkey continue to exercise significant political influence via formal and informal mechanisms.[891] In 2008, senior members of the armed forces have expressed their opinion on domestic and foreign policy issues going beyond their remit, including on Cyprus, the South East, secularism, political parties and other non-military developments.[892] As this thesis has demonstrated Turkey has difficulty in implementing judgments which concern these areas and it can be argued that this is not unrelated to the strong influence that the armed forces exert in Turkish politics.

In addition, the implementation of the ECtHR's judgments and the ECHR in the Turkish legal order is impeded by the founding ideology of Turkey which rests, on the dual principles of "territorial integrity and national unity" and "laicism", dominant in the legal and political culture of the country. Thus on the issue of the dissolution of political parties, the Constitutional Court remains rigidly faithful to its own interpretation excluding different interpretations of the principles of the "unitary" and "secular" Republic and ignoring the relevant ECHR standards. Moreover, it became clear that impartial and independent investigation into allegations of human rights violations by members of the security forces is still not pursued making the fight against impunity almost an impossible task.

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[890] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.32, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

[891] CommEC, 2008 Regular Report on Turkey's Progress Towards Accession, Brussels, 5.11.2007, p.9.

[892] *Ibid*, p.9.

5.10 Implementation of the Recommendations referred to in the 2004 Declaration of the CoM

A central aim of this thesis is to analyse the set of the five Recommendations referred to in the 2004 Declaration of the CoM concerning various measures, underpinned by the principle of subsidiarity, to be taken at the national level in order to strengthen the domestic implementation of the ECHR. As already outlined in Chapter 2, these Recommendations endeavour to prevent violations at the national level and improve domestic remedies, including the requirement that states ensure continuous screening of draft and existing legislation and practice in light of the ECHR and the ECtHR case-law; and also that states must increase the provision of information, awareness-raising, training and education in the field of human rights. In this section there is (as has already been done in the chapter on Cyprus) a detailed analysis of the implementation of these Recommendations in the Turkish legal order. More specifically this section seeks to evaluate the effectiveness of these Recommendations and to critically assess their implementation at national level.

5.10.1 Recommendation Rec(2004)4

The ECHR Rights in university education and professional training

It has been noted that domestic human rights NGOs have been major actors in the development of a domestically grown human rights culture in Turkish politics.[893] Of these NGOs, the Human Rights Association,[894] founded in 1986, is Turkey's oldest and largest human rights organisation. With over 10,000 members and activists, it advocates for human rights by organising campaigns, drafting reports and focusing public attention on rights abuses.[895] In addition, the Human Rights Foundation of Turkey, founded in 1990, aims primarily at assisting people subjected to torture and is active in rehabilitation centres that treat victims of torture. Furthermore, the

[893] See Çali, B., "Human Rights Discourse and Domestic Human Rights NGOs " in in Kabasakal Arat, Z, "Human Rights in Turkey", Pennsylvania Studies in Human Rights, University of Pennsylvania Press-Philadelfia, 2007, pp.217-232.
[894] Human Rights Association, www.ihd.org.tr
[895] See, e.g., Human Rights Association (2006).

Foundation publishes annual reports on the status of human rights in Turkey.[896] The increase in the number of NGOs in Turkey reflects the process restoring the rule of law and widespread social reaction to the authoritarian regime established under the 1982 Constitution.[897] In particular, it can be said that the legal and political activism of Kurdish lawyers in early 1990s has played an important role in this development. Central to this process was the assistance that Kurdish lawyers have received from human rights lawyers and organisations in the United Kingdom.[898]

It should be noted that until recently, it was for individual lawyers to take cases to Strasbourg. Rather, cases were filed by lawyers associated with national human rights NGOs. It has been argued that his was due to "lawyers' lack of expertise and knowledge on the petition process, victims' preference for institutional support particularly when allegations of gross violations such as torture are made against state officials and the sensitivity of human rights organizations to human rights abuses".[899]

Apart from human rights NGOs, numerous Turkish associations and foundations are engaged in projects designed to increase public awareness of human rights. For example, in one volunteer project initiated by an association and supported by the EU, following appropriate training, thirty individuals of different professional backgrounds engaged in discussions on human rights and distributed information material in Istanbul cafés. They claim to have reached 9,200 people in a total of 314 traditional café houses (*kahvehane*).[900]

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[896] See, e.g., Human Rights Foundation (2006).

[897] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey" in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.518.

[898] See for example the Kurdish Human Rights Project ('KHRP') a London-based NGO founded in 1992 and committed to the promotion and protection of the human rights of all persons in the Kurdish regions of Turkey, Iraq, Iran, Syria and elsewhere. A central part of its work is the strategic use of international human rights mechanisms to tackle human rights abuses. KHRP has brought cases before the ECtHR on behalf of over 500 victims and survivors of extra-judicial killings, 'disappearances', torture, unfair trials, censorship and other human rights abuses, in particular against Turkey.

[899] Kurban, D., Erözden, O., & Gülalp, H., "Supranational rights litigation, implementation and the domestic impact of Strasbourg Court jurisprudence: A case study of Turkey", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.40, available at: http://www.juristras.eliamep.gr/wpcontent/uploads/2008/10/casestudyreportturkeyfinal.pdf

[900] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey" in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.518.

A number of human rights bodies have been established in Turkey since 1999 such as the Reform Monitoring Group, the Human Rights Presidency, the provincial and sub-provincial Human Rights Boards, the Human Rights Advisory Board and several investigation boards. This is a positive development and it has been suggested that it reflects a new approach in developing a constructive relationship between human rights organisations and the Turkish State.[901] However, as this research will demonstrate below the impact of these bodies has as yet been very limited.

Since January 2004, the Human Rights Presidency[902] has intensified its work to raise awareness on human rights, process complaints and address specific cases. Individuals are now able to register complaints of human rights abuses by completing a form with a list of questions inspired by the ECHR, which can be posted in complaint boxes.[903] However, the Human Rights Presidency has not yet succeeded in having a nationwide impact. Efforts have focused, in particular, on increasing awareness of the existence of the Presidency and the provincial Human Rights Boards.[904] Nevertheless, the impact of the Presidency remains low as it has a limited budget and it is not consulted on legislative proposals.[905] It is evident that the Human Rights Presidency lacks independence from the government, is understaffed and has a limited budget.[906]

The Human Rights Advisory Board (HRAB),[907] reporting directly to the Prime Minister, was established in 2001 as Turkey's national human rights institution.[908] Despite facing many difficulties during its work, the HRAB introduced significant

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[901] CommEC, 2004 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.10.2004, p.32.

[902] The mandate of the Presidency, which operates under the auspices of the Prime Ministry, is to coordinate the works of various human rights bodies, to monitor the implementation of the legal framework on human rights, offer recommendations towards harmonising domestic legal framework with international human rights instruments Turkey has ratified, monitor and coordinate the training programs of public bodies, review human rights complaints and coordinate efforts for the prevention of further violations.

[903] CommEC, 2004 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.10.2004, p.32-33.

[904] CommEC, 2005 Regular Report on Turkey's Progress Towards Accession, Brussels, Brussels, 09.11.2005, p.21.

[905] *Ibid*, p.21.

[906] CommEC, 2006 Regular Report on Turkey's Progress Towards Accession, Brussels, 08.11.2006, p.12.

[907] A body composed of NGOs, experts and representatives from ministries.

[908] Act Amending the Law on the Organization of the Prime Minister Office and the By-Law Regulating Government Employees, Act no. 4643, 12 April 2001, R.G. no. 24380, 21 April 2001, 8.

initiatives to increase awareness of human rights. In particular, in 2004, the HRAB approved two reports that were criticising the government: a report that challenged the government's human rights policy, and a Report on Cultural and Minority Rights, which criticised the government's policy on the treatment of minorities and communities.[909]

While the HRAB reports provoked lively debate within Turkey, the Public Prosecutor filed a criminal case against Ibrahim Kaboğlu, chairman of the HRAB, and Baskin Oran, author of the HRAB report on minority rights, for "inciting hatred and enmity" and "insulting the judiciary". After Kaboğlu and numerous board members resigned in protest, the HRAB has ceased to operate, while the government formally suspended it in early 2005.[910]

A Human Rights Violations Investigation and Assessment Centre was established within the Gendarmerie Command in April 2003.[911] Furthermore, in September 2003 the Reform Monitoring Group was established and since then it has examined a number of human rights violations and exerted influence to resolve specific problems raised by foreign embassies and NGOs.[912] Moreover, the number of provincial and sub-provincial Human Rights Boards increased from 859 to 931.[913] In addition, a regulation published in November 2003 removes representatives of the security forces from these Boards and facilitates greater participation by civil society representatives.[914]

However, the lack of independence of these bodies from the executive undermines their legitimacy in the eyes of civil society, rendering them practically ineffective. In

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[909] The report highlighted the restrictive interpretation of the 1923 Lausanne Treaty and urged the government to align its human rights policy with international standards, giving equal rights to non-Muslim groups and recognising cultural rights to citizens of non-Turkish ethnic origin.
[910] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey" in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.506.
[911] Since its establishment in 2003, the gendarmerie's Human Rights Violations Investigation and Assessment Centre has received 162 direct complaints, the majority of which relate to allegations of ill-treatment or unjust detention. To date, disciplinary measures have been taken in 3 cases (CommEC, 2005 Regular Report on Turkey's Progress Towards Accession, Brussels, Brussels, 09.11.2005,p.21).
[912] CommEC, 2004 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.10.2004, p.33.
[913] *Ibid*, p.32.
[914] *Ibid*, p.32.

particular, a number of NGOs invoke the lack of independence of the Human Rights Boards as a reason for refusing to take part in this institution.[915] It is suggested that the efforts of NGOs to establish an independent national human rights institution have not yet produced a positive result.

A law enacted in 2006 to establish an independent ombudsperson's office has not yet entered into force due to a presidential veto.[916] Specifically, in June 2006, the parliament enacted a law establishing an Ombudsperson to receive complaints from natural and legal persons with regards to administrative acts.[917] However, the law has not entered into force due to the President's veto on the ground that the establishment of an institution under the auspices of the parliament which would monitor all acts of the administration is contrary to the constitution.[918]

The findings of this thesis suggest that the human rights boards do not constitute effective human rights protection mechanisms mainly because of their lack of independence from the executive and due to issues of lack of transparency and expertise of these bodies as well the overlap in their mandates aside. Moreover, they are extremely under-utilised by human rights groups and individuals because of lack of faith in their impartiality, independence and expertise.[919]

It is submitted that there is an urgent need for better public awareness of the work of these institutions and for the allocation of adequate resources, in particular as regards staffing. Moreover, it is of paramount significance that the human rights boards remain completely independent from the executive in accordance with the Paris

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[915] CommEC, 2007 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.11.2007, p.13.

[916] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.8, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

[917] Law on Public Auditing Institution, No. 5521, adopted on 15 June 2006.

[918] For the reasoning of the presidential veto issued on 1 July 2006, *see* the Presidency's website at http://www.cankaya.gov.tr/tr_html/ACIKLAMALAR/01.07.2006-3512.html.

[919] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.10, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

Principles of the United Nations.[920] It is suggested that independent human rights institutions could have been given the responsibility for monitoring the implementation of the ECtHR's judgments and proposing changes in legislation for better protection of human rights in Turkey. However, it has been pointed out that the state's adversarial stance toward such bodies has prevented them from performing their functions, and from taking on an even greater monitoring role.[921] Consequently, political manipulation has undermined the independence and effectiveness of Turkey's human rights institutions. In essence, their power has been limited and their status is merely consultative.

In Turkey, the teaching of courses on human rights and liberties have been traditionally included in the first-year constitutional law course and studied in depth during the fourth-year general public law course at law school. Furthermore according to Kaboğlu,[922] in recent years, a separate human rights course became compulsory at the Ankara and Istanbul political science departments and at most law schools,[923] while it remains optional at other universities.[924] Only one law school, the University of Bahçeşehir's Faculty of Law, offers an optional course on the application of the ECHR. Most doctrinal law school courses incorporate the human rights perspective, while major universities in Turkey host also research centres on human rights. In particular, the Faculty of Political Science at the University of Ankara has a "Centre for Human Rights" and the Hacettepe University has the "Centre for Research and Application on the Philosophy of Human Rights ".[925]

In Turkey, the ECHR education has been included in 22 university programmes. The teaching of the ECHR is a subject at first degree level and in 13 universities at postgraduate, master's and doctoral levels. In 6 universities conferences and seminars are regularly held on this matter.

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[920] United Nations Commission on Human Rights, Resolution 1992/54, "Principles Relating to the Status of National Institutions," 3 March 1992.
[921] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey" in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.506.
[922] *Ibid*, p.519.
[923] E.g., Başkent, Bilkent, Galatasaray, Bilgi, Marmara, Dicle, and İstanbul.
[924] E.g., Gazi, Kocaeli, Bahçeşehir, and Koç.
[925] CDDH(2006)008 Addendum III Bil, Information submitted by member states with regard to the implementation of the five recommendations mentioned in the Declaration adopted by the CoM at its 114th session (12 May 2004), Strasbourg, 7 April 2006.

From 2003 to 2004, the CoE and the CommEC in collaboration with the Turkish authorities[926] launched a joint project (CoE/European Commission Joint Initiative),[927] to increase human rights awareness among judges, other public officials and the public at large. The project took place in three phases.[928] During the first phase in 2003, 9 five-day seminars were held in different regions of Turkey. These seminars provided 225 judges and public prosecutors with intensive training on the ECHR and the case-law of the ECtHR. During the second phase of the training programme in February 2004, these 225 judges and public prosecutors were invited to Ankara for 3 days of methodology training. At the conclusion of the second phase, a pool of 225 human rights trainers had been established.[929] In the third phase, conducted between 11 April 2004 to 9 July 2004 the 225 trainers conducted a series of seminars on the ECHR and the case-law of the ECtHR for 9,200 judges and public prosecutors at 30 centres throughout Turkey. Each judge and public prosecutor was intensively trained for a period of 25 hours over 2 ½ days.

Finally, a number of seminars and courses on human rights have been organised in Turkey.[930] Most notably three symposia sponsored by the country's high courts[931] and a major international conference on Turkey's fiftieth anniversary of the ECHR ratification,[932] have helped to increase human rights awareness. Overall, however, the rather tenuous nature of human rights education in Turkey correlates with the political authorities' distrust of independent human rights bodies.[933] Furthermore, it has been

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[926] Turkey's National Committee for Human Rights Education played an important role in the realisation of this project.

[927] The main aim of the project was the implementation of a comprehensive strategy for the training of judges, prosecutors and other public officials on the ECHR and the ECtHR's case-law.

[928] Richmond, P. and Björnberg, K., "The Functioning of the Judicial System in the Republic of Turkey", Report of an Advisory Visit, 11 – 19 July 2004, European Commission, Brussels, p.132 available at: http://www.xs4all.nl/~ingel/ankara/advisory%20report%20II.pdf

[929] It should be noted that the 225 trainers continue to train police and and gendarmie officers, assisstant judiciary personnel and lawyers in the areas where they are located.

[930] See CDDH(2006)008 Addendum III Bil, (CDDH), Information submitted by member states with regard to the implementation of the five recommendations mentioned in the Declaration adopted by the CoM at its 114th session (12 May 2004), Strasbourg, 7 April 2006.

[931] ECHR and Judicial Power (2003), Court of Cassation, Ankara; ECHR and Administrative Jurisdiction (2003), Council of State, Ankara; ECHR and Constitutional Jurisdiction (2004), Constitutional Court, Ankara. For the proceedings of the first symposium see TBB-İHAUM (2004*a*).

[932] International Human Rights Congress, ECHR and Turkey, 16-19 May 2004, Istanbul, Fifty Years of the ECHR: Results and Perspectives. See also Institut Luxembourgeois des Droits de L'Homme, Bulletin des Droits de L'Homme, nos. 11-12 (2005), 27.

[933] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey", in Keller, H., &

argued that "the activism displayed by the judiciary in restricting fundamental rights and liberties protected under the ECHR demonstrates that the training given (...) to prosecutors and judges has been insufficient for the effective implementation of ECtHR judgments. The conservative, nationalist and authoritarian mentality runs too deep in the judicial culture in Turkey to be eradicated through professional trainings".[934]

Therefore, it could be said that something more radical is required in order to change the mentality which seems to prevail in the judiciary of the Turkish legal order. The creation of a "human rights culture" within a domestic legal order, the main objective of Recommendation Rec(2004)4 is certainly a difficult task requiring considerable time and consistent and persistent effort. Clearly long term strategies will need to be adopted in order to ensure that the instrument of the ECHR becomes an integral part in the legal arsenal of the Turkish judiciary. Academic legal courses and training for Bar Associations in the field of human rights should become both more consistent and more intense in order to provide a solid background for law professionals and members of the judiciary. And above all, in order to ensure that such strategies and training take root, and ensure the emergence of a reliable "human rights culture" in Turkey there is need of a political will for a "European Turkey" where human rights compliance is not a matter of stylistic and opportunistic adjustments but of substantial reform.

In Turkey, scholarly interest in the ECHR was minimal up to the late 1980s. With the recognition of the individual petition before the ECommHR in 1987 and the ECtHR's compulsory jurisdiction over Turkey in 1990, scholars became more interested in European human rights law.

The *Turkish Yearbook of Human Rights* and its Turkish-language counterpart Yearbook of Human Rights, the annual publication of the Constitutional Court, the

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Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.522.

[934] Kurban, D., Erözden, O., & Gülalp, H., "Supranational rights litigation, implementation and the domestic impact of Strasbourg Court jurisprudence: A case study of Turkey", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.40 available at: http://www.juristras.eliamep.gr/wp-content/uploads/2008/10/casestudyreportturkeyfinal.pdf

Council of the State's Journal, the Court of Cassation's Journal and the periodical publications of Turkish law faculties contain articles on the ECHR and its implementation. The legal periodicals of the bar associations and their affiliates publish ECtHR judgments, while the Bar Associations and private publishers also publish annotated collections of ECtHR case-law.

The relationship between the ECHR and the Turkish legal order and the ECtHR's case-law on Turkey has been the object of academic research, particularly in legal literature.[935] However, it has been claimed that, the overall purpose of the literature on the ECtHR's case-law on Turkey is to provide a practitioner's guide for lawyers, judges and prosecutors who do not speak English and/or do not follow the jurisprudence of the ECtHR.[936] Moreover, there is very limited academic literature on the impact of the ECtHR case-law on national law and practice.[937]

5.10.2 Recommendation Rec(2002)13

Publication and dissemination in the Member States of the text of the ECHR and of the case-law of the ECtHR

In Turkey, the ECtHR's judgments against the State are translated in Turkish, published on the website of the Ministry of Justice[938] and forwarded to judges and prosecutors. The Ministry of Justice has also established an on-line human rights information databank that is accessible to all judges from their personal notebook computers. The databank contains all the rulings of the ECtHR and domestic decisions involving human rights.[939] Furthermore, since 1997 the ECtHR's judgments

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[935] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey", in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.520.

[936] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.27, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

[937] *Ibid*, p.27.

[938] Ministry of Justice, www.edb.adalet.gov.tr/ymb/ymb.htm. See also Anadolu University, http://aihm.anadolu.edu.tr .

[939] Richmond, P. and Björnberg, K., "The Functioning of the Judicial System in the Republic of Turkey", Report of an Advisory Visit, 11 – 19 July 2004, European Commission, Brussels, p.135 available at: http://www.xs4all.nl/~ingel/ankara/advisory%20report%20II.pdf

are distributed to all courts through the Bulletin of Case-Law, which is published by the Ministry of Justice.[940] Printed in 13,000 copies of this publication is distributed to all the judicial authorities.[941]

In addition to the major cases concerning Turkey that are circulated in periodical publications of the bar associations and the police, scholars have also published a number of commentaries on the ECtHR case-law. There are several periodicals which publish translated judgments against Turkey and other important judgments. There are also numerous textbooks in Turkish and Internet sites dealing with the topic of the ECHR and the case-law. For example, the web site of the Bar Association in Ankara explains how to take a case to the ECtHR and includes an application form.[942]

The time framework for the translation of the judgments varies, and usually depends on the length and complexity of the judgment. However, in the majority of cases a period of 2 to 3 months is sufficient.[943]

Another important move of the Turkish Government is to bring to the attention of the authorities the case-law of the ECtHR concerning other member states, the important judgments, particularly those of the Grand Chamber regarding third States, and those who constitute a development of case-law.[944] The most important are translated and reprinted on the website of the authorities and in particular the Ministry of Justice.

In addition, in order to publicise the jurisprudence of the ECtHR a number of handbooks on the case-law of the ECtHR in various fields have been translated and distributed to all judicial authorities.[945] Furthermore, the authorities are planning the

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[940] CDDH(2006)008 Addendum III Bil, Information submitted by member states with regard to the implementation of the five recommendations mentioned in the Declaration adopted by the CoM at its 114th session (12 May 2004), Strasbourg, 7 April 2006.
[941] In addition, the judgments contained on the website www.edb.adalet.gov.tr
[942] CDDH(2006)008 Addendum III Bil, Information submitted by member states with regard to the implementation of the five recommendations mentioned in the Declaration adopted by the CoM at its 114th session (12 May 2004), Strasbourg, 7 April 2006
[943] DH-PR(2006)004rev Bil , CDDH, DH-PR, Replies to the new questionnaire with regard to the five recommendations mentioned in the May 2004 Declaration adopted by the CoM, Strasbourg, 17 January 2007.
[944] *Ibid.*
[945] See for example Ursula Kilkelly, "Guide on the application of Article 8 of the ECHR"; Monica Macovei, "Guidance on the application of Article 10 of the ECHR on Freedom of Expression"; Nuala Mole and Catharina Harby, "Guide on the application of Article 6 of the ECHR on fair trial"; Monica

translation and dissemination of other guides regarding positive obligations under the ECHR, as well as the preparation of a handbook on the role of judges and prosecutors in observing the right to a fair trial.

5.10.3 Recommendation Rec(2004)5

Verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR

According to Recommendation Rec(2004)5 member states should ensure that there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the ECHR in the light of the case-law of the ECtHR as quickly as possible. It might therefore have been expected that steps would be taken to ensure that legislation which raises issues under the ECHR is not passed without first having undergone expert scrutiny.

In Turkey, the preparation of standards bills is carried out by the relevant ministries and is subject to the comments of other government departments and civil society in general. In addition, it is imperative to obtain the opinion of the Directorate General of the EU on the compatibility of the text drawn up with the EU "*acquis communautaire*". Following an assessment of all different views, the draft bill is sent to the Presidency of the Council of Ministers, which after consideration forwards it as a government project to the Presidency of the Turkish Grand Assembly.

The bill at this level is considered by various specialist parliamentary committees including the Commission on Human Rights and the Committee established by Act 4847 of 15 April 2003 charged *inter alia* with verifyiing the compatibility of bills

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Carss-Frisk, "Guide on the application of Article 1 of Protocol No. 1 on the right to own property"; Monica Macovei, "Guide for the application of Article 5 of the ECHR on freedom and security"; Aisling Reidy, "Guidance on the application of Article 3 of the Convention on the Prohibition of Torture" (DH-PR(2006)004rev Bil , CDDH, DH-PR, Replies to the new questionnaire with regard to the five recommendations mentioned in the May 2004 Declaration adopted by the CoM, Strasbourg, 17 January 2007).

with the "*acquis communautaire*". At the same time the bill's compatibility with the ECHR and the ECtHR's jurisprudence is also examined and verified.[946]

The Parliamentary Human Rights Investigation Committee[947] collects complaints on human rights violations and requests that the relevant authorities follow up and redress the situation when necessary. The Committee also provides procedural advice to citizens who would like to apply to the ECtHR following the exhaustion of domestic remedies. The Committee adopts reports on issues related to the human rights situation.[948] There is no doubt that the Committee plays an active role in collecting complaints on human rights violations and conducting fact-finding visits to the regions. Although it was called upon in a number of cases to table proposals with a view to amending norms of internal law which are not in line with the international norms and arrangements in the field of human rights,[949] it should be noted that the Committee has no legislative role, and is thus generally not consulted on legislation affecting human rights.[950] The Committee also lacks enforcement power.[951]

Verification of compatibility of administrative practices occurs at various levels: Judicial administrative, hierarchical administrative control, control of the approving authority for certain public institutions, political control through various control mechanisms available to the parliament, control, and civil society. At all these levels verifying compatibility with the ECHR may intervene. Obviously following the constitutional amendment of 2004 Article 90 provides now the rule international

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[946] DH-PR(2006)004rev Bil, CDDH, DH-PR, Replies to the new questionnaire with regard to the five recommendations mentioned in the May 2004 Declaration adopted by the CoM, Strasbourg, 17 January 2007.

[947] Established by the Act dated 5th December 1990, No. 3686 the Commission has the power to set its own agenda and the mandate to conduct human rights monitoring on its own initiative, undertake fact-finding missions to locations it deems necessary, make unannounced visits to places of detention, interview official and non-official individuals and issue non-binding reports based on its missions.

[948] CommEC, 2004 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.10.2004, p.32-33.

[949] Bozkurt, R., Secretary General of Grand National Assembly of Turkey, "The Role of Turkish Parliament in Promoting Human Rights", p.1, Association of Secretaries General of Parliaments, Geneva Meeting, 1 - 3 October 2003, available at: www.asgp.info/Resources/Data/Documents/MEMBKIRBQXTBKXINGNIWXAWIMDEBVM.pdf

[950] CommEC, 2006 Regular Report on Turkey's Progress Towards Accession, Brussels, 08.11.2006, p.12.

[951] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.11, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

conventions dealing with human rights, on domestic law verification becomes an important parameter control administrative practices.[952] This provision, under the terms of article 11 of the Constitution, binds the legislature, the executive, the legal one, the whole of the administrative machinery, the other institutions, as well as the people.

5.10.4 Recommendation Rec(2000)2

on the re-examination or reopening of certain cases at domestic level following judgments of the ECtHR

The ECtHR found violations of Article 11 of the ECHR in several cases concerning political parties, previously banned by the Constitutional Court with key members of which had been charged and convicted. In August 2002 the Turkish Parliament gave many, but not all, of those convicted by a Turkish court the right to a retrial in Turkey if the ECtHR found a violation of the fair trial standards, and if the consequences could not be compensated monetarily.[953]

Nevertheless, reopening domestic proceedings is subject to strict procedural requirements and time limits. The Law No. 4793 amending the Civil Procedures Act and Criminal Procedures Act[954] provided for the reopening of domestic proceedings in cases where the ECtHR has found a violation of Article 6, but limited its temporal scope to judgments which became final before 4 February 2003 and judgments rendered in cases filed with the ECtHR after this date. As a result, the execution of the ECtHR judgments in *Hulki Güneş*[955] and in 113 similar cases, relating to fairness of proceedings before the former State Security Courts, remains pending.

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[952] The Constitutional amendment of 2004 by adding a new subparagraph to article 90 of the Constitution of 1982, established the supremacy of the international treaties relating to humans rights in the event of conflict with a national legislative provision.

[953] This provision was introduced under Harmonization Law No. 4771 (the third package) of 9 August 2002, and subsequently included in the 2005 Criminal Procedure Code (Article 311).

[954] Adopted on 21 January 2003 and entered into force on 4 February 2003.

[955] *Hulki Günes v. Turkey,* No. 28490/95, 19/06/2003; see also CoE, CoM, Interim Resolution, 30 November 2005, ResDH(2005)113 (noting that the Turkish authorities have not responded to the Committee's calls to correct this gap in Turkish law).

Amnesty International considered that "both the in-built restrictions, which mean that this law is applied selectively, and the practical implementation of this law to date, provide serious grounds for concern". Regarding the selective application of the law on retrial following ECtHR judgments finding Turkey in violation of fair trial principles, Article 311 (2) of the 2005 Criminal Procedure Code,[956] provides that there will be no right to a retrial in Turkey for those cases pending before the ECtHR on 4 February 2003.[957] One of the cases pending was that of *Öcalan,* so that retrial for Abdullah Öcalan was made impossible under the new legislation.[958]

The measure thus has a discriminatory effect on all the other cases which, along with that of Abdullah Öcalan, were pending at the ECtHR on 4 February 2003. Amnesty International considers that the Turkish government should take immediate steps to amend Article 311(2) of the Criminal Procedure Code, so that in all cases where the ECtHR finds a violation of fair trial principles the right to retrial in Turkey is applicable.

The CoM of the CoE has challenged this denial of the right to retrial, referring to the case of *Hulki Günes v. Turkey*. The ECtHR ruled that Hulki Günes had been subjected to an unfair trial in Turkey.[959] Because the ECtHR had delivered its judgment in June 2003, and the case was pending on 4 February 2003, Hulki Günes was automatically denied the right to retrial in Turkey. On 30 November 2005 the CoM called on Turkey to redress the violations of the right to a fair trial found by the ECtHR in the *Hulki Günes v. Turkey* case. Particularly in view of the life sentence Hulki Günes had

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[956] Special provisions in the Code of Criminal Procedure (came into effect on 1 June 2005) allow the reopening of criminal proceedings following a judgment of the ECtHR. Paragraphs 1 f) and 2 of Article 311 headed "Reasons for a New Trial in Favour of Accused" read as follows: "1 f) - If it was determined by a final judgment of the ECtHR that the judgment for penalty had been rendered by violating the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols, the retrial can be requested within one year from the date on which the judgment of the ECtHR becomes final. 2) Sub-paragraph f) of the paragraph one shall be applied for the judgments on the applications introduced to the ECtHR after the date 4.02.2003 and for the judgments finalized by 4.02.2003"; CDDH(2006)008, Addendum III Bil, Information submitted by member states with regard to the implementation of the five recommendations mentioned in the Declaration adopted by the CoM at its 114th session (12 May 2004), Strasbourg, 7 April 2006.

[957] 2005 Criminal Procedure Code, Article 311, para.2.

[958] Kurban, D., Erözden, O., & Gülalp, H., "Supranational rights litigation, implementation and the domestic impact of Strasbourg Court jurisprudence: A case study of Turkey", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.28, available at: http://www.juristras.eliamep.gr/wp-content/uploads/2008/10/casestudyreportturkeyfinal.pdf

[959] *Hulki Gunes v. Turkey*, No. 28490/95, 19/06/2003.

received and which he was serving, the CoM called for the reopening of the impugned criminal proceedings or other appropriate *ad hoc* measures to redress the violations found.[960]

Amnesty International's second major area of concern relating to this retrial provision concerns the practical implementation of the law to date. The first case of retrial following a ECtHR judgment (July 2001) four former Democracy Party (DEP) parliamentarians – Leyla Zana, Selim Sadak, Orhan Dogan and Hatip Dicle had been sentenced to 15-year prison terms in December 1994 for membership of the PKK. Their retrial began at Ankara State Security Court No. 1 in April 2003, but on 21 April 2004 the court once again sentenced the four to 15 years' imprisonment for membership of the PKK in proceedings which Amnesty International considered to constitute "a replay of the original trial, designed to uphold the original verdict".[961] On 10 June 2004, the four were released from prison, following the chief prosecutor's application to the Court of Cassation to quash the verdict of the court below. The Court of Cassation proceeded on 14 July 2004 to overturn the Ankara court's verdict and a second attempt at retrial of the four parliamentarians began at Ankara Heavy Penal Court No. 11 (which had replaced the State Security Court) on 22 October 2004 and is still ongoing.

Amnesty International expressed many concerns over the deficiencies in the first retrial. Serious violations of the principle of fair trial included the pre-formed opinion of the case by a chief judge and his opposition to retrial whilst continuing to preside over the case, in violation of the presumption of innocence; repeated refusal by the court to release the four parliamentarians pending the court's verdict; and denial of the right to cross-examine prosecution witnesses. The second retrial of the four parliamentarians – now being tried in a special Heavy Penal Court is also flawed. [962]

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[960] Interim Resolution ResDH(2005)113, concerning the judgment of the ECtHR 19 June 2003 in the case of Hulki Gunes against Turkey, CoM, CoE, 30 November 2005.

[961] See, Amnesty International, "Turkey: Injustice continues despite welcome reforms", press release (AI Index 44/014/2004).

[962] At the hearing of the retrial on 7 July 2006, it was revealed that tapes which allegedly constituted a key part of the evidence against the defendants in the original trial had been destroyed back in 1997 and could therefore not be transcribed. The defendants had requested the examination and transcription of this alleged evidence in their retrial.

It is evident that the "Öcalan gap" had negative consequences for other individuals such as Hulki Güneş, whose cases were pending at the ECtHR on 4 February 2003. As a result of the continued imprisonments of these individuals the CoM adopted three interim resolutions[963] and two decisions,[964] and sent two letters to the Turkish Government.[965] The CoM noted that that the Turkish authorities have not responded to the interim resolutions and have not provided information or a time-frame regarding a legislative reform designed to allow the reopening of domestic proceedings in all similar cases, calling for the removal of the legal lacuna preventing retrial in similar cases and reiterating that a continuation of the situation would amount to a manifest breach of Turkey's obligations under Article 46 of the ECHR.[966]

5.10.5 Recommendation Rec(2004)6

on the improvement of domestic remedies.
Resolution Res(2004)3 on judgments revealing an underlying systemic problem
Pilot judgments

Following the adoption of Recommendation Rec(2004)6 (on the improvement of domestic remedies) and Resolution Res(2004)3 (on judgments revealing an underlying systemic problem) the ECtHR has adopted a number of "pilot judgments" in which it has identified an underlying systemic problem in the relevant domestic legal order of member states and called on states not just to provide redress for individual applicants, but also to provide appropriate solutions to the relevant systemic problem. The "pilot judgment procedure" has been applied to one systemic situation in Turkey in the case of *Doğan and Others v Turkey* [967] and is being again proposed in relation to violations of property rights in the northern part of Cyprus

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[963] CoM, Interim Resolution DH2005(113), Interim Resolution 2007(26), Interim Resolution 2007(150).

[964] The decisions adopted by the CoM at its 987th and 1007th meetings in February and October 2007, respectively.

[965] Letters dated 21 February 2005 and 12 April 2006.

[966] State of execution of cases against Turkey, CoE, available at: http://www.coe.int/t/e/human_rights/execution/04_statistics/StatisticsExecutionJudgments_July07.asp# ,4 July 2008.

[967] *Doğan and Others v Turkey,* Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29/06/2004.

(which is under the jurisdiction of Turkey) in the case of *Xenides-Arestis v Turkey.*[968] This part engages in a detailed analysis of these two cases.

5.10.5.1 Doğan and Others v Turkey

The ECtHR in the case, of *Doğan and Others v Turkey*[969] in June 2004, had identified the presence of a structural problem with regard to internally displaced people (mainly Kurdish villagers) and indicated possible measures to be taken in order to put an end to the systemic situation in Turkey. Although it has been suggested that this was not a "pilot" but a "principal" judgment,[970] it is quite clear that the basic characteristics of a pilot[971]judgment are present so that it was such in every way but in name. At present, admittedly, an adequate explanation of the difference between a "pilot" and a "principal" judgment is not easily forthcoming. This judgment illustrates how sometimes it is uncertain and unclear whether a judgment is a "pilot" one or not thereby underlying the need for clarity regarding the essential elements of a "pilot judgments" as well as for precise guidelines for the application of the "pilot judgments procedure". This thesis argues that it is of paramount significance to be able to establish when a judgment is a "pilot" one since this kind of judgments *de facto* extend beyond the sole interest of the individual "pilot" applicants and require the ECtHR to consider measures to effectively and permanently resolve the underlying general defect in the national legal order identified in the merits judgement as the systemic source of the violation found.

Following that judgment, the Turkish authorities had taken several measures, including enacting the Law on Compensation of Losses Resulting from Terrorist Acts[972] of 27 July 2004, with a view to redressing the ECHR grievances of those denied access to their possessions in their villages. It has been claimed that this represented recognition of the need to compensate those in the Southeast who had

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[968] *Xenides-Arestis v Turkey*, No. 46347/99, 22/12/2005.
[969] *Doğan and Others v Turkey,* Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29/06/2004.
[970] Meeting between ECtHR and organisations representing applicants and/or intervening as third parties, 10th April 2006, Strasbourg.
[971] Riza Turmen, Judge ECtHR, Interview by author 30th March 2007, Strasbourg.
[972] Law on Compensation for Losses Resulting from Terrorism and the Fight against Terrorism, No. 5233, 17 July 2004, Official Gazette No. 25535, 27 July 2004 ("Compensation Law").

suffered material damages since the beginning of the Emergency Rule period (19 July 1987).[973]

The *Law on Compensation of Losses Resulting from Terrorist Acts* was implemented albeit with considerable delay and uncertainty.[974] In November 2005 the CommEC highlighted that the system established by the Law had several shortcomings. Firstly, there was concern that the commissions responsible for assessing the damage include officials from the Interior Ministry who were responsible for the security forces, which inflicted the damage. Secondly, the conditions attached to eligibility for compensation were too strict and could leave a large number of potential beneficiaries outside the scope of the Law. This applied in particular to persons who had been forced to destroy their own properties or sign a form attesting that they were leaving voluntarily. There was also a heavy burden of proof on applicants to provide documentation, including property titles that in many cases never existed. Thirdly, the lack of legal support for applicants, coupled with the limited capacity of the commissions to process claims, undermined the overall efficiency of the system. Fourthly, the maximum threshold for compensation was too low and there is no time limit for the government to settle agreed claims. Finally, the absence of an appeal mechanism was also of concern.[975]

Despite such severe criticisms by the CommEC the effectiveness of this remedy has been confirmed by the ECtHR in its decision in case of *İçyer v. Turkey*[976] (declared inadmissible) in February 2006. The ECtHR noted that it could be seen, from a substantial number of sample decisions furnished by the Turkish Government, that those who had sustained damage in cases of denial of access to property, damage to their property or death or injury could successfully claim compensation via the remedy offered by the Compensation Law. According to the ECtHR those decisions demonstrated that the remedy in question was available not only in theory but also in practice.

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[973] CommEC, 2004 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.10.2004, p.50.
[974] CommEC, 2005 Regular Report on Turkey's Progress Towards Accession, Brussels, Brussels, 09.11.2005, p.38-39.
[975] *Ibid*, pp.38-39.
[976] *İçyer v. Turkey*, No. 18888/02, 09/02/2006.

The ECtHR considered that the provisions of the Compensation Law were capable of providing adequate redress for the ECHR grievances of those who were denied access to their possessions in their places of residence. Accordingly, the Government could be deemed to have fulfilled their duty to review the systemic situation at issue and to introduce an effective domestic remedy. Subsequently, approximately 1,500 similar cases from south-east Turkey (where applicants complain about their inability to return to their villages) pending before the ECtHR were dismissed on the grounds that the applicants had not exhausted the effective domestic remedy under the Compensation Law.

The ECtHR decision in *İçyer v.Turkey* notwithstanding, the implementation of the Law on Compensation of Losses Resulting from Terrorist Acts raises several concerns. Overall, there seems to be divergences in the methods used by the compensation commissions. They have extensive discretionary powers and procedures are often cumbersome. As a result, the payment of the amounts due is slow. There are concerns about the level of compensation. Furthermore, the conditions attached to the eligibility for compensation could leave a large number of potential beneficiaries outside the scope of the Law. There is also a heavy burden of proof on applicants to provide documentation, including property titles, which in many cases have never existed. The issue of "reconciliation" is not addressed in the compensation approach in relation to past human rights violations committed against internally displaced persons – such as the burning and destruction of property, killings, disappearances and torture.[977]

The decision of the ECtHR in the case of *İçyer v.Turkey* has been criticised by academics, NGOs and policy studies as unjust and politically motivated.[978] The ECtHR has been held responsible for the deterioration in the implementation of the law on compensation.[979] Seemingly motivated by the desire to ease its workload,[980]

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[977] CommEC, 2006 Regular Report on Turkey's Progress Towards Accession, Brussels, 08.11.2006, pp.22-23.

[978] See The Problem of Turkey's Displaced Persons: An Action Plan for Their Return and Compensation (2006); Human Rights Watch, Unjust, Restrictive and Inconsistent: The Impact of Turkey's Compensation Law with Respect to Internally Displaced People, 2006; Aker, A., Çelik, A., Kurban, D., Ünalan, T., and Yükseker, H., The Problem of Internal Displacement in Turkey: Assessment and Policy Proposals, TESEV, 2005.

[979] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project

the ECtHR has been charged with giving a premature judgment solely on the basis of selected sample decisions presented by the government whilst leaving the IDPs at the mercy of the authorities.[981]

In particular, in a report published by Human Rights Watch[982] in December 2006 it was claimed that the Turkish government was failing to provide fair compensation for hundreds of thousands of displaced people. It was argued that the Compensation Law provides no viable opportunity to appeal assessments, and the mainly Kurdish villagers have no alternative but to accept whatever is offered. In fairly critical language Holly Cartner[983] stated that the displaced villagers had been victimised yet again by the arbitrariness of a compensation process that was supposedly established to help them. She went on to add that "a compensation process to benefit the displaced has now become a way to relieve the state of its liability. The derisory sums offered are not only unjust, but they also undermine any possibility for the villagers to rebuild their lives".

The application of the "pilot judgment procedure" in the case of *Doğan and Others v Turkey* demonstrates the existence of a real risk for individuals who have previously submitted their cases to Strasbourg and as a result of the "pilot judgment" had to revert to the domestic courts, where they cannot be assured of obtaining effective redress. If this happens, it has been argued, they will have to go back to the ECtHR once again, thus extending considerably the length of such proceedings.[984]

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funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.27, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

[980] The ECtHR actually does refer to the 1,500 pending Internally Displaced Persons claims and its heavy case load.

[981] Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, p.27, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

[982] Human Rights Watch, "Unjust, Restrictive, and Inconsistent- The Impact of Turkey's Compensation Law with Respect to Internally Displaced People", December 2006, Number 1, available at http://hrw.org/backgrounder/eca/turkey1206/

[983] Holly Cartner, Europe and Central Asia director at Human Rights Watch.

[984] Lambert-Abdelgawad, E., "Le protocole 14 et l'execution des arrest de la Cour europeene des droits de l'homme" in Cohen-Jonathan, G., and Flauss, J.F., "La Reforme du systeme de controle contentieux de la Convention europeenne des droits de l'homme", Droit et Justice, Vol. 61, Bruxelles: Bruylant, 2005, p.102.

5.10.5.2 Xenides-Arestis v. Turkey

In *Xenides-Arestis v. Turkey,*[985] a chamber judgment from the third Section, in December 2005, concerning one of the post-*Loizidou* cases involving the denial of access to property in Turkish-occupied northern Cyprus, the Chamber held that the respondent state must introduce a remedy, which secured genuinely effective redress not only for the applicant but also in respect of all similar applications pending before the ECtHR. Such a remedy was to be available within three months from the date on which the judgment was delivered and the redress should occur three months thereafter. These directions were included in the operative part of the judgment.

Professor Frowein has claimed that since the judgment as a Chamber judgment could not acquire binding force on the day of delivery the Chamber in imposing an obligation to act on the respondent state was in clear violation of Articles 46 and 44 of the ECHR.[986] Thus, the Chamber went beyond its jurisdiction when it stated that the respondent state "must" introduce a remedy within three months after the delivery of the judgment without taking into account the rules in Article 44 of the ECHR as to when a judgment becomes final.[987] Pending the implementation of the relevant general measures, consideration of approximately 1400 applications deriving from the same general cause was adjourned.

Following this judgment, the authorities of the "Turkish Republic of Northern Cyprus" introduced the "Law for the Compensation, Exchange and Restitution of Immovable Properties",[988] which entered into force on 22 December 2005, and the "By-Law made under Sections 8 (2) (A) and 22 of the Law for the Compensation, Exchange and Restitution of Immovable Properties which are within the scope of sub-paragraph (b) of paragraph 1 of Article 159 of the Constitution", which entered into force on 20 March 2006. Furthermore it established the "Immovable Property Commission" to consider applications for compensation. The Commission is

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[985] *Xenides-Arestis v Turkey*, No. 46347/99, 22/12/2005.
[986] See Frowein, J., "The Binding Force of ECHR Judgments and its Limits", in Human rights, democracy and the rule of law = Menschenrechte, Demokratie und Rechtsstaat = Droits de l'homme, démocratie et état de droit : liber amicorum Luzius Wildhaber / eds. Stephan Breitenmoser ... [et al.]. - Zürich : Dike ; Baden-Baden : Nomos, 2007. - p. 261-269.
[987] *Ibid.*
[988] "Law No. 67/2005".

composed of five to seven members, two of whom are foreign members, Mr Hans-Christian Krüger[989] and Mr Daniel Tarschys[990]. It has the competence to decide on the restitution, exchange of properties or payment of compensation. A right of appeal lies to the "TRNC" High Administrative Court. The implementation of the new Law inevitably, and if approved by the ECtHR would provide an admissibility hurdle for future applicants.

The Chamber reserved the question of the application of Article 41 and delivered the just satisfaction judgment in December 2006. In that judgment the ECtHR welcomed "the steps taken by the Turkish Government in an effort to provide redress for the violations of the applicant's ECHR rights as well as in respect of all similar applications pending before it". The ECtHR noted that "the new compensation and restitution mechanism, in principle, had taken care of the requirements of the decision of the ECtHR on admissibility of 14 March 2005 and its judgment of 22 December 2005".[991]

Subsequently, the ECtHR has selected 8 "test-cases"[992] in order to examine the effectiveness of the relevant compensation and restitution mechanism. In response to previous criticisms, that a judgment, the "pilot" one, may not entail global assessment of the underlying systemic problem, the ECtHR here may be introducing an additional step to the "pilot judgment procedure". Though these cases have not been through this mechanism, the ECtHR seems to consider that arguments advanced by the parties could be decisive in reaching a conclusion regarding the effectiveness of the proposed remedy.

There does not seem to be a formal mechanism and criteria for selecting "pilot-judgments" and it is somewhat surprising that the ECtHR from the early stages of the "pilot judgment procedure" attempted to apply it in the case of *Xenides-Arestis v.*

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[989] Former Deputy Secretary-General of the CoE.
[990] Former Secretary-General of the CoE.
[991] *Xenides-Arestis v. Turkey*, No. 46347/99 (just satisfaction), 07/12/2006, at para.37.
[992] *Takis, Eleni and Elpida Demopoulos v. Turkey*, No. 46113/99; *Evoulla Chrysostomi v. Turkey*, No. 3853/02; *Lordos and A. Lordou v. Turkey*, No. 13751/02; *Eliadou and 3 Others v. Turkey*, No. 13466/03; *Thoma Kilara-Sotoriou and Thoma Kilara-Moushoutta v. Turkey*, No. 10200/04; *Stylas v. Turkey*, No. 14163/04; *Charalambou Onoufriou and 3 Others v. Turkey*, No. 19993/04; *Chrysostomou (nee Savvopoulou) v. Turkey*, No. 21819/04.

Turkey. It is widely understood that Turkey has been aware of its obligations for a number of years but has consistently failed to bring its violations to an end, despite numerous calls for it to do so from both the ECtHR[993] and the CoM.[994] Andrea Gattini has claimed that "a look at the still pending execution of the *Loizidou* judgment would have suggested to the third section of the ECtHR a more sober attitude towards the appropriateness and effectiveness of the pilot judgments".[995] It has been suggested that "Article 35 (1) of the ECHR relates to a situation of normality in which a state, within its lawful national jurisdiction, provides effective domestic remedies".[996] The application of the "pilot judgments procedure" in this case raises questions given that the ECtHR appears to be cautious and hesitant in proceeding to apply this procedure in apparently better-suited situations.[997]

It should be noted that the *post-Loizidou* cases are not a result of problematic legislation or a malfunctioning in the Turkish domestic legal order. On the contrary the chamber in *Xenides-Arestis* has identified that the source of the underlying systemic problem in the case in question is the unjustified hindrance of her "respect for her home" and "peaceful enjoyment of her possessions" which is enforced as a matter of "TRNC" policy or practice.[998] The textual expression of the "TRNC" policy

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[993] See *Cyprus v. Turkey,* No. 25781/94, 10/05/2001; *Loizidou v. Turkey,* No. 15318/89, (Merits) 18/12/1996.

[994] Turkey's open denial to comply with a ECtHR judgment has resulted in four strongly worded Interim Resolutions of the CoM. In connection with the ECtHR *Loizidou* judgment, the Turkish government declined to pay for damages, costs and expenses as ordered by the ECtHR unless a global settlement is reached that covers all property cases in Cyprus. In a 1999 Interim Resolution, the CoM "strongly urge[d]" Turkey to reconsider its position. Further, in a 2000 Resolution, the CoM emphasised that the failure on the part of a Member State to comply with a ECtHR judgment is unprecedented and declared that Turkey's position "demonstrates a manifest disregard for its international obligations."[994] In light of Turkey's continuous non-compliance, the CoM issued a third Resolution in 2001, stressing that acceptance of the ECHR and the binding nature of the ECtHR judgments, has become a requirement for membership in the CoE and calling upon the member states to take such action as they deem appropriate to ensure Turkey's compliance.[994] However, not until June 2003 did Turkish authorities declare that they had initiated compliance measures. After a fourth Interim Resolution in November 2003 that "[v]ery deeply deplor[ed] the fact that Turkey did not honour its undertaking", Turkey paid the sums awarded, together with default interest, in December 2003.

[995] Gattini, A., "Mass claims at the ECtHR", Human rights, democracy and the rule of law = Menschenrechte, Demokratie und Rechtsstaat = Droits de l'homme, démocratie et état de droit : liber amicorum Luzius Wildhaber / eds. Stephan Breitenmoser ... [et al.]. - Zürich : Dike ; Baden-Baden : Nomos, 2007, p.281.

[996] Brownlie, I., Opinion on "The Status of 'Law 67/2005' Relating to Article 159 of the 'Constitution' of the 'TRNC'", 16/06/2006, para.87.

[997] For example, detention facilities in various countries, e.g. Greece. See also a relevant Interim Resolution of the CoM ResDH(2005)21 concerning the issue of conditions of detention in Greece,7 April 2005.

[998] The ECtHR in the case of *Xenides-Arestis* found that "the violation of the applicant's rights guaranteed by Article 8 of the Convention and Article 1 of Protocol No. 1 originates in a widespread

or practice is Article 159 of the "TRNC" Constitution and "TRNC" legislation based thereon.

The ECtHR in the case of *Cyprus v. Turkey* had observed that "the Commission found it established on the evidence that at least since June 1989 the "TRNC" authorities no longer recognised any ownership rights of Greek Cypriots in respect of their properties in northern Cyprus.[999] This purported deprivation of the property at issue was embodied in "Article 159[1000] of the TRNC Constitution".[1001] It is evident that this "TRNC" policy or practice" constitutes the *raison d'etre* of all the post-*Loizidou* cases.

The ECtHR has clearly held in both the cases of *Loizidou v. Turkey*[1002] and *Cyprus v. Turkey*[1003] that the purported taking of private property under Article 159 of the "TRNC Constitution" has no legal validity in international law. Article 159 of the "TRNC Constitution" is legally invalid and therefore, Greek-Cypriot owners of immovable property in northern Cyprus have retained their title and should be allowed to resume free use of their possessions. These important elements were reaffirmed, *inter alia*, in the "pilot" case of *Xenides-Arestis.*

This thesis argues that following the issuing of a "pilot" judgment by the ECtHR in the case of *Xenides-Arestis* the Turkish Government has an obligation by way of

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problem affecting large numbers of people, namely the unjustified hindrance of her "respect for her home" and "peaceful enjoyment of her possessions" which is enforced as a matter of "TRNC" policy or practice (see *Cyprus v. Turkey*, §§ 174 and 185)", *Xenides-Arestis v. Turkey*, No. 46347/99, 22/12/2005, para.38.

[999] *Cyprus v. Turkey*, No. 25781/94, 10/05/01, para.32.

[1000] Article 159 (1) (b) of the "TRNC Constitution" provides as follows: "All immovable properties, buildings and installations which were found abandoned on 13 February 1975 when the Turkish Federated State of Cyprus was proclaimed or which were considered by law as abandoned or ownerless after the above-mentioned date, or which should have been in the possession or control of the public even though their ownership had not yet been determined ... and ... situated within the boundaries of the TRNC on 15 November 1983, shall be the property of the TRNC notwithstanding the fact that they are not so registered in the books of the Land Registry Office; and the Land Registry Office shall be amended accordingly". Article 159 (4) reads as follows: "In the event of any person coming forward and claiming legitimate rights in connection with the immovable properties included in subparagraphs (b) and (c) of paragraph (1) above [concerning, *inter alia*, all immovable properties, buildings and installations which were found abandoned on 13 February 1975], the necessary procedure and conditions to be complied with by such persons for proving their rights and the basis on which compensation shall be paid to them, shall be regulated by law."

[1001] *Cyprus v. Turkey*, No. 25781/94, 10/05/01, para.184.

[1002] *Loizidou v. Turkey*, 18/12/1996, No. 15318/89, (merits) para.44-45.

[1003] *Cyprus v. Turkey*, No. 25781/94, 10/05/01, para.186.

general measures to take action to remove for the future the systemic problem found by the ECtHR and secondly should make rapidly available adequate and appropriate remedies with retroactive effect, capable of offering redress for past damage sustained in similar cases.

In the "pilot" judgment of *Urbárska obec Trenčianske Biskupice v. Slovakia* (a case which concerned the transfer of ownership of the applicant's land and its compulsory letting) the ECtHR held that: "general measures at national level appear desirable in the execution of the present judgment in order to ensure the effective protection of the right to property in accordance with the guarantees set forth in Article 1 of Protocol No. 1. Firstly, the respondent State should remove all obstacles to the letting of land in allotments on rental terms which take account of the actual value of the land and current market conditions in the area concerned. Secondly, the respondent State should remove all obstacles to the award of compensation for the transfer of ownership of such land, the amount of which bears a reasonable relation to the market value of the property as of the date of transfer".[1004]

It appears that the Turkish Government failed to remove the source of the underlying systemic problem identified by the ECtHR in paragraph 38 of *Xenides-Arestis* (2005). In this context, Article 159 of the "TRNC Constitution" is still in place and the provisions of "Law 67/2005" (which takes Article 159 as its "legal" basis) fall short of Turkey's obligation to cease its wrongdoing by putting an end to the systemic violation found in the "pilot" case (thereby restoring displaced persons' peaceful enjoyment of their homes and properties) and to offer victims full reparation for its wrongdoing so as to wipe out the consequences of its wrongful conduct. By contrast, in the case of *Broniowski* the ECtHR concluded that "[i]n their amending legislation and in their declaration in the friendly settlement, the respondent Government have, in the Court's view, demonstrated an active commitment to take measures intended to remedy the systemic defects...".[1005]

It is clear that the administrative practice found by the ECtHR in *Cyprus v. Turkey* of denying Greek-Cypriots the peaceful enjoyment of their homes and possessions still

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[1004] *Urbárska obec Trenčianske Biskupice v. Slovakia*, No. 74258/01, 27/11/07, para.150.
[1005] *Broniowski v. Poland*, No. 31443/96, [GC] Friendly Settlement, 28/09/2005, para.42.

exists. Although Greek-Cypriot property owners may visit the Turkish-occupied area they are in the paradoxical situation of visiting their own properties as tourists or refugees returning to find others in occupation.

Moreover, the existence of the "TRNC" policy or practice excludes the application of the rule of exhaustion of domestic remedies enshrined in Article 35 of the ECHR. As long as the relevant policy or practice remains in force the rule of exhaustion of domestic remedies does not apply. The relevant rule does not apply in the case of applicants who were forcibly displaced from the Turkish-occupied northern part of Cyprus and who are denied as a matter the continuing "TRNC" policy or practice, the right to return to their homes in the Turkish occupied area of Cyprus.[1006]

In light of the above the Turkish Government has an obligation under 46 of the ECHR in executing the "pilot" judgment to take not only individual measures of redress in respect of Mrs *Xenides-Arestis* but also general measures covering other post-*Loizidou* actual or potential claimants. However, Turkey refuses to afford even individual relief to the "privileged"[1007] "pilot" applicant, Mrs Xenides-Arestis. It is important to note that in the "pilot judgment procedure" individuals who have lodged applications deriving from the same systemic source as the "privileged" one selected as the "pilot case" will not, if the procedure follows its planned course, receive any judicial examination of their grievance by the ECtHR. It should not be forgotten that the "pilot" applicant (and Mrs Loizidou) is still a victim of the systemic problem of

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[1006] The ECtHR in the case of *Cyprus v. Turkey* in the section dealing particularly with the alleged violations of the rights of displaced persons to respect for their home and property held that:
"184. The Court agrees with the Commission's analysis. It observes that the Commission found it established on the evidence that at least since June 1989 the "TRNC" authorities no longer recognised any ownership rights of Greek Cypriots in respect of their properties in northern Cyprus (see paragraph 32 above). This purported deprivation of the property at issue was embodied in a constitutional provision, "Article 159 of the TRNC Constitution", and given practical effect in "Law no. 52/1995". It would appear that the legality of the interference with the displaced persons' property is unassailable before the "TRNC" courts. Accordingly, there is no requirement for the persons concerned to use domestic remedies to secure redress for their complaints.
185. The Court would further observe that the essence of the applicant Government's complaints is not that there has been a formal and unlawful expropriation of the property of the displaced persons but that these persons, because of the continuing denial of access to their property, have lost all control over, as well as possibilities to enjoy, their land. As the Court has noted previously (see paragraphs 172-73 above), the physical exclusion of Greek-Cypriot persons from the territory of northern Cyprus is enforced as a matter of "TRNC" policy or practice. The exhaustion requirement does not accordingly apply in these circumstances."

[1007] The "pilot" applicant in effect enjoys a privileged status relative to other complainants since the freezing of the remaining cases is certainly at the expense of the individuals.

"TRNC" policy or practice, which clearly remains in force. The clear denial of Turkey to enforce the "pilot" judgment and to remove the "TRNC" policy or practice leaves the remaining post-*Loizidou* actual or potential claimants with no realistic prospect of success before any purported remedy held out by the Turkish Government.

It must be clear that the principal objective pursued by post-*Loizidou* claimants is not to recover financial compensation.[1008] The core of the applicants' claims aim primarily at the establishment of a violation on the basis of recognition of title, return of the property and an award of damages for pecuniary and non-pecuniary loss. Therefore, the applicants are not willing to give up ownership and accept compensation in lieu. It is submitted that only the ability of the applicants to be restored to the peaceful enjoyment of the property and compensation for the loss sustained during the period in which they were denied access thereto would put them as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1 and Article 8 of the Convention.[1009]

It should be noted that the ECtHR in the case of *Doğan and Others v Turkey* held that "the authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country (see in this respect Principles 18 and 28 of the United Nations Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, dated 11 February 1998)".[1010]

The ECtHR in the just satisfaction judgment in the case of *Xenides-Arestis* pointed out "that the parties failed to reach an agreement on the issue of just satisfaction where, like in the case of *Broniowski v. Poland* (friendly settlement and just satisfaction)

[1008] Professor Frédérick Sudre has argued that there are serious reservations concerning the 'pilot judgment procedure' relating to "procedural innovations emanating from chambers, which – to say the least – is debatable, whether the pilot judgments concern just satisfaction (*Xenides-Arestis v. Turkey*, No. 46347/99, 22/12/2005)'. AS/Jur (2008) 08, Committee on Legal Affairs and Human Rights, "Guaranteeing the authority and effectiveness of the ECHR", Working document prepared by Mr Frédérick Sudre, Professor, Faculty of Law, University of Montpellier.

[1009] *Doğan and Others v. Turkey*, Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 13/07/2006, para.48.

[1010] *Doğan and Others v. Turkey*, Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29/06/2004, para.154.

([GC], no. 31443/96, ECHR 2005-...), it would have been possible for the ECtHR to address all the relevant issues of the effectiveness of this remedy (i.e. "Law 67/2005") in detail".[1011] The friendly settlement could have, as in *Broniowski,* addressed both individual and general measures at national level. These measures should have been directed towards (a) eliminating the source of the violation for the future, so as to avoid continuing violations of the Convention grounded on the same grievance (b) making available a domestic remedy, with retroactive effect, capable of providing adequate redress for the prejudice caused to all persons adversely affected by the systemic defect in question.

However the Turkish Government does not even recognise its responsibilities and the existence of the systemic problem as identified by the ECtHR itself. Turkey insists that it bears no responsibility for human rights violations in Cyprus[1012] and disagrees with the findings of the ECtHR in its judgments in the cases of *Loizidou v Cyprus* and *Cyprus v Turkey.*[1013] The position of the Turkish Government is that the ECtHR "in the absence of a comprehensive and final settlement of the property issue should not proceed to determine the title over the properties in question".[1014]

It is evident that the success of the "pilot judgment procedure" lies primarily in the hands of the respondent government, which has to be ready and willing to tackle the root of the systemic problem. However, it has been correctly argued that this procedure is at best only a partial solution especially since its success depends entirely on the willingness of governments to cooperate more actively.[1015] Therefore, this thesis argues that the given and confirmed commitment of the respondent state to solve the systemic problem should be considered as a *conditio sine qua non* by the ECtHR when deciding to apply this procedure. Consequently, it is submitted that a fundamental prerequisite for the application of the "pilot judgment procedure" is the demonstration of an active commitment on behalf of the respondent Government to

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[1011] *Xenides-Arestis v. Turkey*, No. 46347/99, 07/12/2006, para.37.
[1012] *Xenides-Arestis v. Turkey*, No. 46347/99, (dec.) 02/09/2004, pp.11-13.
[1013] *Xenides-Arestis v. Turkey*, No. 46347/99, (dec.) 02/09/2004, p.26.
[1014] *Xenides-Arestis v. Turkey*, No. 46347/99, 22/12/2005, para.25.
[1015] Gattini, A., "Mass claims at the ECtHR", Human rights, democracy and the rule of law = Menschenrechte, Demokratie und Rechtsstaat = Droits de l'homme, démocratie et état de droit : liber amicorum Luzius Wildhaber / eds. Stephan Breitenmoser ... [et al.]. - Zürich : Dike ; Baden-Baden : Nomos, 2007, p.283.

provide solution for the systemic problem identified by the ECtHR as lying at the root of *Loizidou*-type cases.

At present the Turkish Government have not yet provided individual relief to the "pilot" applicant Mrs *Xenides-Arestis* and yet somewhat inconsistently, they propose to provide redress to all post-*Loizidou* claimants via the mechanism under the "Law 67/2005". It should be noted that the Turkish Government have been aware of their obligations for a number of years but have consistently failed and refused to bring their violations to an end, despite numerous calls for them to do so from both the ECtHR and the CoM. Moreover, at the time Turkey finally executed the just satisfaction part in the *Loizidou* case it also made a Declaration to the effect that the payment made was "in no way a precedent for cases presently pending before the Court or for similar cases in the future, neither does it prejudice the position of the Turkish Government with regard to the different judgments of the Court in this case."[1016]

The fact that the fact the "pilot judgment procedure" is at its early stages and inconsistently applied may be utilised by states with a record of non-conformity with the judgments of the ECtHR in order to avoid further findings of violations. This inevitably will be at the expense of the individual applicants and consequently would compromise the right of individual petition.

The ECtHR in *Broniowski* observed that "the object in designating the principal judgment as a "pilot judgment" was to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the right of property in the national – Polish – legal order. ...the pilot judgment procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to the persons concerned the Convention rights and freedoms as required by Article 1 of the Convention, offering to them more rapid redress and, at the same time, easing the burden on the

[1016] 862nd Meeting -26,27 November and 2 December 2003, Item H54-1, Loizidou against Turkey-judgments of 18/12/96 (merits) and 28/07/98 (just satisfaction), Interim Resolutions DH(99)680, DH(2000)105, ResDH(2001)80 and ResDH(2003)174, (CM/DoI/OJ/OT(2003)854/H54-790 (pages 109 to 111), CM/Del/Dec(2003)854/H54-790, 856/H54-1, 857/H54-1, 859/H54-1, 860/H54-1 and 861/H54-1, Statement by the Representative of Turkey. Appendix to Resolution DH (2003)YYY.

Court which would otherwise have to take to judgment large numbers of applications similar in substance".[1017]

In the absence of a state's willingness to comply with the judgments of the ECtHR and to provide adequate solutions for problems of systemic nature, the application of the "pilot judgment procedure" may result in a failure to consider a large number of well-founded cases.[1018] The main aim of the Recommendation Rec(2004)6 is to prevent repetitive cases brought before the ECtHR and thereby reduce the ECtHR's considerable caseload. The application of the "pilot judgment procedure", as derived from this recommendation in the case of Turkey has indicated that states that suffer from systemic problems paradoxically may not be the ideal candidates for this procedure as it stands. Systemic problems often arise as a result of systematic failure by a state to implement the ECHR effectively and to comply with the judgments of the ECtHR. The success of the "pilot judgments procedure" will depend on the state's declared will to move on from a habitual and contemptuous disregard the ECHR to and "ECHR-centred" direction.

5.11 Conclusion

This chapter as the previous one on Cyprus, analytically discussed the issue of the domestic implementation of the ECHR in the legal order of Turkey as well as critically evaluated the response of the Republic to the May 2004 Recommendations.

As a result of the 2004 constitutional amendment to Article 90 of the Constitution on the status of international law, legal literature and the courts now generally recognise that the ECHR has a superior status to common legislation, but inferior to the Constitution.

Turkey seems to have an effective mechanism of defence before the Strasbourg Court and for the implementation of its judgments. This mechanism might be effective in implementing a number of judgments but it has been argued that the ways in which

[1017] *Broniowski v. Poland*, No. 31443/96, [GC] Friendly Settlement 28/09/2005, para.35-36.
[1018] It should be noted that a classic feature of cases deriving from structural situations is that they are almost by definition well-founded.

the ECtHR judgments have made a difference in the Turkish legal order seem to depend on various factors, such as the type of violation in question, the commitment of the government to executing the judgment concerned, the political nature of the issue, the number of judgments and the amount of compensation Turkey was required to pay.

As this chapter has demonstrated Turkey has difficulty in implementing judgments which concern sensitive areas and it can be argued that this is not unrelated to the strong influence that the armed forces exert in Turkish politics. In addition, the implementation of the ECtHR's judgments and the ECHR in the Turkish legal order is impeded by the founding ideology of Turkey which rests, on the dual principles of "territorial integrity and national unity" and "laicism", dominant in the legal and political culture of the country.

As discussed, in trying to implement effectively the Recommendations of 2004, Turkey adopted various measures. In particular, in response to the Recommendation Rec(2004)6, Turkey adopted measures in order to prevent repetitive cases brought before the ECtHR arising from specific systemic problems as identified by the ECtHR. However, it became clear that the application of the "pilot judgment procedure", as derived from this recommendation in the case of Turkey might not be successful. As it has been demonstrated in this chapter states that suffer from systemic problems ironically may not be the ideal candidates for this procedure as it stands since systemic problems often arise as a result of non-compliance with the judgments of the ECtHR.

PART IV

CHAPTER 5: Comparative analysis of the implementation of the ECHR in Cyprus and Turkey

"It is not the oath that makes us believe the man, but the man the oath"

Aeschylus

6.1 Introduction

The States Parties to the ECHR have a legal obligation to guarantee the rights and freedoms defined in the ECHR to all individuals within their jurisdiction. States are obliged to ensure that their domestic law is compatible with the ECHR and, if necessary need, to make appropriate amendments to their domestic law. All rights of the ECHR must be directly secured to everyone within the jurisdiction of the state (not only to the citizens). As discussed in Chapter 2 the ECHR has now become an integral part of the domestic legal order of all states parties.[1019]

An abstract analysis of domestic implementation of the ECHR is not enough in itself to increase the understanding of the application of the ECHR in the legal order of member states of the CoE. It is suggested that the particular issue will be best analysed by means of case studies in two countries. This chapter provides a comparative analysis of the domestic implementation of the ECHR in the legal orders of Cyprus and Turkey.

[1019] Rec(2004)6, Recommendation of the CoM to member states on the improvement of domestic remedies (Adopted on 12 May 2004, at the 114th Session of the CoM (12-13 May 2004).

The findings of this thesis demonstrate that the ECHR and the ECtHR's case-law are increasingly becoming more influential on legal orders of Cyprus and Turkey. The analysis of how the ECHR has been implemented in these two countries respectively has highlighted both areas of success but also gaps that need to be further addressed. It is anticipated that the inquiry into these two different legal orders will disclose a number of inherent failures of the system as a whole. A focal purpose of this chapter is to contrast the approach of the two countries to the Recommendations which aimed to improve the implementation of the ECHR at national level, referred to in the 2004 Declaration of the CoM on "Ensuring the effective implementation of the ECHR at national and European level". Lessons learnt from this comparison will contribute to the ongoing dialogue on the reform of the ECHR system. Throughout examples of the method adopted in other member states of the CoE will be used in an attempt to make the conclusions more comprehensive and also assist in the evaluation of the mechanisms and the identification of effective methods.

6.2 Historical background

Whilst there are undoubtedly similarities between Cyprus and Turkey concerning the accession to the CoE and ratification of the ECHR, on balance the differences far outweigh these similarities. It is for this reason that the choice of these two countries as the case studies of this research ensures that any conclusions reached about the general system will lead to recommendations and observations on approaches, which can be applied to all member states of the CoE. The comparative perspective of this thesis renders it necessary to observe that Turkey has a population of 72 million while Cyprus has a population just under a million, as well as the difference in the territorial expanse of the two countries.

Turkey acceded to the CoE and ratified the ECHR in 1954 while Cyprus became a member of the CoE in 1961 and ratified the ECHR in 1962. It is widely regarded that Turkey's accession to the CoE and the ECHR was driven by its political desire to participate in the Western alliance. With regards to Cyprus, the United Kingdom had already extended the ECHR's applicability to the then colony of Cyprus under Article 63 of the ECHR in 1953. Moreover, Part II of the 1960 Cyprus Constitution on "Fundamental Rights and Liberties" was modelled on the ECHR. The three guarantor countries (Greece, Turkey and the United Kingdom) of the then new Cypriot state had already ratified the ECHR. Therefore, it is argued that it was a natural development for Cyprus to become a member of the CoE and ratify the ECHR. Whereas Turkey made reservations to Article 2 of Protocol No. 1 to the ECHR on the right to education,[1020] Cyprus entered no reservation to the ECHR. As this thesis shows Cyprus has ratified all the Protocols to the ECHR with no exception, while Turkey has yet to ratify Protocols No. 4, 7, 9, 10 and 12.[1021]

The findings of this research reveal that neither of the two countries had examined their domestic legislation as to its consistency with the ECHR at the time of

[1020] The reservation was made because of the existence of the "Fundamental Act of Public Education" as discussed above.

[1021] Turkey has signed the Protocol No. 4 on 19/10/1992, the Protocol No. 7 on 14/03/1985 and the Protocol No. 12 on 18/04/2001 but it has not yet deposited the instrument of ratification with the Secretary-General of the CoE for none of these Protocols.

ratification. Unlike the Eastern European countries[1022] neither Cyprus nor Turkey followed any formal accession procedure before their accession to the CoE.[1023]

[1022] See Jordan, P., "Does Membership Have Its Privileges? Entrance Into The CoE And Compliance With Human Rights Norms", Human Rights Quarterly, Vol.25, 2003, pp.660-688.

[1023] Ed Bates noted that a formal accession procedure was in place for joining the CoE which, on paper, suggested that in welcoming the arrival of so many new states, that organisation was not compromising its standards as regards protection of human rights, democracy and the rule of law. On paper, because it is widely acknowledged that there was a great difference between paper commitments and practical reality. Bates, E., "Execution of Judgments Delivered by the ECtHR", in Christou, Th. & Raymond, J.,P., "ECtHR, Remedies and Execution of Judgments", British Institute of International and Comparative Law, 2005, p.54.

6.3 Status of the ECHR in the domestic legal order

The implementation of international law within the domestic legal orders is usually discussed with reference to the theories of monism and dualism.

The Cypriot Constitution of 1960 contains express provisions with regard to the effect of validly concluded treaties on domestic law. Article 169 explicitly introduced the dualist legal tradition in the Cypriot legal order. On the other hand, Article 90 of the 1982 Turkish Constitution indicates that Turkey follows a monist tradition. Despite this divergence, a comparison between Cyprus and Turkey shows that the procedure which both countries follow to implement an international treaty is quite similar. According to Jörg Polakiewicz, with regard to the internal application of the ECHR rights and freedoms, this difference appears not to be decisive. Irrespective of whether a country follows a monist or dualist tradition, a parliamentary act is usually required in order to give direct effect to the ECHR's provisions[1024] and it became clear that it is so in both countries.

The Constitution of Cyprus contains explicit provision, which gives precedence to international treaty law.[1025] Hence, the ECHR is superior to any "law of the Republic" but inferior to the Constitution. In the great majority of states parties to the ECHR, treaties in general and the ECHR in particular, are of a higher rank than normal legislation, but remain inferior to the national legislation.[1026]

Whereas Cyprus' domestic courts began citing the ECHR even before Cyprus ratified it, the Turkish domestic courts started invoking the ECHR more regularly as recently as the 1990s. As Andrew Drzemczewski has explained "the possibility of using the ECHR's provisions as persuasive sources of law, however, where otherwise there

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[1024] Polakiewicz, J., "The Status of the Convention in National Law", in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, p.32.
[1025] Article 169(3) of the Cypriot Constitution.
[1026] Polakiewicz, J., "The Status of the Convention in National Law", in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, p.39.

appears to exist a lacuna in domestic law, or where the courts are faced with a doubtful or uncertain point of internal law, has self-evident advantages".[1027]

Furthermore, the Cypriot legal system provides for the possibility of remedying alleged violations of individuals' ECHR rights at the domestic level. In 2001, the Cypriot Supreme Court held that claims for human rights violations were actionable rights that can be pursued in civil courts (district courts), by instituting civil proceedings for recovering damages and other appropriate relief for the violation against the state or private individuals.[1028]

In the author's view as long as constitutional law fails to resolve the question of the relationship between national law and the ECHR, the domestic courts are not in a position to define the hierarchical position of the ECHR in the legal system. For example in Turkey the ambiguity regarding the hierarchy of international agreements in domestic legal order was a source of confusion for domestic courts. As a result, the Turkish high courts adopted different views on the status of international law in the domestic legal order. The Constitutional Amendment of 2004, by adding a new subparagraph to Article 90 of the Constitution of 1982, established the supremacy of the international treaties relating to humans rights in the event of conflict with a national legislative provision. Whilst recent constitutional amendments in Turkey on the rank of international law have remedied some of the existing problems, they have done so neither clearly nor absolutely. Furthermore, it must be clear that the powerful military remains substantially beyond judicial scrutiny.

According to Tülay Tuğcu, President of the Constitutional Court of Turkey, it is almost impossible for Turkish national judges to apply the new wording of Article 90 of the Constitution without taking into account the case-law of the ECtHR.[1029] In the author's opinion the impact of the ECHR and of the case-law of the ECtHR on the Turkish legal order is likely to be greater in the future, because Turkish national

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[1027] Drzemczewski, A., "European Human Rights Convention in domestic law", Clarendon Press-Oxford, 1983, p.191.
[1028] See *Takis Yiallouros v. Eugeniou Nicolaou*, 08/05/2001.
[1029] Tuğcu, T., "The Place of the ECHR in Turkey", Solemn hearing of the ECtHR on the occasion of the opening of the judicial year Friday, 20 January 2006.

judges will inevitably have to consider whether domestic law complies or not with the provisions of the ECHR.

6.4 Recognision of Article 25 (now 34) of the ECHR

As can be seen from the previous chapters the two countries were among the last CoE member states to recognise the right of individual petition[1030] and shortly afterward proceeded to recognise the ECtHR's obligatory jurisdiction.[1031] The EU ambition of both of these countries was undoubtedly a motivating factor in their recognition of Article 25 (now 34) of the ECHR. It is recalled that declarations were made by both countries on the right of individual application. As outlined the declarations of Cyprus and Turkey partly concerned the situation in Cyprus after the Turkish invasion of the island and consequent continuing occupation.

However, the conditions attached by Turkey on the right of the individual petition were deemed invalid by the ECHR organs. The ECtHR in the case of *Loizidou v. Turkey*[1032] had to decide on the validity of the territorial restrictions attached to Turkey's declarations under Articles 25 and 46 of the ECHR. The ECtHR interpreted Articles 25 and 46 respectively as only allowing limitations *ratione temporis* and conditions of reciprocity. Any other restrictions *ratione loci* or *ratione materiae* were unacceptable due to "special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms".[1033] The ECtHR held that qualified acceptances of the competence of the Commission and the ECtHR would jeopardize the aim of the ECHR "to achieve greater unity in the maintenance and further realization of human rights".[1034] The possibility for member states to qualify their consent under the optional clauses: "would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)" and its consequences for the enforcement of the ECHR: "would

[1030] Turkey recognised the right of individuals to lodge complaints with the ECommHR under the then Article 25 ECHR in 1987 and Cyprus in 1989.
[1031] Under the then Article 46 ECHR.
[1032] *Loizidou v. Turkey*, No. 15318/89 (Preliminary Objections), 23/03/1995.
[1033] *Ibid*, para.70.
[1034] *Ibid*, para.77.

be so far-reaching that a power to this effect should have been expressly provided for. However no such provision exists in either Article 25 or Article 46".[1035] The Turkish conditions would have the effect of introducing late "*de facto* reservations". It is important to note that the restrictions *ratione materiae* included in the Cypriot declaration were at last withdrawn in December 1994.[1036]

The use of reservations and declarations has now declined and many member states have allowed those they had made to elapse. This is probably due to the fact that the ECHR system has now gained the trust and goodwill of the member states, most of which have made considerable progress in redressing incompatibilities between domestic law and the ECHR guarantees.[1037] Moreover, the ECtHR interprets reservations narrowly in order to ensure that member states do not undermine the ECHR's purposes.[1038]

In the 1990s Turkey cited the need to protect itself against terrorism in justifying its derogations from several ECHR guarantees under Article 15 of the ECHR.

6.5 Applications to Strasbourg

One important finding of this thesis concerns the issue of the inter-state cases which have been submitted against Turkey. As discussed in Chapter 3 interstate cases are indeed a rather rare phenomenon and member states may feel considerable reluctance to initiate proceedings against other member states before the ECtHR due to the political consequences of such an action. However, since the establishment of the ECHR system Turkey attracted 6 of the 21 interstate cases.[1039] Four of these cases were filed by Cypriot Government; following Turkey's 1974 invasion of Cyprus and

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[1035] *Ibid*, para.75.
[1036] By letter of 22 December 1994 the declaration under the then Article 25 of the ECHR was renewed for a further period of three years without the restrictions *ratione materiae* set out above.
[1037] Keller, H., & Stone Sweet, A., "Assesing the Impact of the ECHR on National Legal Systems", in Keller, H., & Stone Sweet (ed.) "A Europe of Rights", Oxford University Press, 2008, p.679.
[1038] See for example *Belilos v. Switzerland*, No. 10328/83, 29.04.1988.
[1039] *Cyprus v. Turkey,* Nos. 6780/74 and 6950/75, (adm.) 26/05/1975; *Cyprus v. Turkey,* No. 8007/77, (adm.) 10/07/1978; *Cyprus v. Turkey,* No. 25781/94, 10/05/2001; *France v. Turkey*, *Norway v. Turkey*, *Denmark v. Turkey*, *Sweden v. Turkey*, *Netherlands v. Turkey,* Nos. 9940/82; 9941/82; 9942/82; 9943/82; 9944/82, (adm.) 06/12/83; *Denmark v. Turkey*, No. 34382/97, 05/04/2000.

the continuing division of the island, the Cypriot government filed four inter-state applications against Turkey.[1040]

Before considering the substantive differences in the nature of individual cases brought against Turkey and Cyprus it is worth also taking note of the significant difference in the volume of cases. Turkey being a much bigger country than Cyprus also generates greater number of cases. Furthermore, Turkey faces more problems of systemic nature than Cyprus in the sense of the Resolution of the CoM.[1041]

The comparative material demonstrates that violations of the right to life, personal liberty and security, the prohibition of torture and inhuman and degrading treatment, freedom of expression, freedom of association and assembly are widespread in Turkey. Whereas, despite a thematic diffusion of the ECtHR case-law against Cyprus in recent years violations of such nature are comparatively rare in Cyprus.

While the fair trial guarantee and property rights have resulted in numerous findings of violations for both countries, the specific reasons for the violations often differ. For example problems such as the breaches of property rights in southeast Turkey and the northern part of Cyprus or the issue of the independence and impartiality of the State Security Courts, have no parallel in the case of Cyprus. On the other hand, it can be said that the problems experienced by Cyprus are far from being unique in Europe and the biggest challenge Cyprus currently faces is the length of domestic proceedings.

An underlying cause of most of the ECHR violations by Turkey is the tenet that the unity and identity of the Turkish state is incompatible with the unqualified domestic implementation of the ECHR. Moreover, the situation is exacerbated by the continuing deep-rooted conflict with Kurdish militants.[1042]

[1040] *Cyprus v. Turkey,* Nos. 6780/74 and 6950/75, (adm.) 26/05/1975; *Cyprus v. Turkey,* No. 8007/77, (adm.) 10/07/1978; *Cyprus v. Turkey,* No. 25781/94, 10/05/2001.

[1041] Resolution Res(2004)3 of the CoM on judgments revealing an underlying systemic problem (adopted by the CoM on 12 May 2004, at its 114th Session).

[1042] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey", in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.486.

6.6 The ECtHR's judgments and its effects at national level

In the past, Cyprus' and Turkey's unwillingness to comply with certain judgments of the ECtHR (in particular the case of *Modinos*[1043] for Cyprus and the case of *Loizidou*[1044] for Turkey) tested the limits of the ECHR supervisory system. After several years of delay Cyprus eventually complied with the case of *Modinos*. On the other hand, in a case of unprecedented non-compliance with an ECtHR judgment, from 1998 to 2003, Turkey consistently refused to comply with the *Loizidou* judgment concerning property rights in the northern part of Cyprus.

Both in Cyprus and Turkey, constitutional amendments, statutory modifications and changes in the interpretation of domestic law have improved the domestic implementation of the ECHR. In the case of Turkey, it is difficult to assess the extent to which such measures have been in direct response to the ECtHR judgments. Whereas it is evident that the EU accession process has served as a more directly as a catalyst for changes in domestic law it became clear that is not possible to find out with certainly whether the motivation behind the reforms which were carried out in Turkey was to comply with the ECtHR judgments or to satisfy the requirements of the EU accession process. What can be said however is that complying with the ECtHR's judgments and implementing the ECHR is a fundamental prerequisite of the EU accession process and this has already been realised in the Turkish legal order.

The findings of violation by the ECtHR against Cyprus have to date in almost all cases led to the adoption of legislative measures aimed at preventing further similar violations. In each of these cases the Cypriot Government has attempted to give effect to the ECtHR judgment by amending the relevant law or policy. It is appropriate to note that following the adoption of the relevant measures by the Government there have been no subsequent cases of similar violations brought before the ECtHR. This is of paramount significance since it would be insufficient and not in line with the aims and purposes of the ECHR if a state, after a violation has been found in a specific case, took remedial action only in favour of the applicant (individual

[1043] *Modinos v. Cyprus*, No. 15070/89, 22/04/1993.
[1044] *Loizidou v. Turkey*, No. 15318/89, (Merits) 18/12/1996.

measures) without removing the root cause of the violation found (general measures)[1045]. It should not be forgotten that the obligation of the member states to take general measures to eliminate the causes of the violation in order to prevent its repetition has been repeatedly emphasised and was one of the crucial aims of the Recommendations of May 2004.[1046]

As already pointed out the effective implementation of the ECHR and the ECtHR judgments in the Turkish legal order is undermined by the fundamental principles of state unity and identity against the background of armed clashes with Kurdish separatists and the Cyprus problem. This study demonstrates that despite all the recent progress in human rights, major deficits remain for Turkey in terms of compliance with the ECtHR case-law most notably on issues such as freedom of expression. It became clear that there exists certain mentality among Turkish judges which deems the preservation of state interests above the protection of individual rights. The founding ideology of Turkey which rests on the dual principles of 'territorial integrity and national unity' and 'laicism' is strongly embedded in the legal and political culture in the country. Hence, this thesis argues that the implementation problems are inevitably greater in Turkey than in Cyprus because they raise concerns of the Turkish political, judicial and military establishment over the compatibility of international human rights with national unity and territorial and constitutional identity.[1047] Consequently, the implementation of some ECtHR's judgments, especially those concerning complex political issues have often been implemented in ways which do not reflect the requirements of the judgments of the ECtHR.

Finally, in Cyprus and Turkey, compliance efforts are generally limited to findings of ECHR violation. The effect of ECtHR judgments against other member states that could apply to both Cyprus and Turkey has yet to be fully appreciated. The creation of a structure in the countries for the monitoring of judgments and admissibility decisions of the ECtHR will provide the respective governments with the necessary

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[1045] Leuprecht, P., "The Execution of Judgments and Decisions" in eds Macdonald, R. St. J/Matcher, F./Petzold, H, "*The European System for the Protection of Human Rights*", 1993, p.794.

[1046] See in particular Recommendation (2004)6 of the CoM to member states on the improvement of domestic remedies.

[1047] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey", in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.522.

expertise on the ECHR and the ECtHR case-law.[1048] Such a structure would promote the identification, at an early stage, of the possible effects of these judgments on the relevant domestic orders. To illustrate this, it should be noted that the Cyprus Government amended the Electoral Law of Cyprus so as to give the right to prisoners to vote in elections, following the case of *Hirst v. The United Kingdom*[1049]. However, it remains to be seen whether this will be done in a systematic manner or whether this was a spontaneous amendment of a domestic law caused by the fear of being condemned.

Effecting change or producing results following a finding of violation of the ECHR by the ECtHR is not an easy task as somebody might think. Winning a case in Strasbourg brings undoubtedly a wonderful feeling for the applicants and their lawyers. However, a "victory" in Strasbourg does not automatically bring results. Unfortunately, in many cases this is not the end of the long road to Strasbourg.[1050] It is suggested that one of the negative features and/or weaknesses of the ECHR system is that there is no guarantee that the ECtHR judgment will deliver anything significant in terms of positive change for the applicant who had based his expectations on the ECtHR and at last won his case. This is not to underestimate the value of the ECtHR's judgments. They make member states sit up and pay attention. Nevertheless, winning a case in Strasbourg is sometimes the beginning of a new, perhaps longer and harder, road to enforce that judgment in the relevant domestic order. Bringing into effect the findings of an ECHR judgment is indeed a complicated and time-consuming process, sometimes with an unknown result.

It is suggested that the rapid and effective execution of the ECtHR's judgments contributes to enhancing the protection of human rights in member states and to the long-term effectiveness of the European human rights protection system. The full implementation of the comprehensive package of coherent measures referred to in the Declaration "Ensuring the effectiveness of the implementation of the ECHR at national and European levels", adopted by the CoM in May 2004 is, *inter alia,*

[1048] Barkhuysen, T., & Van Emmerik, M., "A Comparative View on the Execution of Judgments of the ECtHR" in Christou, Th. & Raymond, J.,P., "ECtHR, Remedies and Execution of Judgments", British Institute of International and Comparative Law, 2005, p.18.
[1049] *Hirst v The United Kingdom,* No. 74025/01, 06/10/2005.
[1050] See for example the cases of *Modinos* and *Loizidou* discussed in previous chapters.

intended to facilitate compliance with the legal obligation to execute the ECtHR's judgments.

The PACE recommended that the CoM induce member states to improve or, where necessary, to set up domestic mechanisms and procedures – both at the level of governments and of parliaments – to secure timely and effective implementation of the ECtHR's judgments, through co-ordinated action of all national actors concerned and with the necessary support at the highest political level.[1051] In particular, following his visit to Russia in May 2006, the former PACE Rapporteur, Erik Jurgens, recommended the creation of a special mechanism of inter-agency co-operation to take on the question of the implementation of ECtHR judgments.

However, as Philip Leach has noted such a systematic approach remains the exception across the member states of the CoE.[1052] In Turkey there exists a coordination system in place, involving a number of ministries for the purpose of coordinating its legislative and executive lawmaking activities in order to implement the judgments against Turkey in which a violation of the ECHR was found. As discussed in the Chapter on Turkey the Ministry of Foreign Affairs has a central role within the relevant system. Cyprus, on the other hand has, for this very purpose, established the Human Rights Sector within the office of the Attorney-General. The Human Rights Sector has the potential to play an important role in the process of the effective implementation of the ECHR and the ECtHR's judgments in the domestic legal order. The Human Rights Sector advises the administration on behalf of the Attorney-General on the legislative measures that must be adopted in order to enforce the ECtHR's judgments. As discussed in the relevant chapter, this Sector drafts the relevant legislation, gives instructions for the payment of "just satisfaction" amount and generally coordinates the procedure for the execution of ECtHR's judgments at the national level. However, it is too soon to assess how effective the Sector is since it has yet to be faced with difficult and complex issues.

[1051] Parliamentary Assembly Recommendation 1764 (2006) – "Implementation of the judgments of the ECtHR".

[1052] Leach Ph., "Strasbourg's oversight of Russia - an Increasingly Strained Relationship", Public Law, 2007 Win, p. 640-654.

This thesis argues that the establishment of coordination procedures in the respective domestic legal orders of the member states of the CoE could help decisively to improve the implementation of the ECHR and the ECtHR's judgments at national level. Such mechanisms are indicative of the willingness of the states to comply with the ECHR standards. Furthermore, a specialised body at national level equipped with competence to give effect to the ECtHR's judgments in the relevant legal order will undoubtedly contribute to the efforts for more effective domestic implementation of the ECHR.

The example of Ukraine deserves a mention. More specifically, Ukraine introduced a new law concerning the implementation of ECtHR judgments in March 2006[1053]. The Ukrainian law imposes various obligations on the Office of the Government Agent, relating to the preparation and publication of the full text and summaries of the judgment. However, it also imposes the weightier responsibility on that Office of proposing to the Cabinet of Ministers (within a month of a judgment becoming final) the requisite "general measures".[1054] Furthermore, the Government Agent is required within a month, to prepare a detailed analysis for the Supreme Court, which should include proposals to bring national courts' case-law into line with the ECHR,[1055] and to draft proposals to be taken into account in the drafting of laws, to be submitted to the Ukrainian Parliament.[1056]

Consideration should also be given to a new law adopted by the Italian Parliament in 2006, known as the "Azzolini Law", introducing the legislative basis for a procedure for the implementation of ECtHR judgments.[1057] The "Azzolini Law" holds the Prime Minister responsible for ensuring that his Cabinet is under a duty to promote the implementation of decisions of the ECtHR against Italy. The decisions should be reported to Parliament immediately, so that there can be scrutiny by the competent

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[1053] Law on the Enforcement of Judgments and the Application of the Case-Law of the ECtHR, Law No. 3477 of February 23, 2006, which entered into force on March 3, 2006. An unofficial English language 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 ECtHR* (Doc.11020, September 18, 2006).
[1054] Arts 14 (1) and 14 (2).
[1055] Art. 14 (3).
[1056] Art. 14 (4).
[1057] Azzolini Law, January 9, 2006 No. 12 (Italian Official Bulletin no.15, January 19, 2006). The Law adds a new paragraph "a-bis" to Art.5, para.3, of the Law 23.08.1988, No. 400, concerning the regulation of the government's activity and the organization of the Prime Minister's Office.

commissions. Furthermore, an annual report on implementation should be submitted to Parliament. The former PACE Rapporteur, Erik Jurgen, following his visit to Italy strongly encouraged the speedy implementation of the "Azzolini Law" which according to him "may play a decisive role in resolving unacceptable systemic problems in Italy".[1058]

Whilst both the new Ukrainian and Italian laws appear to be perfect on paper the real test will be how they are applied in practice and whether they will survive the test of time. In this context Philip Leach has observed that, "by imposing more specific requirements on the executive and by developing parliamentary scrutiny, they are undoubtedly moving in the right direction".[1059] It must be understood however, that the mere establishment at national level of these specialised bodies is indeed not sufficient. What is really crucial is that these bodies should have the competence to influence and/or convince the political actors to take steps in the right direction. The enactment or the amendment of legislations or the changing of policies in order to comply with the ECtHR's judgements need political will and do not depend exclusively on the opinion of bureaucrats.

In recognition of the need to establish coordination procedures at the national level to reinforce domestic capacity to execute the ECtHRt's judgments, the CoM adopted a Recommendation in February 2008 to member states on efficient domestic capacity for rapid execution of judgments of the ECtHR.[1060] The CoM recommended that member states, "designate a co-ordinator – individual or body – of execution of judgments at the national level, with reference contacts in the relevant national authorities involved in the execution process".

It is suggested that Parliaments have the potential to play an important role in scrutinising the adequacy of the governmental response to the judgments of the ECtHR and rule on whether a change in the law is necessary. Recognising this

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[1058] Committee on Legal Affairs and Human Rights, Mr Erik Jurgens, *Implementation of judgments of the ECtHR* (Doc.11020, September 18, 2006), para.37.

[1059] See also Parliamentary Assembly of the CoE, *Implementation of judgments of the ECtHR,* Resolution 1516 (2006), October 2, 2006.

[1060] Recommendation CM/Rec(2008)2 of the CoM to member states on efficient domestic capacity for rapid execution of judgments of the ECtHR *(Adopted by the CoM on 6 February 2008 at the 1017th meeting of the Ministers' Deputies).*

imperative role of Parliamentarians in ensuring a coordinated and effective implementation of the ECHR, Mr Jurgens urged parliamentarians to take a much more pro-active approach in their respective legislative bodies to ensure the ECHR's implementation. National parliaments should introduce specific mechanisms for regular parliamentary oversight of ECtHR judgments. Indeed, responsible governmental ministries should be held more strictly accountable to Parliament for prompt execution of ECtHR judgments.[1061]

The success of such thorough supervision by Parliament can be seen by the UK's Parliamentary Joint Human Rights Committee.[1062] The Committee has undertaken the role of monitoring the implementation of ECtHR judgments by the UK, including the publication of correspondence between them and the relevant ministers. The Committee has been critical in instances where the implementation has been delayed and about the lack of public access to the related changes. Finally the Committee has evaluated legislation adopted in response to ECtHR judgments.

The first progress report issued by the Joint Committee on Human Rights of the UK Parliament and its regular supervision of progress made in the execution of cases against the United Kingdom is undoubtedly not only a model to be followed, but according to Jurgens, also an important contribution presently underway to "bring human rights home" and to reinforce the domestic implementation of the ECtHR.[1063]

[1061] Committee on Legal Affairs and Human Rights, Mr Erik Jurgens, *Implementation of judgments of the ECtHR* (Doc.11020, September 18, 2006), para.97.

[1062] See the report of the United Kingdom's Joint Committee on Human Rights, *Implementation of Strasbourg Judgments: First Progress Report* (HL Paper 133, HC 954, March 8, 2006): "To be effective, ... international review must be accompanied by close scrutiny at a national level of the implementation of Convention rights and judgment of the ECtHR" (para.3). See also Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights* (HL Paper 128, HC 728, June 28, 2007): "... in our system, when courts give judgments in which they find that a law, policy or practice is in breach of human rights, there is still an important role for Parliament to play in scrutinising the adequacy of the Government's response to such judgments and, in some cases, deciding for itself whether a change in the law is necessary to protect human rights and, if so, what that change should be" (para.1).

[1063] Committee on Legal Affairs and Human Rights, Mr Erik Jurgens, *Implementation of judgments of the ECtHR* (Doc.11020, September 18, 2006), para.95.

6.7 Recommendation Rec(2004)4

The European Convention on Human Rights in university education and professional training

Following the recognition by both member states of the right to individual petition the importance of the ECHR became increasingly appreciated in both legal orders. The comparative material shows that Law schools in both Cyprus and Turkey have neither mandatory undergraduate courses nor specialised graduate degrees on issues related to the ECHR or to international human rights.

Individual rights and freedoms protected under the constitution are included in public law courses taught in Turkish universities. These courses are taught from the ECHR perspective. A separate course in human rights is offered as an option only in some law schools.

In Cyprus the teaching of the ECHR as part of a Law course is only found in two higher-education institutions only as an optional subject. Furthermore there is no possibility for LLM in Human Rights.

Most member states of the CoE provide a compulsory introduction to the ECHR as part of the common core subjects taught at their faculties of law both in bachelor's degree or in master's level.[1064] However, very few states offer a separate compulsory course on the ECHR. In most cases, the ECHR system is taught as part of public international law and/or constitutional law courses.[1065]

This research shows that very few advocates in Cyprus are familiar with the ECHR and have knowledge of the ECtHR case-law. The same is true of most Cypriot judges who being unaware of the ECtHR jurisprudence are not in a position to make sufficient use in their deliberations. Therefore it is suggested that there is a pressing

[1064] CDDH(2006)008 Addendum I, "Follow-up Sheets on the Implementation of the Five Recommendations", Strasbourg, 7th April 2006, p.26.
[1065] *Ibid*, p.26.

need for training of judges and lawyers for effective implementation of the ECHR as was stressed in the Recommendation Rec(2004)4 of the CoM.

In Turkey as discussed above as a result of a number of training programmes there now are sufficient numbers of human rights trainers for Turkish lawyers. In Cyprus, as opposed to Turkey there have been no appropriate programmes for the training of people who would then train Cypriot lawyers in human rights[1066]. This seems to be a common problem at European level, since most member states do not appreciate the need to train specialised trainers[1067]. While there is an increasing tendency to set up specialised human rights research centres and university chairs (which in Cyprus do not exist either), the teaching of the ECHR system is carried out primarily by non specialists. This is the case even for courses taught in such target sectors such as police officers and prison staff[1068].

The findings of this research reveal that in Turkey, despite the existence of numerous human rights bodies, not all are independent and the majority of them face serious obstacles in their operations. It has been argued that in Turkey, the perception that human rights protection is not fully consistent with national unity and constitutional identity undermines the efficiency of independent human rights bodies.[1069]

6.8 Recommendation Rec(2002)13

Publication and dissemination in the Member States of the text of the ECHR and of the case-law of the ECtHR

The modes of implementating the ECHR in the domestic legal order are at least partly related to the ways in which knowledge about the ECHR, and more particularly the ECtHR's judgments are disseminated and understood. This wider knowledge and

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[1066] DH-PR (2006)004 rev Bil.
[1067] CDDH(2006)008 Addendum I, "Follow-up Sheets on the Implementation of the Five Recommendations", Strasbourg, 7th April 2006, p.32.
[1068] *Ibid*, p.32.
[1069] Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey", in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.506.

understanding are important, as they inform and influence government officials in the way they respond to the challenges of the ECHR regime.

The text of the ECHR has been translated in the national language of all the member states of the CoE.[1070] As part of the domestic legal orders of the member states and the wide dissemination and accessibility to the public, it has been argued that the text of the ECHR is, or at least may be sufficiently known by relevant state and non-state authorities.[1071] However, the study of the text of the ECHR in itself is completely insufficient. To really know the ECHR and appreciate its (potentially) profound significance, one needs to read and follow, on a regular basis judgments of the ECtHR; it is this very case-law that gives the ECHR its nature of a "living instrument", with an ever-changing content and re-adjustment to present day conditions.[1072]

The comparative material illustrates that Cyprus and Turkey use similar means to disseminate the ECtHR case-law against their states. It appears that all ECtHR judgments are translated into their respective national language. The period for the translation of the judgments varies, and usually depends on the relevant judgment. However, it appears that in both countries in the majority of cases it takes 1 to 3 months for a judgment to be translated. While all ECtHR judgments against the two countries are translated into their respective languages and published online, their dissemination beyond public authorities is largely a matter of private initiative.

It is generally the case that in case-law of the ECtHR concerning a specific state is widely disseminated by the national authorities the member states or by civil society or NGOs. In several member states, the tradition is that civil society plays a role in the dissemination of the case-law, in particular through specialist publishers, independently or in partnership with public authorities.[1073] Nevertheless, member states do not seem to translate the ECtHR judgments, which concern other states thereby failing to pay sufficient attention to their potential relevance.

[1070] *Ibid*, p.15.
[1071] *Ibid*, p.15.
[1072] Nowicki, M., & Drzemczewski, A., "The Impact of the ECHR in Poland: a Stock-taking After Three Years", *European Human Rights Law Review*, 1996, Vol. 3, p.281.
[1073] CDDH(2006)008 Addendum I, "Follow-up Sheets on the Implementation of the Five Recommendations", Strasbourg, 7th April 2006, p.15.

For example in Cyprus, even though the English language is commonly spoken, there is still an urgent need to also make the case-law of ECtHR accessible as widely as possible in the Greek language. As regards the Cypriot scholarship on ECHR it is difficult for the legal community to find any serious analyses of Cypriot law and practice *vis-à-vis* the rights and freedoms guaranteed in the ECHR, as interpreted by the ECtHR.

Additionally, there are neither human rights NGOs carrying out any substantial activities, working on issues relating to the ECHR in Cyprus nor any Human Rights Research Institute. Both of this type of institutions can contribute greatly to the dissemination of the case-law and practice of the ECtHR and their absence from Cyprus is noticeable.

On the contrary in Turkey, human rights NGOs play an important role in the process of dissemination of judgments of the ECtHR. They are also engaged in activities that further the effective implementation of the ECHR in the domestic legal order. It should be noted that in recent years, Turkish Human Rights NGOs are increasing in numbers, activities and commitment.

The initiative of the Turkish government to translate and distribute to all judicial authorities a number of the CoE Human Rights handbooks referring to the general case-law of the ECtHR is undoubtedly a practice to be emulated by other member states in the ongoing efforts to publicise the jurisprudence of the ECtHR.[1074] These handbooks provide an excellent introduction to the ECtHR's case-law in the relevant areas they cover and they can be a useful tool in the hands of lawyers, judges and civil society.

[1074] See for example Ursula Kilkelly, "Guide on the application of Article 8 of the ECHR"; Monica Macovei, "Guidance on the application of Article 10 of the ECHR on Freedom of Expression"; Nuala Mole and Catharina Harby Guide on the application of Article 6 of the ECHR on fair trial; Monica Carss-Frisk, Guide on the application of Article 1 of Protocol No. 1 on the right to own property; Monica Macovei, Guide for the application of Article 5 of the ECHR on freedom and security; Aisling Reidy, Guidance on the application of Article 3 of the Convention on the Prohibition of Torture (DH-PR(2006)004rev Bil , CDDH, DH-PR, Replies to the new questionnaire with regard to the five recommendations mentioned in the May 2004 Declaration adopted by the CoM, Strasbourg, 17 January 2007).

In the two legal orders compared, the official translations are almost exclusively translations of judgments. While, admittedly, judgments as a final judicial product of the ECtHR's work are what the ECtHR essentially is there for, a systematic omission of translation of admissibility decisions in Cypriot cases- both those declaring cases inadmissible and admissible- is to be deplored. It is suggested that important lessons can be drawn from both admissible and inadmissible cases. Where the ECtHR has ruled that there is an issue under the ECHR, judges and public officials are put on notice that under similar circumstances there will be a violation of the ECHR.

In addition to these difficulties in monitoring ECtHR's judgments, one should note problems in accessing important texts issued by the CoM in the course of its execution supervision. These may explain the delays experienced in retrospective compliance with the ECtHR's case-law. Finally, it is imperative that national remedial measures, whether legislative, judicial or practical, should be made systematically available to victims of infringements, but also to the general public.

6.9 Recommendation Rec(2004)5

on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR

Member states of the CoE should give full effect to the ECHR at national level by continuously adapting national standards in accordance with the ECHR as interpreted by the ECtHR.[1075] Member states' mechanisms for the systematic verification of ECHR compatibility should also ensure adequate follow-up in the form of prompt modification of laws and administrative practices in order to make them compatible with the ECHR.

With reference to procedures for verifying the compliance of draft legislation with human rights standards, including the ECHR, in Cyprus, as discussed in the relevant chapter, mechanisms exist which are able and have a role in assessing the compatibility of laws and administrative practice with the ECHR and the ECtHR's

[1075] See Articles 1, 13, 19 and 46 of the ECHR.

case-law. There are "filters" such as the office of Attorney-General and in particular the Human Rights Sector that have the ability and capacity to fulfil this role. Furthermore, parliamentary committees also play an important role in "Strasbourg-proofing". In addition, the compatibility of draft legislation or existing laws with the Constitution, and consequently with the ECHR, is assessed by the domestic courts according to Articles 140 and 144 of the Constitution respectively. This is very important since domestic courts usually have the last word on the compatibility of the domestic law with the ECHR, before an applicant decides to turn to Strasbourg, according to Article 35 of the ECHR which requires the exhaustion of domestic remedies.

In contrast, Turkey does not have any specialised procedures in place that deal specifically with the compatibility of its laws with the ECHR and the case-law of the ECtHR. An important finding, which emerged during the research process, was that the Parliamentary Human Rights Investigation Committee has neither a legislative nor consultative role with regards to legislation effecting human rights. In fact, as part of their accession process to the EU, Turkey places greater emphasis to the EU "*acquis communautaire*". As it was noted, whilst EU member states generally have special procedures to verify compliance of draft legislative instruments with EU Law, only few CoE countries have a similar formal mechanism to evaluate the compliance of draft legislation with human rights standards, including the ECHR.[1076]

In Switzerland, government bills submitted to parliament must contain a special clause confirming compliance with the Constitution and international law, including the ECHR. In Ukraine, the newly established National Bureau on compliance with the ECHR, which was set up pursuant to Article 19 of the 2006 Law "*On Executing the Judgments and Applying the Practice of the ECtHR*", which also acts as Ukraine's agent in cases before the ECtHR,[1077] has the potential to play an important role in this field in the future. Its responsibilities include examining all draft legislative

[1076] AS/Jur (2007) 35 rev 2, "The effectiveness of the ECHR at national level", Committee on Legal Affairs and Human Rights, Parliamentary Assembly, CoE, Working document, Rapporteur: Mrs Marie-Louise Bemelmans-Videc, Netherlands, EPP/CD, 26 July 2007, para.8

[1077] The text of this Law can be found in PACE Doc 11020, Appendix III, Part IV.

instruments for their compliance with the ECHR before their presentation to Parliament.[1078]

The Finnish system of an advance review of the ECHR compatibility of new legislation has been described as "best practice".[1079] More specifically, in this process, based on the 1995 Constitution, the Chancellor of Justice of the Government (under sections 108 and 112), the Ombudsman (section 112), the Constitutional Law Committee of the Parliament (section 74), the speaker of Parliament (section 42) and if necessary, the President of the Republic (under section 77, in specific instances) each have the potential to play important roles in that.[1080] For instance, the Constitution obliges the ministries responsible for the preparation of certain legislative reforms to ensure that the provisions of the ECHR are respected.[1081] The Ministry of Justice shall point out potential problems relating to compliance with the ECHR. In addition, the plenary meetings where the Government approves the legislative proposal are attended by the Chancellor of Justice of the Government, who is responsible for overseeing the lawfulness of the official acts of the Government and the President of the Republic under the Constitution, especially with regards to human rights.

Before the final consideration of Government proposals in the plenary of the Parliament, the Constitutional Law Committee is responsible for examining the constitutionality of legislative proposals and other matters brought for its consideration, as well as their relation to international human rights treaties. The Speaker of the Parliament can refuse to include a draft law on the agenda if he/she considers a matter to be contrary to the Constitution. If the Parliament does not accept this decision, the matter is referred to the Constitutional Law Committee. Finally,

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[1078] AS/Jur (2007) 35 rev 2, "The effectiveness of the ECHR at national level", Committee on Legal Affairs and Human Rights, Parliamentary Assembly, CoE, Working document, Rapporteur: Mrs Marie-Louise Bemelmans-Videc, Netherlands, EPP/CD, 26 July 2007, para.8

[1079] *Ibid*, para.10.

[1080] See in more detail CDDH(2006)008 Addendum III Bil, CDDH (CDDH), Information submitted by member states with regard to the implementation of the five recommendations mentioned in the Declaration adopted by the CoM at its 114th session (12 May 2004), Strasbourg, 7 April 2006

[1081] See CDDH(2006)008 Addendum II, "Tables on the Implementation of the Five Recommendations", Strasbourg, 7 April 2006.

after the adoption of a new piece of legislation by the Parliament, it has to be submitted to the President of the Republic for confirmation.[1082]

It should be also noted that according to the terms of the Recommendation Rec(2004)5, verification must take place against the ECHR "in the light of the case-law of the Court" and that is important that member states take into account also judgments in cases to which they are not a party insofar as these judgments are relevant for their internal legal order.[1083] However, as discussed earlier neither Cyprus nor Turkey have any mechanisms in their respective legal orders for the monitoring of judgments and admissibility decisions of the ECtHR against other member states so they can consider them in case they are relevant to their national law.

This thesis argues that the importance and usefulness of verification mechanisms on the long-term effectiveness of the ECHR is indeed self-evident. The adoption of legislation whose conformity with the ECHR and ECtHR's case-law has been verified in advance, member states on the one hand reduce the risk of violating the ECHR and on the other hand "vaccinate" their authorities with the "ECHR thinking" in their relations with individuals within their jurisdictions.

6.10 Recommendation Rec(2000)2

on the re-examination or reopening of certain cases at domestic level following judgments of the ECtHR;

The remedies of re-opening or re-examination of cases are available in the majority of member states, more frequently in criminal rather than in civil or administrative cases. In recent years, a number of member states have introduced these remedies into their

[1082] There is no specific provision on the President's duty to examine the conformity of the adopted law with basic rights and human rights but he/she can do so. If the President does not confirm the law within a time of three months, it is returned for the consideration of the Parliament.

[1083] CM(2008)52, 118th Session of the CoM, Strasbourg, 7th May 2008, CDDH- Activity Report- Sustained Action to Ensure the Effectiveness of the Implementation of the ECHR at National and European Levels (follow-up on the Declaration adopted at the 116th Session of the CoM, Strasbourg, 18-19 May 2006), p.24.

legal systems through legislative changes or as a broader interpretation of previously applicable law.[1084]

In Cyprus, unlike in the majority of the member states of the CoE where legislation provides for applicants to request reopening of criminal proceedings following a judgment of the ECtHR, there is no such legislation dealing specifically with this issue. The situation is unclear since there has been no judgment of the ECtHR against Cyprus to date, necessitating for its implementation the reopening at national level of proceedings in which a final judgment had been issued. Nevertheless, it is desirable that the Republic of Cyprus should pass legislation (in compliance with Recommendation (2000)2, which will afford for applicants the option to request reopening of criminal proceedings following a judgment of the ECtHR.

In Turkey, following the judgment of the ECtHR in the case of *Sadak, Zana, Dicle and Dogan*,[1085] a new law entered into force on 4 February 2003 allowing the re-opening of domestic proceedings in all cases that had already been decided by the ECtHR (and had become final before the law entered into force) and in all new cases which would henceforth be brought before the ECtHR. However, Turkish law subjects the reopening of proceedings to strict procedural prerequisites. The provisions of this law, exclude the possibility of re-opening cases, which were at the time pending before the Court and that have not yet been decided, as well as for

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[1084] See, in this connection document CDDH (2006) 008 Addendum III, pp. 3 to 110 for a detailed compilation. The difference in "reopening" and "re-examination" of cases has been explained as follows in Explanatory Memorandum to Rec(2000)2 on the re-examination or reopening of certain cases at a domestic level following judgments of the ECtHR: "5. As regards the terms, the recommendation uses "re-examination" as the generic term. The term "reopening of proceedings" denotes the reopening of court proceedings, as a specific means of re-examination. Violations of the ECHR may be remedied by different measures ranging from administrative re-examination of a case (e.g. granting a residence permit previously refused) to the full reopening of judicial proceedings (e.g. in cases of criminal convictions)". However, as has been noted in the CDDH Progress Report of 2005, § 21, there has been some confusion in the two concepts on the part of member states. A further explanation is provided in Doc CDDH(2006)008 Addendum I, 07.04.2006, p. 3, entitled *Follow-up on the implementation of the five recommendations*: "For the purposes of the follow-up of the recommendation, re-examination is understood as a re-assessment, normally by the same decision-making body, of the situation which gave rise to a violation of the ECHR, which may also lead to the granting of what was at issue in the original proceedings. Other situations involving *restitutio in integrum* are therefore not included in the present exercise. The same holds true for situations where re-examination is not the main object of the proceedings or where what was originally at stake can no longer be granted but must be replaced with monetary damages. Reopening is reserved for judicial proceedings challenging the validity of an earlier decision qualifying as *res iudicata*."

[1085] *Sadak, Zana, Dicle and Dogan* v *Turkey*, Nos 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 17.07.2001.

friendly settlements. As a result, there will be no right to a retrial in Turkey for those cases pending before the Strasbourg Court as of 4 February 2003.

In response to this Recommendation for re-opening procedures at domestic level "more than a dozen member states of the CoE have adopted legislation providing for the re-opening of criminal proceedings and a number of courts have developed their case-law so as to allow for such re-opening."[1086] As of 2006 this remedy is available in 80% of member states in criminal cases and about half of the states in civil and administrative cases.[1087] The implementation of the Recommendation appears to have made an important contribution to the effectiveness of the ECHR, in particular in respect of individual applicants. Moreover, the importance of the Recommendation is underlined by the fact that many member states have undertaken the necessary reforms without the state having to execute a specific ECtHR judgment.

In an attempt to ensure that a finding of a violation in favour of individuals is not a hollow victory and recognising the importance of providing individuals with an effective remedy following the finding of a violation the majority of states provide for the opportunity to reopen cases. One such example would be in relation to criminal proceedings deemed unfair and the option of a retrial with the due process guarantees. Thus the examples of Cyprus and Turkey are atypical of approaches of other Member States.

6.11 Recommendation Rec(2004)6

on the improvement of domestic remedies;

The Recommendation (2004)6[1088] on the improvement of domestic remedies for ECHR violations, addresses both preventative and curative approaches to the stemming of the flow of applications to the ECtHR. This Recommendation urges member states to ascertain, through constant review, in light of ECtHR case-law, that

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[1086] CDDH(2006)008 Addendum I, "Follow-up Sheets on the Implementation of the Five Recommendations", Strasbourg, 7th April 2006, p.7.
[1087] *Ibid*, p.7.
[1088] Rec (2004)6 to member states on the improvement of domestic remedies, (adopted by the CoM on 12.05.2004, at its 114th Session).

domestic remedies exist for anyone having an arguable complaint of a violation of the ECHR, and that these remedies are effective - meaning that they can result in a decision on the merits of the complaint providing adequate redress for any violation found.[1089]

Cyprus like many CoE member states faces a problem with the length of domestic proceedings. As discussed in the previous chapter, the ECtHR did not accept the position of the Cypriot Government that there had been a domestic remedy established through case-law.[1090] On the contrary the ECtHR considered that Cyprus had failed to show that an effective domestic remedy was available to the applicants in respect of the length of domestic proceedings. Moreover, it had accordingly found a breach of Article 13 of the ECHR. Iain Cameron argues that "demands of legal certainty call for clear legislation, not simply a vague encouragement to the courts to apply the principle of treaty conform construction".[1091] It is the author's opinion that the Cypriot parliament is the appropriate body to lay down in law the principles to be applied by the Cypriot courts when assessing the compensatory element in cases of human rights violations.

It is clear that length of domestic proceedings complaints have been a particularly burdensome feature of the ECtHR's workload, consuming resources and impeding the ECtHR in its efforts to address in a timely manner the many cases lodged with it which raise substantial human rights issues. Following the ECtHR's judgment in the *Kudla* case,[1092] in which the ECtHR, departing from its previous case-law, found a violation of Article 13 in that the applicant had had no domestic remedy whereby he could have enforced his right to a "*hearing within a reasonable time*" as guaranteed by Article 6(1) of the ECHR, a number of states are in the process of introducing remedies that would meet the Article 13 requirements as interpreted by the ECtHR.

[1089] See, in this connection, the excellent "Report on effectiveness of national remedies in respect of excessive length of proceedings" recently issued by the Venice Commission, document CDL-AD (2006) 036 rev of 03.04.2007. Cf the work of the CoE's European Commission on the Efficiency of Justice (CEPEJ) whose work will, hopefully in the long run, have an effect on certain aspects of length of domestic procedures.

[1090] See the case of *Yiallourou v. Evgenios Nikolaou.*

[1091] Cameron, I., "Damages for violations of ECHR rights : the Swedish example" in Wahl, N., & Cramér, P., (eds) "Swedish studies in European law" Vol. 1, 2006, Oxford-Portland- Or, Hart, 2006, p.127.

[1092] *Kudła v. Poland*, No 30210/96, 26.10.2000.

The ECtHR, in the case of *Giuseppina and Orestina Procaccini v Italy,*[1093] commended some States, namely Austria, Croatia, Spain, Poland and the Slovak Republic, for combining two types of remedies, one designed to expedite the proceedings and the other to afford compensation.[1094] It is evident that the ECtHR's docket would have become unmanageable had these countries not provided for the possibility for individuals to seek redress for a breach of the Article 6 reasonable-time requirement. It is therefore not surprising that the Rec (2004) 6 draws particular attention to the need for member states to address the length of proceedings issue. Michael O'Boyle is convinced that the time has clearly come to repatriate many of these issues to the forum best suited to resolve them, namely the national courts.[1095]

This thesis maintains that progress in human rights standards would be accompanied by a decrease in the number of applications to Strasbourg. In order to illustrate this, consideration should be given to the legislative reforms carried out in Turkey on the re-organisation of the State Security Courts. This development has undoubtedly relieved the ECtHR of the burden of having to deal with applications brought under Article 6 of the ECHR.[1096] It is reasonable to assume that a highly developed national system of remedies has a positive effect on the conformity with the ECHR.

In setting up domestic remedies, member states should make sure they satisfy the ECtHR's standards for effectiveness of remedies.[1097] However, it is submitted that securing the ECtHR's confirmation of the effectiveness of a domestic remedy is not the end of the road. On the contrary, following the adoption of a domestic remedy member states are expected to ensure that it complies continuously with the required standards under the ECHR. Nevertheless, this is not always done by the member states as it is illustrated by the case of *Içyer v. Turkey*. As discussed earlier, since the

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[1093] *Giuseppina and Orestina Procaccini v. Italy,* No 65075/01, 29.03.2006.
[1094] AS/Jur (2007) 35 rev 2, "The effectiveness of the ECHR at national level", Committee on Legal Affairs and Human Rights, Parliamentary Assembly, CoE, Working document, Rapporteur: Mrs Marie-Louise Bemelmans-Videc, Netherlands, EPP/CD, 26 July 2007, para.34.
[1095] O'Boyle, M., "On reforming the operation of the ECtHR", *European Human Rights Law Review*, 2008 p.6.
[1096] GT-DH-PR B(2007)003, CDDH , DH-PR, GT-DH-PR, Working Group B, Meeting Report, 7th meeting, 20-21 February 2006, Strasbourg, 7 March 2007.
[1097] AS/Jur (2007) 35 rev 2, "The effectiveness of the ECHR at national level", Committee on Legal Affairs and Human Rights, Parliamentary Assembly, CoE, Working document, Rapporteur: Mrs Marie-Louise Bemelmans-Videc, Netherlands, EPP/CD, 26 July 2007, para.30.

ECtHR announced its decision in *Içyer*, there have been noticeable failures in the implementation of the Compensation Law.

It is worth emphasising that the main objective in establishing effective domestic remedies is to render it redundant for applicants to take the long and arduous road to Strasbourg and to prevent member states from avoiding their international liabilities. One of the core findings of this thesis is that there is also the additional risk that individuals who have previously submitted their cases to Strasbourg will have to revert to the domestic courts, where they cannot be assured of obtaining effective redress. Inevitably, such a development would force applicants to return to the ECtHR once again, thus extending considerably the length of such proceedings.[1098]

Certainly the ECtHR is not an appellate instance. Thus a system of jurisdiction on the European level can only be successful when an effective national mechanism of legal protection exists. It is of enormous importance for the current system of the ECHR that effective, specific ECHR remedies exist at home, at the national level. The domestic courts need to regard the ECtHR as a precedent setting authority. Borrowing the words of Michal Balcerzak: "Why should we not say it loudly that every court in member states of the CoE is in fact a court of the ECHR? As we know, the ECHR has so far been incorporated into every legal system of the States Parties. Every national judge must know and apply the jurisprudence of the ECtHR."[1099]

It must be understood therefore that the less developed the standard of human rights in a member state, the more applications in respect of this country can be expected in Strasbourg. In addition, it must be presumed that the larger the gap that exists between ECHR standards and domestic legal systems, the more profound the legal reforms that

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[1098] Lambert-Abdelgawad, E., "Le protocole 14 et l'execution des arrest de la Cour europeene des droits de l'homme" in Cohen-Jonathan, G., and Flauss, J.F., "La Reforme du systeme de controle contentieux de la Convention europeenne des droits de l'homme", Droit et Justice, Vol. 61, Bruxelles: Bruylant, 2005, p.102.

[1099] Balcerzak, M., "State of Developments From the ECHR Perspective, Guaranteeing the Long-term Effectiveness of the ECHR: The Importance of Effective Remedies" in "The Improvement of Domestic Remedies With Particular Emphasis on Cases of Unreasonable Length of Proceedings", "Applying and Supervising the ECHR", Workshop Held at the Initiative of the Polish Chairmanship of the CoE's CoM, Directorate General of Human Rights, CoE, 2006, p.25.

will be required of the states and the greater the challenges that will exist for the ministers as regards full implementation of judgments.[1100]

6.12 Pilot judgment procedure

The need for establishing effective remedies at domestic level is closely linked with the "pilot judgment procedure", which is a tool created by the ECtHR in order to deal with repetitive complaints that highlight the existence of structural or systemic difficulties in the relevant state.

It has been argued that "pilot" judgments were born out of a strong belief that it is not the function of an international court to act as a compensation commission examining large numbers of complaints raising exactly the same issue.[1101] As outlined in the relevant chapter pilot judgments are intrinsically connected to the obligation of member states to take general measures in order to eliminate the causes of the violation of the ECHR and prevent its repetition. Where national governments are unable or unwilling to address the origins of their systemic problems themselves, by issuing a "pilot" judgment, the ECtHR forcefully directs them to proceed with a comprehensive resolution of such problems in compliance with ECHR standards.

The findings of this thesis reveal that "pilot" judgments have the potential to help the ECtHR significantly in its effort to reduce the caseload. "Pilot" judgments could undoubtedly provide an effective way for the ECtHR to deal with the large number of repetitive cases that clog its docket. This procedure in effect constitutes a technique/ a promising tool to tackle the systemic problems which exist in the member states of the CoE and consequently to reduce the backlog pending before the ECtHR. It is clear that a very significant contribution to reducing the caseload of the ECtHR could be achieved if a domestic remedy was available to other individuals who are also affected by the systemic problem exposed in the pilot judgment.

[1100] Bates, E., "Execution of Judgments Delivered by the ECtHR", in Christou, Th. & Raymond, J.,P., "ECtHR, Remedies and Execution of Judgments", British Institute of International and Comparative Law, 2005, p.55.

[1101] O'Boyle, M., "On reforming the operation of the ECtHR", *European Human Rights Law Review*, 2008 p.6.

It must be noted that during the reflection period for the adoption of the 2004 reform package, which includes Protocol No. 14, the debate was concentrated on the amendment of the admissibility criteria under Article 35 of the ECHR without enough attention having being paid to the pilot judgment procedure despite the large numbers of people who are likely to be affected by it. Despite its potential effect in reducing the ECtHR caseload,[1102] the "pilot judgment procedure" cannot serve as the antidote for all the systemic problems found in the different member states of the CoE. It is acknowledged that not every structural or systemic problem is suitable for the implementation of this procedure. The appropriateness and the suitability of the case should be considered an absolute requirement for the application of this process. Thus the pilot judgment procedure is not a panacea for resolving all such problems within the European system of protection of Human Rights.

This thesis argues that any generalisation of the implementation of this process will lead the ECtHR down an uncertain route. The happy ending in the case of *Broniowksi* should not blind us. Judge Garlicki has suggested that the legal basis of pilot judgments "remains relatively fragile and certain circumspection in resorting to that procedure may be in order" and that "an inflation of pilot judgments would be counterproductive".[1103] He has further argued that the general application of this process will have the opposite effect and that there will not always exist the appropriate conditions and a favorable environment as in *Broniowski*. It has been also argued that this procedure is at best only partial solution especially since its success depends entirely on the willingness of governments to cooperate more actively.[1104]

[1102] On 6 October 2008 the ECtHR struck out the remaining 176 "Bug River" (*sprawy zabużańskie*) cases against Poland, finding that the Polish Government has successfully put in place an effective compensation scheme which is available to the nearly 80,000 people forced to abandon their properties between 1944 and 1953 in the eastern provinces of pre-war Poland. It should be noted that on 4 December 2007 in its decisions striking out the cases *Wolkenberg and Others v. Poland,* (No. 50003/99) and *Witkowska-Tobola v. Poland (*No. 11208/02), the ECtHR established that the new Bug River compensation scheme satisfied the requirements set out in its judgment in *Broniowski v. Poland*. Subsequently, the ECtHR struck out a further 110 cases. The remaining 176 cases have been struck out on 6 October 2008 in a global decision marking the successful end of the ECtHR's "pilot-judgment" procedure in this case (see ECtHR, Press Release issued by the Registrar, "First "pilot judgment" procedure brought to a successful conclusion- Bug River cases closed", 6 October 2008).

[1103] Garlicki, L., "Broniowski and After: On the Dual Nature of Pilot Judgments", in Liber amicorum Luzius Wildhaber: Human Rights, Strasbourg views, eds. Lucius Caflisch ... [et al.]. - Kehl ; Strasbourg ; Arlington, Va : N.P. Engel, 2007, p.191.

[1104] Gattini, A., "Mass claims at the ECtHR", Human rights, democracy and the rule of law = Menschenrechte, Demokratie und Rechtsstaat = Droits de l'homme, démocratie et état de droit : liber

The example of *Içyer* reveals that this procedure should not result in a "compensatory assessment" alone for violations of the ECHR rights. It should be noted that the findings of the ECtHR in the particular case did not address the problem of whether the applicant(s), or persons in the same situation, can, in fact, return to their villages.[1105]

The crucial problem to be resolved in the area of pilot judgments is arguably the problem of enforcement.[1106] Therefore, there is an urgent need for the ECtHR to ensure that class-wide relief applies to all similarly-situated applicants and is appropriate to the systemic human rights problems it has adjudicated.[1107] Hence, the attention of the ECHR system should focus on how to convince governments to provide solutions to their systemic problems. It should be remembered that reviewing and finding appropriate solutions requires that the state consistently exercises political will in the appropriate direction. The freezing of the remaining judgments is certainly at the expense of the individuals and does not seem to put any real pressure on the governments. It is submitted that the ECtHR when applies the "pilot judgment procedure" should follow the approach, which was adopted, in the 'pilot' case of *Lukenda v. Slovenia.*[1108] There the ECtHR took the opposite approach from what was followed before – as soon as it had delivered the 'pilot' judgment, it rapidly processed approximately 200 further judgments against Slovenia concerning allegations of excessive length of proceedings before domestic courts. This thesis argues that in this way the ECtHR on the one hand will have the possibility of having a wider picture of the situation and hence of the measures required and on the other hand will test the willingness of the member state to comply to resolve the underlying systemic problem.

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amicorum Luzius Wildhaber / eds. Stephan Breitenmoser ... [et al.]. - Zürich : Dike ; Baden-Baden : Nomos, 2007, p.283.

[1105] Committee on Legal Affairs and Human Rights, Mr Erik Jurgens, *Implementation of judgments of the ECtHR* (Doc.11020, September 18, 2006), para.70.

[1106] O'Boyle, M., "On reforming the operation of the ECtHRs", *European Human Rights Law Review*, 2008 p.6.

[1107] Helfer, L., "Redesigning the ECHR: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", Vanderbilt University Law School, Public Law & Legal Theory, Working Paper Number 07-20, p.28.

[1108] *Lukeda v. Slovenia*, No. 23032/02, 06/10/2005.

Moreover, the "pilot applicant" in effect enjoys a privileged status relative to other complainants. As it was highlighted in the case of *Xenides-Arestis* the interests of the "pilot applicant" and the remaining applicants will not always necessarily be the same. It is therefore suggested that there must be a way for the remaining applicants to be heard. Only in this way there will be a global and thorough assessment of the systemic problem.

The commitment of the respondent state to solve the systemic problem should be seriously taken into account by the ECtHR when deciding whether or not to apply this procedure. The demonstration of an active commitment on behalf of the member state to provide solution for the systemic problem identified by the ECtHR should be considered as a fundamental prerequisite for the application of this procedure. For example, at the time Turkey executed the just satisfaction part in the *Loizidou* case it also made a Declaration to the effect that the payment made was "in no way a precedent for cases presently pending before the ECtHR or for similar cases in the future." However, such reluctance on the part of Turkey to comply with *post-Loizidou* cases has been ignored by the ECtHR by the subsequent issuing of the pilot judgment in *Xenides-Arestis*.

The inherent weaknesses of the pilot judgment procedure as it stands make it possible for reluctant governments to avoid their obligations under the ECHR. The inadmissibility decision in *Içyer* illustrates clearly this problem: there all similarly situated applicants were required to exhaust a remedy which has been severely criticised in its essential failures to comply with ECHR standards. Thus the victims of the ECHR violations in these circumstances are subjected to a procedure which renders them victims once again.

Thus the pilot judgment procedure should remain under stringent examination so that it is not allowed to become the Trojan horse within the walls of the legal protection of the European system of protection of human rights.

6.13 Conclusion

Looking back on the detailed analysis of the domestic implementation of the ECHR in the Cypriot and Turkish legal order the comparison reveals a series of similarities and differences. It is suggested that despite all the problems and difficulties neither Cyprus nor Turkey disregard the ECHR and the ECtHR case-law. It is probably fair to say that for both countries there is no other international treaty which has had such noticeable effect in their respective domestic legal orders.

The comparative material illustrates that both countries deemed it necessary to respond to the 2004 Recommendations of the CoM and it can be said that their efforts to meet the required standards by the ECHR were considerable. However, much remains to be done, in Turkey and to a lesser extent in Cyprus to implement successfully in practice the Recommendations and to ensure more effective implementation of the ECHR in their respective legal orders.

In their totality, the Recommendations form appropriate guidelines resulting/stemming directly from the ECHR, helping member states in their efforts to improve the protection of human rights in their domestic legal order. The importance of the measures listed in these instruments is uncontested. Therefore, it was not surprising that some of the recommendations are referred to in the report of the Wise Persons.[1109]

The measures aiming at the prevention of human rights violations at national level seek to stress the responsibility of national authorities according to the principle of subsidiarity. This thesis argues that if fully applied, these measures will relieve the pressure on the ECtHR in various ways: they would reduce the number of individual applications where a possible incompatibility of national law with the ECHR has been avoided, or where the alleged violation has been remedied at the national level, but also because the work of the ECtHR will be made lighter if a case has been the subject of a well-reasoned decision at the national level.

[1109] See Report of the Group of Wise Persons to the CoM, Strasbourg, November 2006, para.87-93.

The fact that Protocol No. 14 is not yet in force does not downgrade in any way the importance of these Recommendations. This thesis argues that this event makes them even more important and necessary. Since Protocol No. 14 has not entered into force as expected, the free-standing accompanying package of resolutions and recommendations that surround it should become the focus of renewed attention as states bemoan their impotence in the face of Russia's non-ratification.[1110] These are all sensible and elementary steps that have already been taken by many states but not by all and which would greatly reduce the flow of cases to Strasbourg if they were properly implemented.[1111]

The complete and full implementation of the five recommendations would ensure that the level of human rights standards could be raised in the domestic legal order of each member state. As outlined above, the knowledge of the ECtHR's case-law and access to translations of judgments concerning cases from other member states remains relatively poor in Cyprus and Turkey. It is evident that this situation weakens the judiciary's capacity to guarantee the ECtHR's effectiveness. It has been argued that the more ignorant of the ECHR system are national officials, the less likely it is that they will be able to perform their duties properly.[1112] Nevertheless, the influx of human rights applications would not necessarily diminish to a great extent as a result of an increase in the knowledge of the ECHR. Comparative studies have shown that the better the ECHR is known at national level,[1113] the more people tend to turn to Strasbourg. However, the examination of applications would be facilitated and many would be rendered inadmissible because national authorities and courts have already complied with ECHR obligations.[1114]

[1110] O'Boyle, M., "On reforming the operation of the ECtHR", *European Human Rights Law Review*, 2008 p.6.
[1111] Ibid, p.6.
[1112] Keller, H., & Stone Sweet, A., "Assesing the Impact of the ECHR on National Legal Systems", in Keller, H., & Stone Sweet (ed.) "A Europe of Rights", Oxford University Press, 2008, p.688.
[1113] That is mainly the aim of Recommendation Rec(2004)4, The ECHR in university education and professional training and Recommendation Rec(2002)13 Publication and dissemination in the Member States of the text of the ECHR and of the case-law of the ECtHR.
[1114] Siess-Scherz, I., "The 2004 Reform and its Implementation", in "Applying and Supervising the ECHR- Future developments of the ECtHR in the light of the Wise Persons' Report", Colloquy organised by the San Marino chairmanship of the CoM of the CoE, San Marino, 22-23 March 2007, p.24.

PART V

CHAPTER 6

"Even when laws have been written down, they ought not always to remain unaltered"

Aristotle

7.1 CONCLUSIONS

Having completed the detailed discussion of each area examined in the chapters above, we may now consider the overall picture that emerges from this study of the relationship between the domestic implementation of the ECHR and the ongoing reforms of the ECtHR.

Part I argued that the issue of the exponential growth in the number of individual applications is the biggest challenge the ECtHR has faced in its history. Consequently, a major problem the ECtHR is currently experiencing is its effectiveness in dealing with applications within a "reasonable time". It was established that despite the substantial increase in its productivity and output in general, the caseload continues to rise considerably and this undoubtedly puts the effectiveness and credibility of the ECHR system in serious danger.

The ECtHR has become a "victim of ongoing reforms", since the constant efforts to streamline and reinforce the system proved to be inadequate in managing the challenge of its ever-increasing caseload. There has been widespread agreement that further reforms to the ECHR mechanism are required in order to cope with the serious influx of cases from the 47 member states of the CoE. However, the success of any proposed reform does not depend only on the ECtHR itself but also on the clear willingness of member states to comply with their obligations under the ECHR.

Part II illustrated the subsidiary role of the ECHR to the national legal orders and the importance of its effective implementation at national level. It argues that the

emphasis in legal protection should then be on the domestic level; an effective domestic remedy, which leads to a decision which all parties can approve, is more efficient and practical than a similar finding at the international level, mainly because it will save a lot of time.

Part II also critically analyses the 2004 Recommendations and the "pilot judgment procedure". The impetus behind these Recommendations is to ensure that everything possible is done to prevent or deal with ECHR violations at national level, so that the ECtHR is not overloaded with cases which could be dealt with adequately at national level. The recommended measures aimed at the upstream level seek to stress the responsibility of national authorities and to reinforce the capabilities of the national legal systems to prevent or at least remedy violations of the ECHR rights at national level.

Parts III and IV tracked and evaluated the impact of the ECHR in the domestic legal orders of Cyprus and Turkey. They also critically assessed the effectiveness and the implementation of the May 2004 Recommendations in these two member states of the CoE. The comparative material demonstrates that both national systems are increasingly influenced by the ECHR and the case-law of the ECtHR. In addition it became clear that for both countries there is no other international treaty which has had such noticeable effect in their respective domestic legal orders. It could be argued that the ECHR has a significant impact even where it has been resisted and opposed. In both states examined in this thesis, the ECHR has caused the introduction of innovative procedural and substantive, including the development of mechanisms for coordinating national law and the ECHR, as the latter evolves.

Cyprus and Turkey considered it necessary to respond to the 2004 Recommendations and it can be said that their efforts to meet the required standards by the ECHR were considerable. However, it was established that much remains to be done in Turkey and to a lesser extent in Cyprus, to implement successfully and in practical terms the Recommendations and to ensure more effective implementation of the ECHR in their respective legal orders.

The reforms adopted in May 2004 were an attempt to involve all the active participants of the ECHR system (that is the ECtHR, member states and the CoM) in order to share the burden of the backlog of the ECtHR. This was clearly demonstrated by the establishment of the "pilot judgment procedure". As this thesis shows the "pilot judgments procedure" has the potential to assist in the effort to reduce considerably the caseload of the ECtHR . It is clear that a good progress in reducing the caseload of the ECtHR could be achieved if a domestic remedy was available to other individuals also affected by the systemic problem specified in the pilot judgment. However, a number of deficiencies in this procedure have been identified by this research especially regarding the issue of enforcement of such judgments. The ECHR system should employ all means to effectively convince governments to provide solutions to their systemic problems and exercise political will in the appropriate direction.

It was universally recognised, at an early stage of the reform process, that measures introduced at national level would constitute an indispensable part of any eventual "reform package".[1115] It became clear that measures could not only focus on streamlining and improving the work in Strasbourg – both at the ECtHR's level as well on the level of execution of the ECtHR's judgments. A crucial factor in the effort to guarantee the long-term effectiveness of the ECHR system had also to be an improvement in the prevention of violations of the ECHR at national level. It has already been argued that "human rights protection begins and ends at home".[1116]

A set of five recommendations was adopted to encourage member states to take effective domestic steps to ensure appropriate protection of the ECHR rights at the domestic level, in full conformity with the principle of subsidiarity and the obligations of member states under Article 1 of the ECHR. The five recommendations aim at improving the quality of national laws, the effectiveness of remedies, including the reopening of domestic procedures to give effect to the ECtHR judgments, and the

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[1115] Introductory report of Mr Walter Schwimmer, Secretary General, for the European Ministerial Conference on Human Rights, Part II, Respect for human rights, a key factor for democratic stability and cohesion in Europe: current issues, November 2000, CoE Publishing, 44; Activity Report of the Reflection Group on the Reinforcement of the Human Rights Protection Mechanism, doc. CDDH-GDR (2001) 010, III, June 2001; Report of the Evaluation Group to the CoM on the ECtHR, September 2001, Chapter VI, para. 44 ff.

[1116] Mr Walter Schwimmer, Secretary General, statement made at the opening session of the Ministerial Conference in November 2000, CoE Publishing, 20.

awareness of the requirements of the ECHR, including those ensuing from the judgments of the ECtHR, by measures in the fields of publication, dissemination, education and training.

This thesis argues that the struggle for ensuring the survival and effective operation of the ECtHR should triumph at the national level. Consequently it could be said that the heavy burden for compliance falls to member states. The 2004 Recommendations target the root of the problem and they are appropriate prescriptions for a healthy future.

The 2004 Recommendations for ensuring the protection of ECHR rights within the national legal systems have been described as "largely symbolic"[1117] since they are not mandatory in member states and it has been suggested that they will be "fruitless if they remain as simple recommendations and are not backed by a strong will to bring them into effect".[1118] However, this thesis argues that the fact that the Recommendations are instruments, which are not legally binding, does not mean that they are also ineffective. It is true that Recommendations don't have a binding legal character; the adoption of a Recommendation does not create a legal obligation for the state.[1119] However, a recommendation has the advantage of being unanimously adopted.[1120] The process of drafting and adopting Recommendations, which concludes with their unanimous adoption, indicates that member states are already in agreement about the need to work towards improvement in the area concerned and may even, be in a state of preliminary preparedness for responding to suggestions.

Hence, although the Recommendations are not legally binding their effectiveness should not be underestimated. As discussed, Cyprus and Turkey deemed it necessary to respond to the 2004 Recommendations and their efforts to meet the required

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[1117] Beernaert, Marie-Aude, "Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price", *European Human Rights Law Review*, Vol.5, 2004, p.547.
[1118] Zwaak, L., & Cachia, Th. "The ECtHR: A Success Story?", *Human Rights Brief,* Vol.11, Issue 3, 2004, p.34.
[1119] De Vel, G., & Markert, Th., "Importance and Weaknesses of the CoE Conventions and of the Recommendations Addressed by the CoM to Member States", in Haller, Bruno (ed.) "Law in Greater Europe : Towards a Common Legal Area, Studies in Honour of Heinrich Klebes", The Hague-London-Boston, Kluwer Law International, 2000, p.351.
[1120] Drzemczewski Andrew, Head Secretariat of Committee on Legal Affairs and Human Rights, Parliamentary Assembly, CoE, 29th November 2006, Strasbourg, interview by author, recording, Strasbourg, France.

standards by the ECHR were considerable. Furthermore a number of examples of response to Recommendations by other member states highlighted in this research, clearly show that the recommendations of the CoM are taken seriously by the member states and have significant effect.

In particular Recommendation (2004)6 which concerns domestic remedies, has great influence on the practice of the CoM for monitoring the execution of judgments of the ECtHR. Even in cases where there is no violation of Article 13 of the ECHR which concerns the domestic remedies, the CoM has introduced the practice of checking whether there exist domestic remedies for violations found by the ECtHR even if the ECtHR has not found a violation of Article 13 of the ECHR. This practice is in effect a result of Recommendation (2004)6[1121] and it is an important development because the CoM obliges member states to check whether domestic remedies exist or whether they should be introduced in the near future. Domestic remedies are undoubtedly the most effective preventive mechanism to great numbers of applicants in Strasbourg ,on the same issue.

The central finding of this thesis is that the 2004 Recommendations are a technical vehicle for implementing the ECHR in the domestic legal orders of member states. They are wise guidelines stemming directly from the ECHR to assist member states in their efforts to improve the protection of human rights in their domestic legal order. The Recommendations require member states to act preventatively to ensure that the right systems are in place rather than seeking to take action after violations have occurred.

The proposed measures aiming at the prevention of human rights violations at national level underline the responsibility of national authorities according to the principle of subsidiarity. This thesis argues that if fully applied, these measures will relieve the pressure on the ECtHR in various ways: They would reduce the number of individual applications where a possible incompatibility of national law with the ECHR has been avoided, or where the alleged violation has been remedied at the

[1121] Sitaropoulos Nikolaos, Department Execution of Judgments, ECtHR, 30th November 2006, Strasbourg, interview by author, recording, Strasbourg, France.

national level, and the work of the ECtHR will be made lighter if a case has been the subject of a well-reasoned decision at the national level.

It is evident that the language and principles of the text of the ECHR and the ECtHR case-law have a powerful influence beyond the courtroom. The construction of a human rights culture over time would depend not just on courts awarding remedies for violations of individuals' rights, but on decision-makers internalising the requirements of the ECHR standards. It is suggested that the 2004 Recommendations direct the member states to aspire to full compliance with their human rights obligations rather than remain content with negative compliance.

The conclusions/findings of this thesis are greatly relevant to the discussion on the reform of the ECtHR's structures and procedures in the context of Protocol No. 14. It is suggested that in the long run, the problem of the huge workload of the ECtHR is not likely to be solved by adjusting the conventional mechanisms in respect of admissibility. Sir Nicolas Bratza has suggested that "an amendment to the ECHR designed to reduce the influx of cases or to speed up their processing by the ECtHR, [will] treat the symptoms but not the underlying disease, namely the continuing failure of national legal systems effectively to implement the ECHR guarantees and to provide effect means of redress where breaches of the ECHR rights have been found to have occurred".[1122] Protocol No. 14 on its own is simply not enough. It is in the interest of all member states to ensure the existence or development of efficient mechanisms of legal protection in the individual countries. This thesis argues that the guiding principle for the ongoing debate on reform and innovation of the ECHR system should be the persistent/consistent pursuit of increased effectiveness of the domestic protection of human rights.

[1122] Bratza, N., "The Future of the ECtHR- Storm Clouds and Silver Linings", Thomas More Lecture, October 2002.

APPENDIX 1: Recommendation Rec(2004)4

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

Recommendation Rec(2004)4
of the Committee of Ministers to member states
on the European Convention on Human Rights in university education and professional training

(adopted by the Committee of Ministers on 12 May 2004,
at its 114th Session)

The Committee of Ministers, in accordance with Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity among its members, and that one of the most important methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reiterating its conviction that the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") must remain the essential reference point for the protection of human rights in Europe, and recalling its commitment to take measures in order to guarantee the long-term effectiveness of the control system instituted by the Convention;

Recalling the subsidiary character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article 1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities;

Welcoming in this context that the Convention has now become an integral part of the domestic legal order of all states parties;

Stressing the preventive role played by education in the principles inspiring the Convention, the standards that it contains and the case-law deriving from them;

Recalling that, while measures to facilitate a wide publication and dissemination in the member states of the text of the Convention and of the case-law of the European Court of Human Rights (hereinafter referred to as "the Court") are important in order to ensure the implementation of the Convention at national level, as has been indicated in Recommendation Rec(2002)13, it is crucial that these measures are supplemented by others in the field of education and training, in order to achieve their aim;

Stressing the particular importance of appropriate university education and professional training programmes in order to ensure that the Convention is effectively applied, in the light of the case-law of the Court, by public bodies including all sectors responsible for law enforcement and the administration of justice;

Recalling the resolutions and recommendations it has already taken on different aspects of the issue of human rights education, in particular: Resolution (78) 41 on the teaching of human rights; Resolution (78) 40 containing regulations on Council of Europe fellowships for studies and research in the field of human rights; Recommendation No. R (79) 16 concerning the promotion of human rights research in the member states of the Council of Europe; Recommendation No. R (85) 7 on teaching and learning about human rights in schools, as well as its appendix containing suggestions for teaching and learning about human rights in schools;

Recalling the role that may be played by the national institutions for the promotion and protection of human rights and by non-governmental organisations, particularly in the field of training of personnel responsible for law enforcement, and welcoming the initiatives already undertaken in this area;

Taking into account the diversity of traditions and practice in the member states as regards university education, professional training and awareness-raising regarding the Convention system;

Recommends that member states:

I. ascertain that adequate university education and professional training concerning the Convention and the case-law of the Court exist at national level and that such education and training are included, in particular:

– as a component of the common core curriculum of law and, as appropriate, political and administrative science degrees and, in addition, that they are offered as optional disciplines to those who wish to specialise;

– as a component of the preparation programmes of national or local examinations for access to the various legal professions and of the initial and continuous training provided to judges, prosecutors and lawyers;

– in the initial and continuous professional training offered to personnel in other sectors responsible for law enforcement and/or to personnel dealing with persons deprived of their liberty (for example, members of the police and the security forces, the personnel of penitentiary institutions and that of hospitals), as well as to personnel of immigration services, in a manner that takes account of their specific needs;

II. enhance the effectiveness of university education and professional training in this field, in particular by:

– providing for education and training to be incorporated into stable structures – public and private – and to be given by persons with a good knowledge of the Convention concepts and the case-law of the Court as well as an adequate knowledge of professional training techniques;

– supporting initiatives aimed at the training of specialised teachers and trainers in this field;

III. encourage non-state initiatives for the promotion of awareness and knowledge of the Convention system, such as the establishment of special structures for teaching and research in human rights law, moot court competitions, awareness-raising campaigns;

Instructs the Secretary General of the Council of Europe to transmit this recommendation to the governments of those states parties to the European Cultural Convention which are not members of the Council of Europe.

Appendix to Recommendation Rec(2004)4

Introduction

1. The Ministerial Conference held in Rome on 3 and 4 November 2000 to commemorate the 50th anniversary of the European Convention on Human Rights (hereinafter referred to as "the Convention"), invited the member states of the Council of Europe to "take all appropriate measures with a view to developing and promoting education and awareness of human rights in all sectors of society, in particular with regard to the legal profession".[1123]

2. This effort that national authorities are requested to make is only a consequence of the subsidiary character of the supervision mechanism set up by the Convention, which implies that the rights guaranteed by the Convention be fully protected in the first place at national level and applied by national authorities.[1124] The Committee of Ministers has already adopted resolutions and recommendations dealing with different aspects of this issue[1125] and encouraging initiatives that may be undertaken notably by independent national human rights institutions and NGOs, with a view to promoting greater understanding and awareness of the Convention and the case-law of the European Court of Human Rights (hereinafter referred to as "the Court").

3. Guaranteeing the long-term effectiveness of the Convention system is among the current priorities of the Council of Europe and, in this context, the need for a better implementation of the Convention at national level has been found to be vital. Thus, it appears necessary that all member states ensure that adequate education on the Convention is provided, in particular concerning legal and law enforcement professions. This might contribute to reducing, on the one hand, the number of violations of rights guaranteed by the Convention resulting from insufficient knowledge of the Convention and, on the other hand, the lodging of applications which manifestly do not meet admissibility requirements.

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1. European Ministerial Conference on Human Rights, H-Conf(2001)001, Resolution II, paragraph 40.
2. See Article 1 of the Convention.
3. In particular: Resolution (78) 41 on the teaching of human rights; Resolution (78) 40 containing regulations on Council of Europe fellowships for studies and research in the field of human rights; Recommendation No. R (79) 16 concerning the promotion of human rights research in the member states of the Council of Europe; Recommendation No. R (85) 7 on teaching and learning about human rights in schools, as well as its appendix containing suggestions for teaching and learning about human rights in schools.

4. This recommendation refers to three complementary types of action, namely:

i. the incorporation of appropriate education and training on the Convention and the case-law of the Court, notably in the framework of university law and political science studies, as well as professional training of legal and law enforcement professions;

ii. guaranteeing the effectiveness of the education and training, which implies in particular a proper training for teachers and trainers; and

iii. the encouragement of initiatives for the promotion of knowledge and/or awareness of the Convention system.

5. Bearing in mind the diversity of traditions and practice in the member states in respect of university education, professional training and awareness-raising regarding the Convention, it is the member states' responsibility to shape their own education programmes according to their respective national situations, in accordance with the principle of subsidiarity, while ensuring that the standards of the Convention are fully presented.

University education and professional training

6. Member states are invited to ensure that appropriate education on the Convention and the case-law of the Court is included in the curricula of university law degrees and Bar examinations as well as in the continuous training of judges, prosecutors and lawyers.

University education

7. It is essential that education on the Convention be fully incorporated into faculty of law programmes, not only as an independent subject, but also horizontally in each legal discipline (criminal law, civil law, etc.) so that law students, whatever their specialisation, are aware, when they graduate, of the implications of the Convention in their field.

8. The creation of post-graduate studies specialised in the Convention, such as certain national master's degrees or the European Master in Human Rights and Democratisation (E.MA) which involves twenty-seven universities over fifteen European states, as well as shorter university programmes such as the summer courses of the Institut international des droits de l'homme René Cassin (Strasbourg) or those of the European University Institute (Florence), should be encouraged.

Professional training

9. Professional training should facilitate a better incorporation of Convention standards and the Court's case-law in the reasoning adopted by domestic courts in their judgments. Moreover, legal advice which would be given to potential applicants by lawyers having an adequate knowledge of the Convention could prevent applications that manifestly do not meet the admissibility requirements. In addition, a

better knowledge of the Convention by legal professionals should contribute to reducing the number of applications reaching the Court.

10. Specific training on the Convention and its standards should be incorporated in the programmes of law schools and schools for judges and prosecutors. This could entail the organisation of workshops as part of the professional training for lawyers, judges and prosecutors. In so far as lawyers are concerned, such workshops could be organised at the initiative of Bar associations, for instance. Reference may be made to a current project within the International Bar Association to set up, with the assistance of the Court, training for lawyers on the rules of procedure of the Court and the practice of litigation, as well as the execution of judgments. In certain countries, the Ministry of Justice has the task of raising awareness and participating in the training of judges on the case-law of the European Court: judges in post may take advantage of sessions of one or two days organised in their jurisdiction and of a traineeship of one week every year; "justice auditors" (student judges) are provided with training organised within the judges' national school (Ecole nationale de magistrature). Workshops are also organised on a regular basis within the framework of the initial and continuous training of judges.

11. Moreover, seminars and colloquies on the Convention could be regularly organised for judges, lawyers and prosecutors.

12. In addition, a journal on the case-law of the Court could be published regularly for judges and lawyers. In some member states, the Ministry of Justice publishes a supplement containing references to the case-law of the Court and issues relating to the Convention. This publication is distributed to all courts.

13. It is recommended that member states ensure that the standards of the Convention be covered by the initial and continuous professional training of other professions dealing with law enforcement and detention, such as security forces, police officers and prison staff but also immigration services, hospitals, etc. Continuous training on the Convention standards is particularly important given the evolving nature of the interpretation and application of these standards in the Court's case-law. Staff of the authorities dealing with persons deprived of their liberty should be fully aware of these persons' rights as guaranteed by the Convention and as interpreted by the Court in order to prevent any violation, in particular of Articles 3, 5 and 8. It is therefore of paramount importance that in each member state there is adequate training within these professions.

14. A specific training course on the Convention and its standards and, in particular, aspects relating to rights of persons deprived of their liberty should be incorporated in the programmes of police schools, as well as schools for prison warders. Workshops could also be organised as part of continuous training of members of the police forces, warders and other authorities concerned.

Effectiveness of university education and professional training

15. For this purpose, member states are recommended to ensure that university education and professional training in this field are carried out within permanent structures (public and private) by well-qualified teachers and trainers.

16. In this respect, training teachers and trainers is a priority. The aim is to ensure that their level of knowledge corresponds with the evolution of the case-law of the Court and meets the specific needs of each professional sector. Member states are invited to support initiatives (research in fields covered by the Convention, teaching techniques, etc.) aimed at guaranteeing a quality training of specialised teachers and trainers in this sensitive and evolving field.

Promotion of knowledge and/or awareness of the Convention system

17. Member states are finally recommended to encourage initiatives for the promotion of knowledge and/or awareness of the Convention system. Such initiatives, which can take various forms, have proved very positive in the past where they have been launched and should therefore be encouraged by member states.

18. One example could be the setting-up of moot court competitions for law students on the Convention and the Court's case-law, involving at the same time students, university professors and legal professionals (judges, prosecutors, lawyers), for example the Sporrong and Lönnroth competition organised in the Supreme Courts of the Nordic countries, and the pan-European French-speaking René Cassin competition, organised by the association Juris Ludi in the premises of the Council of Europe.

APPENDIX 2: Recommendation Rec(2004)5

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

Recommendation Rec(2004)5
of the Committee of Ministers to member states
on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights

(adopted by the Committee of Ministers on 12 May 2004
at its 114th Session)

The Committee of Ministers, in accordance with Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity among its members, and that one of the most important methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reiterating its conviction that the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") must remain the essential reference point for the protection of human rights in Europe, and recalling its commitment to take measures in order to guarantee the long-term effectiveness of the control system instituted by the Convention;

Recalling the subsidiary character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article 1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities;

Welcoming in this context that the Convention has now become an integral part of the domestic legal order of all states parties and noting in this respect the important role played by national courts;

Recalling that, according to Article 46, paragraph 1, of the Convention, the high contracting parties undertake to abide by the final judgments of the European Court of Human Rights (hereinafter referred to as "the Court") in any case to which they are parties;

Considering however, that further efforts should be made by member states to give full effect to the Convention, in particular through a continuous adaptation of national standards in accordance with those of the Convention, in the light of the case-law of the Court;

Convinced that verifying the compatibility of draft laws, existing laws and administrative practice with the Convention is necessary to contribute towards preventing human rights violations and limiting the number of applications to the Court;

Stressing the importance of consulting different competent and independent bodies, including national institutions for the promotion and protection of human rights and non-governmental organisations;

Taking into account the diversity of practices in member states as regards the verification of compatibility;

Recommends that member states, taking into account the examples of good practice appearing in the appendix:

I. ensure that there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the Convention in the light of the case-law of the Court;

II. ensure that there are such mechanisms for verifying, whenever necessary, the compatibility of existing laws and administrative practice, including as expressed in regulations, orders and circulars;

III. ensure the adaptation, as quickly as possible, of laws and administrative practice in order to prevent violations of the Convention;

Instructs the Secretary General of the Council of Europe to ensure that the necessary resources are made available for proper assistance to member states which request help in the implementation of this recommendation.

Appendix to Recommendation Rec(2004)5

Introduction

1. Notwithstanding the reform, resulting from Protocol No. 11, of the control system established under the European Convention on Human Rights (hereinafter referred to as "the Convention"), the number of applications submitted to the European Court of Human Rights (hereinafter referred to as "the Court") is increasing steadily, giving rise to considerable delays in the processing of cases.

2. This development reflects a greater ease of access to the European Court, as well as the constantly improving human rights protection in Europe, but it should not be forgotten that it is the parties to the Convention, which, in accordance with the principle of subsidiarity, remain the prime guarantors of the rights laid down in the Convention. According to Article 1 of the Convention, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". It is thus at national level that the most effective and direct protection of the rights and freedoms guaranteed in the Convention should be ensured. This requirement concerns all state authorities, in particular the courts, the administration and the legislature.

3. The prerequisite for the Convention to protect human rights in Europe effectively is that states give effect to the Convention in their legal order, in the light of the case-law of the Court. This implies, notably, that they should ensure that laws and administrative practice conform to it.

4. This recommendation encourages states to set up mechanisms allowing for the verification of compatibility with the Convention of both draft laws and existing legislation, as well as administrative practice. Examples of good practice are set out below. The implementation of the recommendation should thus contribute to the prevention of human rights violations in member states, and consequently help to contain the influx of cases reaching the Court.

Verification of the compatibility of draft laws

5. It is recommended that member states establish systematic verification of the compatibility with the Convention of draft laws, especially those which may affect the rights and freedoms protected by it. It is a crucial point: by adopting a law verified as being in conformity with the Convention, the state reduces the risk that a violation of the Convention has its origin in that law and that the Court will find such a violation. Moreover, the state thus imposes on its administration a framework in line with the Convention for the actions it undertakes vis-à-vis everyone within its jurisdiction.

6. Council of Europe assistance in carrying out this verification may be envisaged in certain cases. Such assistance is already available, particularly in respect of draft laws on freedom of religion, conscientious objection, freedom of information, freedom of association, etc. It is none the less for each state to decide whether or not to take into account the conclusions reached within this framework.

Verification of the compatibility of laws in force

7. Verification of compatibility should also be carried out, where appropriate, with respect to laws in force. The evolving case-law of the Court may indeed have repercussions for a law which was initially compatible with the Convention or which had not been the subject of a compatibility check prior to adoption.

8. Such verification proves particularly important in respect of laws touching upon areas where experience shows that there is a particular risk of human rights violations, such as police activities, criminal proceedings, conditions of detention, rights of aliens, etc.

Verification of the compatibility of administrative practice

9. This recommendation also covers, wherever necessary, the compatibility of administrative regulations with the Convention, and therefore aims to ensure that human rights are respected in daily practice. It is indeed essential that bodies, notably those with powers enabling them to restrict the exercise of human rights, have all the necessary resources to ensure that their activity is compatible with the Convention.

10. It has to be made clear that the recommendation also covers administrative practice which is not attached to the text of a regulation. It is of utmost importance that states ensure verification of their compatibility with the Convention.

Procedures allowing follow-up of the verification undertaken

11. In order for verification to have practical effects and not merely lead to the statement that the provision concerned is incompatible with the Convention, it is vital that member states ensure follow-up to this kind of verification.

12. The recommendation emphasises the need for member states to act to achieve the objectives it sets down. Thus, after verification, member states should, when necessary, promptly take the steps required to modify their laws and administrative practice in order to make them compatible with the Convention. In order to do so, and where this proves necessary, they should improve or set up appropriate revision mechanisms which should systematically and promptly be used when a national provision is found to be incompatible. However, it should be pointed out that often it is enough to proceed to changes in case-law and practice in order to ensure this compatibility. In certain member states compatibility may be ensured through the non-application of the offending legislative measures.

13. This capacity for adaptation should be facilitated and encouraged, particularly through the rapid and efficient dissemination of the judgments of the Court to all the authorities concerned with the violation in question, and appropriate training of the decision makers. The Committee of Ministers has devoted two specific recommendations to these important aspects: one on the publication and the dissemination in member states of text of the Convention and the case-law of the Court (Rec(2002)13) and the other on the Convention in university education and professional training (Rec(2004)4).

14. When a court finds that it does not have the power to ensure the necessary adaptation because of the wording of the law at stake, certain states provide for an accelerated legislative procedure.

15. Within the framework of the above, the following possibilities could be considered.

Examples of good practice

16. Each member state is invited to give information as to its practice and its evolution, notably by informing the General Secretariat of the Council of Europe. The latter will, in turn, periodically inform all member states of existing good practice.

I. *Publication, translation and dissemination of, and training in, the human rights protection system*

17. As a preliminary remark, one should recall that effective verification first demands appropriate publication and dissemination at national level of the Convention and the relevant case-law of the Court, in particular through electronic means and in the language(s) of the country concerned, and the development of university education and professional training programmes in human rights.

II. *Verification of draft laws*

18. Systematic supervision of draft laws is generally carried out both at the executive and at the parliamentary level, and independent bodies are also consulted.

By the executive

19. In general, verification of conformity with the Convention and its protocols starts within the ministry which initiated the draft law. In addition, in some member states, special responsibility is entrusted to certain ministries or departments, for example, the Chancellery, the Ministry of Justice and/or the Ministry of Foreign Affairs, to verify such conformity. Some member states entrust the agent of the government to the Court in Strasbourg, among other functions, with seeking to ensure that national laws are compatible with the provisions of the Convention. The agent is therefore empowered, on this basis, to submit proposals for the amendment of existing laws or of any new legislation which is envisaged.

20. The national law of numerous member states provides that when a draft text is forwarded to parliament, it should be accompanied by an extensive explanatory memorandum, which must also indicate and set out possible questions under the constitution and/or the Convention. In some member states, it should be accompanied by a formal statement of compatibility with the Convention. In one member state, the minister responsible for the draft text has to certify that, in his or her view, the provisions of the bill are compatible with the Convention, or to state that he or she is not in a position to make such a statement, but that he or she nevertheless wishes parliament to proceed with the bill.

By the parliament

21. In addition to verification by the executive, examination is also undertaken by the legal services of the parliament and/or its different parliamentary committees.

Other consultations

22. Other consultations to ensure compatibility with human rights standards can be envisaged at various stages of the legislative process. In some cases, consultation is optional. In others, notably if the draft law is likely to affect fundamental rights, consultation of a specific institution, for example the Conseil d'Etat in some member states, is compulsory as established by law. If the government has not consulted as required, the text will be tainted by procedural irregularity. If, after having consulted, it decides not to follow the opinion received, it accepts responsibility for the political and legal consequences that may result from such a decision.

23. Optional or compulsory consultation of non-judicial bodies competent in the field of human rights is also often foreseen. In particular these may be independent national institutions for the promotion and protection of human rights, the ombudspersons, or local or international non-governmental organisations, institutes or centres for human rights, or the Bar, etc.

24. Council of Europe experts or bodies, notably the European Commission for Democracy through Law ("the Venice Commission"), may be asked to give an opinion on the compatibility with the Convention of draft laws relating to human

rights. This request for an opinion does not replace an internal examination of compatibility with the Convention.

III. *Verification of existing laws and administrative practice*

25. While member states cannot be asked to verify systematically all their existing laws, regulations and administrative practice, it may be necessary to engage in such an exercise, for example as a result of national experience in applying a law or regulation or following a new judgment by the Court against another member state. In the case of a judgment that concerns it directly, by virtue of Article 46, the state is under obligation to take the measures necessary to abide by it.

By the executive

26. In some member states, the ministry that initiates legislation is also responsible for verifying existing regulations and practices, which implies knowledge of the latest developments in the case-law of the Court. In other member states, governmental agencies draw the attention of independent bodies, and particularly courts, to certain developments in the case-law. This aspect highlights the importance of initial education and continuous training with regard to the Convention system. The competent organs of the state have to ensure that those responsible in local and central authorities take into account the Convention and the case-law of the Court in order to avoid violations.

By the parliament

27. Requests for verification of compatibility may be made within the framework of parliamentary debates.

By judicial institutions

28. Verification may also take place within the framework of court proceedings brought by individuals with legal standing to act or even by state organs, persons or bodies not directly affected (for example before the Constitutional Court).

By independent non-judicial institutions

29. In addition to their other roles when seized by the government or the parliament, independent non-judicial institutions, and particularly national institutions for the promotion and protection of human rights, as well as ombudspersons, play an important role in the verification of how laws are applied and, notably, the Convention which is part of national law. In some countries, these institutions may also, under certain conditions, consider individual complaints and initiate enquiries on their own initiative. They strive to ensure that deficiencies in existing legislation are corrected, and may for this purpose send formal communications to the parliament or the government.

APPENDIX 3: Recommendation Rec(2004)6

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

Recommendation Rec(2004)6
of the Committee of Ministers to member states
on the improvement of domestic remedies

(adopted by the Committee of Ministers on 12 May 2004,
at its 114th Session)

The Committee of Ministers, in accordance with Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity among its members, and that one of the most important methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reiterating its conviction that the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") must remain the essential reference point for the protection of human rights in Europe, and recalling its commitment to take measures in order to guarantee the long-term effectiveness of the control system instituted by the Convention;

Recalling the subsidiary character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article 1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities;

Welcoming in this context that the Convention has now become an integral part of the domestic legal order of all states parties;

Emphasising that, as required by Article 13 of the Convention, member states undertake to ensure that any individual who has an arguable complaint concerning the violation of his rights and freedoms as set forth in the Convention has an effective remedy before a national authority;

Recalling that in addition to the obligation of ascertaining the existence of such effective remedies in the light of the case-law of the European Court of Human Rights (hereinafter referred to as "the Court"), states have the general obligation to solve the problems underlying violations found;

Emphasising that it is for member states to ensure that domestic remedies are effective in law and in practice, and that they can result in a decision on the merits of a complaint and adequate redress for any violation found;

Noting that the nature and the number of applications lodged with the Court and the judgments it delivers show that it is more than ever necessary for the member states to

ascertain efficiently and regularly that such remedies do exist in all circumstances, in particular in cases of unreasonable length of judicial proceedings;

Considering that the availability of effective domestic remedies for all arguable claims of violation of the Convention should permit a reduction in the Court's workload as a result, on the one hand, of the decreasing number of cases reaching it and, on the other hand, of the fact that the detailed treatment of the cases at national level would make their later examination by the Court easier;

Emphasising that the improvement of remedies at national level, particularly in respect of repetitive cases, should also contribute to reducing the workload of the Court;

Recommends that member states, taking into account the examples of good practice appearing in the appendix:

I. ascertain, through constant review, in the light of case-law of the Court, that domestic remedies exist for anyone with an arguable complaint of a violation of the Convention, and that these remedies are effective, in that they can result in a decision on the merits of the complaint and adequate redress for any violation found;

II. review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court;

III. pay particular attention, in respect of aforementioned items I and II, to the existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings;

Instructs the Secretary General of the Council of Europe to ensure that the necessary resources are made available for proper assistance to member states which request help in the implementation of this recommendation.

Appendix to Recommendation Rec(2004)6

Introduction

1. The Ministerial Conference[1126] held in Rome on 3 and 4 November 2000 to commemorate the 50th anniversary of the European Convention on Human Rights (hereinafter referred to as "the Convention") emphasised that it is states parties who are primarily responsible for ensuring that the rights and freedoms laid down in the Convention are observed and that they must provide the legal instruments needed to prevent violations and, where necessary, to redress them. This necessitates, in particular, the setting-up of effective domestic remedies for all violations of the

4. European Ministerial Conference on Human Rights, see paragraph 14.i of Resolution No. 1 on institutional and functional arrangements for the protection of human rights at national and European levels, section A ("Improving the implementation of the Convention in member states").

Convention, in accordance with its Article 13.[1127] The case-law of the European Court of Human Rights (hereinafter referred to as "the Court")[1128] has clarified the scope of this obligation which is incumbent on the states parties to the Convention by indicating notably that:

- Article 13 guarantees the availability in domestic law of a remedy to secure the rights and freedoms as set forth by the Convention.

- this article has the effect of requiring a remedy to deal with the substance of any "arguable claim" under the Convention and to grant appropriate redress. The scope of this obligation varies depending on the nature of the complaint. However, the remedy required must be "effective" in law as well as in practice;

- this notably requires that it be able to prevent the execution of measures which are contrary to the Convention and whose effects are potentially irreversible;

- the "authority" referred to in Article 13 does not necessarily have to be a judicial authority, but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy it provides is indeed effective;

- the "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant; but it implies a certain minimum requirement of speediness.

2. In the recent past, the importance of having such remedies with regard to unreasonably long proceedings has been particularly emphasised,[1129] as this problem is at the origin of a great number of applications before the Court, though it is not the only problem.

3. The Court is confronted with an ever-increasing number of applications. This situation jeopardises the long-term effectiveness of the system and therefore calls for a strong reaction from contracting parties.[1130] It is precisely within this context that the availability of effective domestic remedies becomes particularly important. The improvement of available domestic remedies will most probably have quantitative and qualitative effects on the workload of the Court:

- on the one hand, the volume of applications to be examined ought to be reduced: fewer applicants would feel compelled to bring the case before the Court if the examination of their complaints before the domestic authorities was sufficiently thorough;

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5. Article 13 provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority". It is noted that this appendix does not contain particular reference to the procedural guarantees resulting from substantive rights, such as Articles 2 and 3.

6. See for instance, Conka v. Belgium judgment of 5 February 2002 (paragraphs 64 et seq.).

7. Kudla v. Poland judgment of 26 October 2000.

8. See Declaration of the Committee of Ministers of the Council of Europe of 14 May 2003 "Guaranteeing the long-term effectiveness of the European Court of Human Rights".

– on the other hand, the examination of applications by the Court will be facilitated if an examination of the merits of cases has been carried out beforehand by a domestic authority, thanks to the improvement of domestic remedies.

4. This recommendation therefore encourages member states to examine their respective legal systems in the light of the case-law of the Court and to take, if need be, the necessary and appropriate measures to ensure, through legislation or case-law, effective remedies as secured by Article 13. The examination may take place regularly or following a judgment by the Court.

5. The governments of member states might, initially, request that experts carry out a study of the effectiveness of existing domestic remedies in specific areas with a view to proposing improvements. National institutions for the promotion and protection of human rights, as well as non-governmental organisations, might also usefully participate in this work. The availability and effectiveness of domestic remedies should be kept under constant review, and in particular should be examined when drafting legislation affecting Convention rights and freedoms. There is an obvious connection between this recommendation and the recommendation on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the Convention.

6. Within the framework of the above, the following considerations might be taken into account.

The Convention as an integral part of the domestic legal order

7. A primary requirement for an effective remedy to exist is that the Convention rights be secured within the national legal system. In this context, it is a welcome development that the Convention has now become an integral part of the domestic legal orders of all states parties. This development has improved the availability of effective remedies. It is further assisted by the fact that courts and executive authorities increasingly respect the case-law of the Court in the application of domestic law, and are conscious of their obligation to abide by judgments of the Court in cases directly concerning their state (see Article 46 of the Convention). This tendency has been reinforced by the improvement, in accordance with Recommendation Rec(2000)2,[1131] of the possibilities of having competent domestic authorities re-examine or reopen certain proceedings which have been the basis of violations established by the Court.

8. The improvement of domestic remedies also requires that additional action be taken so that, when applying national law, national authorities may take into account the requirements of the Convention and particularly those resulting from judgments of the Court concerning their state. This notably means improving the publication and dissemination of the Court's case-law (where necessary by translating it into the national language(s) of the state concerned) and the training, with regard to these requirements, of judges and other state officials. Thus, the present recommendation is

9. Recommendation Rec(2000)2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted on 19 January 2000, at the 694th meeting of the Ministers' Deputies.

also closely linked to the two other recommendations adopted by the Committee of Ministers in these areas.[1132]

Specific remedies and general remedy

9. Most domestic remedies for violations of the Convention have been set up with a targeted scope of application. If properly construed and implemented, experience shows that such systems of "specific remedies" can be very efficient and limit both the number of complaints to the Court and the number of cases requiring a time-consuming examination.

10. Some states have also introduced a general remedy (for example before the Constitutional Court) which can be used to deal with complaints which cannot be dealt with through the specific remedies available. In some member states, this general remedy may also be exercised in parallel with or even before other legal remedies are exhausted. Some member states add the requirement that the measure being challenged would grossly infringe constitutional rights and that a refusal to deal with the appeal would have serious and irreparable consequences for the appellant. It should be pointed out that states which have such a general remedy tend to have fewer cases before the Court.

11. This being said, it is for member states to decide which system is most suited to ensuring the necessary protection of Convention rights, taking into consideration their constitutional traditions and particular circumstances.

12. Whatever the choice, present experience testifies that there are still shortcomings in many member states concerning the availability and/or effectiveness of domestic remedies, and that consequently there is an increasing workload for the Court.

Remedies following a "pilot" judgment

13. When a judgment which points to structural or general deficiencies in national law or practice ("pilot case") has been delivered and a large number of applications to the Court concerning the same problem ("repetitive cases") are pending or likely to be lodged, the respondent state should ensure that potential applicants have, where appropriate, an effective remedy allowing them to apply to a competent national authority, which may also apply to current applicants. Such a rapid and effective remedy would enable them to obtain redress at national level, in line with the principle of subsidiarity of the Convention system.

14. The introduction of such a domestic remedy could also significantly reduce the Court's workload. While prompt execution of the pilot judgment remains essential for solving the structural problem and thus for preventing future applications on the same matter, there may exist a category of people who have already been affected by this problem prior to its resolution. The existence of a remedy aimed at providing

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10. Recommendation Rec(2002)13 of the Committee of Ministers to member states on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights (adopted by on 18 December 2002 at the 822nd meeting of the Ministers' Deputies), as well as Recommendation Rec(2004)4 of the Committee of Ministers on the European Convention on Human Rights in university education and professional training, adopted on 12 May 2004 at the 114th Session of the Committee of Ministers.

redress at national level for this category of people might allow the Court to invite them to have recourse to the new remedy and, if appropriate, declare their applications inadmissible.

15. Several options with this objective are possible, depending, among other things, on the nature of the structural problem in question and on whether the person affected by this problem has applied to the Court or not.

16. In particular, further to a pilot judgment in which a specific structural problem has been found, one alternative might be to adopt an ad hoc approach, whereby the state concerned would assess the appropriateness of introducing a specific remedy or widening an existing remedy by legislation or by judicial interpretation.

17. Within the framework of this case-by-case examination, states might envisage, if this is deemed advisable, the possibility of reopening proceedings similar to those of a pilot case which has established a violation of the Convention, with a view to saving the Court from dealing with these cases and where appropriate to providing speedier redress for the person concerned. The criteria laid out in Recommendation Rec(2000)2 of the Committee of Ministers might serve as a source of inspiration in this regard.

18. When specific remedies are set up following a pilot case, governments should speedily inform the Court so that it can take them into account in its treatment of subsequent repetitive cases.

19. However, it would not be necessary or appropriate to create new remedies, or give existing remedies a certain retroactive effect, following every case in which a Court judgment has identified a structural problem. In certain circumstances, it may be preferable to leave the cases to the examination of the Court, particularly to avoid compelling the applicant to bear the further burden of having once again to exhaust domestic remedies, which, moreover, would not be in place until the adoption of legislative changes.

Remedies in the case of an arguable claim of unreasonable length of proceedings

20. The question of effective remedies is particularly topical in cases involving allegations of unreasonable length of proceedings, which account for a large number of applications to the Court. Thus the Court has emphasised in the Kudla v. Poland judgment of 26 October 2000 that it is important to make sure there is an effective remedy in such cases, as required by Article 13 of the Convention. Following the impetus given by the Court in this judgment, several solutions have been put forward by member states in order to provide effective remedies allowing violations to be found and adequate redress to be provided in this field.

Reasonable length of proceedings

21. In their national law, many member states provide, by various means (maximum lengths, possibility of asking for proceedings to be speeded up) that proceedings remain of reasonable length. In certain member states, a maximum length is specified for each stage in criminal, civil and administrative proceedings. The

integration of the Convention into the domestic legal systems of member states, particularly the requirement of trial within a reasonable time, as provided for in Article 6, has reinforced and completed these national law requirements.

Preventing delays, accelerating proceedings

22. If time limits in judicial proceedings – particularly in criminal proceedings – are not respected or if the length of proceedings is considered unreasonable, the national law of many member states provides that the person concerned may file a request to accelerate the procedure. If this request is accepted, it may result in a decision fixing a time limit within which the court – or the prosecutor, depending on the case – has to take specific procedural measures, such as closing the investigation or setting a date for the trial. In some member states, courts may decide that the procedure has to be finished before a certain date. Where a general remedy exists before a Constitutional Court, the complaint may be submitted, under certain circumstances, even before the exhaustion of other domestic remedies.

Different forms of redress

23. In most member states, there are procedures providing for redress for unreasonable delays in proceedings, whether ongoing or concluded. A form of redress which is commonly used, especially in cases already concluded, is that of financial compensation. In certain cases, the failure by the responsible authority to issue a decision within the specified time limit means that the application shall be deemed to have been granted. Where the criminal proceedings have exceeded a reasonable time, this may result in a more lenient sentence being imposed.

Possible assistance for the setting-up of effective remedies

24. The recommendation instructs the Secretary General of the Council of Europe to ensure that the necessary resources are made available for proper assistance to member states which request help in setting up the effective remedies required by the Convention. It might take the form, for instance, of surveys carried out by expert consultants on available domestic remedies, with a view to improving their effectiveness.

APPENDIX 4: Recommendation No. R (2000) 2

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

Recommendation No. R (2000) 2
of the Committee of Ministers to member states
on the re-examination or reopening of certain cases at domestic level
following judgments of the European Court of Human Rights [footnote 1]

(Adopted by the Committee of Ministers
on 19 January 2000
at the 694th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,
Considering that the aim of the Council of Europe is to bring about a closer union between its members;
Having regard to the Convention for the protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention");

Noting that under Article 46 of the Convention on Human Rights and Fundamental Freedoms ("the Convention") the Contracting Parties have accepted the obligation to abide by the final judgment of the European Court of Human Rights ("the Court") in any case to which they are parties and that the Committee of Ministers shall supervise its execution;

Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum)*;

Noting that it is for the competent authorities of the respondent State to decide what measures are most appropriate to achieve *restitutio in integrum*, taking into account the means available under the national legal system;

Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum;*

I. Invites, in the light of these considerations the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;

II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:

(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and
(ii) the judgment of the Court leads to the conclusion that
(a) the impugned domestic decision is on the merits contrary to the Convention, or
(b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

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1. Considering that the quasi-judicial functions of the Committee of Ministers under the former Article 32 of the Convention will cease in the near future, no mention of the Committee of Ministers' decisions is made. It is understood, however, that should certain cases still be under examination when the recommendation is adopted, the principles of this recommendation will also apply to such cases.

APPENDIX 5: Recommendation Rec(2002)13

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

Recommendation Rec(2002)13
of the Committee of Ministers to member states
on the publication and dissemination in the member states
of the text of the European Convention
on Human Rights and of the case-law of the European Court of Human Rights

(Adopted by the Committee of Ministers on 18 December 2002
at the 822nd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering the importance of the European Convention on Human Rights (hereafter referred to as "the Convention") as a constitutional instrument for safeguarding public order in Europe, and in particular of the case-law of the European Court of Human Rights (hereafter referred to as "the Court") ;

Considering that easy access to the Court's case-law is essential for the effective implementation of the Convention at national level, as it enables to ensure the conformity of national decisions with this case-law and to prevent violations;

Considering the respective practices of the Court, of the Committee of Ministers in the framework of its control of the execution of the Court's judgments, and of the member states with respect to publication and dissemination of the Court's case-law;

Considering that member states were encouraged, at the European Ministerial Conference on Human Rights (Rome, 3-4 November 2000), to *"ensure that the text of the Convention is translated and widely disseminated to national authorities, notably the courts, and that the developments in the case-law of the Court are sufficiently accessible in the language(s) of the country";*

Taking into account the diversity of traditions and practice in the member states as regards the publication and dissemination of judicial decisions;

Recalling Article 12 of the Statute of the Council of Europe, according to which the official languages of the Council of Europe are English and French,

Recommends that the governments of the member states review their practice as regards the publication and dissemination of:

- the text of the Convention in the language(s) of the country,

- the Court's judgments and decisions,

in the light of the following considerations.

* * *

It is important that the governments of member states:

i. ensure that the text of the Convention, in the language(s) of the country, is published and disseminated in such a manner that it can be effectively known and that the national authorities, notably the courts, can apply it;

ii. ensure that judgments and decisions which constitute relevant case-law developments, or which require special implementation measures on their part as respondent states, are rapidly and widely published, through state or private initiatives, in their entirety or at least in the form of substantial summaries or excerpts (together with appropriate references to the original texts) in the language(s) of the country, in particular in official gazettes, information bulletins from competent ministries, law journals and other media generally used by the legal community, including, where appropriate, the Internet sites;

iii. encourage where necessary the regular production of textbooks and other publications, in the language(s) of the country, in paper and/or electronic form, facilitating knowledge of the Convention system and the main case-law of the Court;

iv. publicise the Internet address of the Court's site (http://www.echr.coe.int), notably by ensuring that links to this site exist in the national sites commonly used for legal research;

v. ensure that the judiciary has copies of relevant case-law in paper and/or electronic form (CD-Rom, DVD, etc.), or the necessary equipment to access case-law through the Internet;

vi. ensure, where necessary, the rapid dissemination to public bodies such as courts, police authorities, prison administrations or social authorities, as well as, where appropriate, to non-state entities such as bar associations, professional associations etc., of those judgments and decisions which may be of specific relevance for their activities, where appropriate together with an explanatory note or a circular;

vii. ensure that the domestic authorities or other bodies directly involved in a specific case are rapidly informed of the Court's judgment or decision, for example by receiving copies thereof;

viii. consider the possibility of co-operating, with a view to publishing compilations, in paper or in electronic form, of Court judgments and decisions that are available in non-official languages of the Council of Europe.

APPENDIX 6: List of interviewees

1. Christos Artemides, President Cyprus Supreme Court, Nicosia, 9/10/2006
2. Hasan Bakirci, Registry Lawyer ECtHR, Strasbourg, 28/11/2006
3. Basak Cali, Lecturer in Human Rights UCL's Department of Political Science, London, 18/10/2007
4. Christos Clerides, Practising lawyer in Cyprus, Nicosia, Cyprus, 08/10/2006
5. Achilleas Demetriades, Practising Lawyer, Nicosia, Cyprus, 09/10/2006
6. Andrew Drzemczewski, Head of the Secretariat, Committee on Legal Affairs & Human Rights, PACE, Council of Europe, Strasbourg, 29/11/2006
7. Ugur Erdal, Registry Lawyer, ECtHR, Strasbourg, 16/03/2007
8. Lech Garlicki, Judge ECtHR, Strasbourg, 28/11/2006
9. Korinna Georgiades, Registry Lawyer, ECtHR, Strasbourg, 30/11/2006
10. Christos Giakoumopoulos, Director, Directorate General II- Human Rights, Strasbourg, 28/11/2006
11. Roderick Liddell, Director of Common Services, ECtHR, Strasbourg, 28/11/2006
12. Michael Lobov, Legal Officer, Directorate General of Human Rights, Department for the Execution of Judgments of the ECtHR, Strasbourg, 28/11/2006
13. Loukis Loucaides, Former Judge ECtHR, Nicosia, 04/2006
14. Nuala Mole, Director AIRE Centre, London, 13/02/2007
15. Christos Rozakis, Vice-President ECtHR, Strasbourg, 28/11/2006
16. Gioia Scapucci, Directorate Human Rights, Strasbourg, 15/03/2007
17. Nikolaos Sitaropoulos, Legal Officer, Directorate General of Human Rights, Department for the Execution of Judgments of the ECtHR, Strasbourg, 30/11/2006
18. Riza Turmen, Former Judge ECtHR, Strasbourg, 30/03/2007

APPENDIX 7: List of Cases

Akdivar v. Turkey, No. 21893/93, 16/09/1996
Aksoy v. Turkey, No. 21987/93, 18/12/1996
Alfatli v. Turkey, No. 32984/96, 30/10/2003
Assanidze v. Georgia, No. 71503/01, 08/04/2004
Austria v. Italy, No. 778/60, 23/10/1963
Aydin v. Turkey, No. 23178/94, 25/09/1997
Aydın Tatlav v. Turkey, No. 50692/99, 02/05/2006
Aziz v. Cyprus, No. 69949/01, 22/06/2004

Barbera Messegue and Jabardo v. Spain, No. 10588/83 -10589/83 -10590/83, 13/06/1994
Belilos v. Switzerland, No. 10328/83, 29.04.1988
Berktay v. Turkey, No. 22493/93, 01/03/2001
Bilgin v. Turkey, No. 23819/94, 16/11/2000
Bottazzi v. Italy, No. 34884/97, 28/07/1999
Broniowski v. Poland, No. 31443/96, 22/06/2004
Broniowski v. Poland, No. 31443/96, [GC] Friendly Settlement, 28/09/2005
Brumarescu v. Romania, No. 28342/95, 28/10/1999

Ceylan v. Turkey, No. 23556/94, 08/07/1999
Christophi v. Cyprus, No. 24612/03, 15/06/2006
Cichowicz v. Cyprus, No. 6470/02, 19/01/2006
Çiraklar v. Turkey, No. 19601/92, 28/10/1998
Clerides & Kynigos v. Cyprus, No. 35128/02, 19/01/2006
Clerides v. Cyprus, No. 30350/03, 04/05/06
Cyprus v. Turkey, No. 25781/94, 10/05/2001

Democracy and Change Party and others v. Turkey, Nos. 39974/98, 39210/98, 26/04/2005
Denizci and others v. Cyprus, Nos. 25316-25321/94 and 27207/95, 23/05/2001
Denmark v. Turkey, No. 34382/97, 05/04/2000
Dicle for the Democratic Party (DEP) v. Turkey, No. 25141/94, 10/12/2002
Doğan and Others v. Turkey, Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29/06/2004
Doğan and Others v. Turkey, Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 13/07/2006
Driza v. Albania and *Ramadhi and Others v. Albania,* Nos. 33771/02 & 38222/02, 13/11/2007
Dudgeon v. The United Kingdom, No. 7525/76, 22/10/1981
Dulaş v. Turkey, No. 25801/94, 30/01/2001
Düzgören v. Turkey, No. 56827/00, 09/11/20

Egmez v. Cyprus, No. 30873/96, 21/12/2000
Emek Partisi and Şenol v. Turkey, No. 39434/98, 31/05/2005
Erbakan v. Turkey, No. 59405/00, 06/07/2006
Erdoğdu and İnce v. Turkey, No. 25067/94, 08/07/1999
Erdoğdu v. Turkey, No. 25723/94, 15/06/2000
Ergi v. Turkey, No. 23818/94, 28/07/1998

Freedom and Democracy Party (ÖZDEP) v. Turkey, No. 23885/94, 08/12/1999

Gençel v. Turkey, No. 53431/99, 23/10/2003
Genemp Trading Ltd v. Cyprus, No. 35150/02, 29/06/2006
Georgiades v. Cyprus, No. 30504/03, 29/06/2006
Gerger v. Turkey, No. 24919/94, 08/06/1999
Giuseppina and Orestina Procaccini v. Italy, No. 65075/01, 29.03.2006
Güleç v. Turkey, No. 21593/93, 27/07/1998
Gülmez v. Turkey, No. 16330/02, 20/05/2008

Hirst v. The United Kingdom, No. 40787/98, 24/07/2001
Hulki Günes v. Turkey, No. 28490/95, 19/06/2003
Hutten-Czapska v. Poland, No. 35014/97, 19/06/2006

Iatridis v. Greece, No. 31107/96, 19/10/2000
İçyer v Turkey, No. 18888/02, 09/02/2006
Ilaşcu and others v. Moldova and Russia, No. 48787/99, 08/07/2004
Ilhan v. Turkey, No. 22277/93, 27/06/2000
Imakayeva v. Russia, No. 7615/02, 09/11/2006
Incal v. Turkey, No. 22678/93, 09/06/1998
Indjirjian v. Cyprus, No. 37806/04, 29/06/2006
Ioannou & Paraskevaides v. Cyprus, No. 9071/05, 21/09/2006
Ireland v. The United Kingdom, No. 5310/71, 18/01/1978

James and Others v. United Kingdom, No. 8793/79, 21/02/1986
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Karataş v. Turkey, No. 23168/94, 08/06/1999
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Klass and others v. Germany, No. 5029/71, 06/09/1978
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Kudła v. Poland, No. 30210/96, 26/10/2000
Kurt v. Turkey, No. 24276/94, 25/05/1998
Kyriakidis and Kyriakidou, No. 2669/02, 19/01/2006

Larkos v. Cyprus, No. 29515/95, 18/02/1999
Lawless v. Ireland, No. 332/57, 01/07/1961
Lithgow and Others v. United Kingdom, No. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, 08/07/1986
Loizidou v. *Turkey*, No. 15318/89, (prel. Obj.) 23/03/1995
Loizidou v. Turkey, No. 15318/89, (Merits) 18/12/1996
Loizidou v. Turkey, No. 15318/89, (Just Satisfaction) 28/07/1998
Lukenda v. Slovenia, No. 23032/02, 06/10/2005

Marckx v. Belgium, No. 6833/74, 13/06/1979
Michaelides v. Cyprus, No. 11138/04, 04/05/2006
Modinos v. Cyprus, No. 15070/89, 22/04/1993

Nikolaou v. Cyprus, No. 10240/03, 08/06/2006
Norris v. Ireland, No. 10581/83, 26/10/1988

Observer and Guardian v. United Kingdom, No. 13585/88, 26/11/1991
Öcalan v. Turkey, No. 46221/99, (GC), 12/05/2005
Official Receiver and Provisional Liquator of Loucos Trading Co Ltd and Others v. Cyprus, No. 19372/05, 11/07/2006
Official Receiver and Provisional Liquator of Loucos Trading Co Ltd and Others v. Cyprus, No. 22491/05, 11/07/2006
Official Receiver and Provisional Liquator of Loucos Trading Co Ltd and Others v. Cyprus, No. 40766/2005, 11/07/2006
Oğur v. Turkey, No. 21594/93, 20/05/1999
Okçuoğlu v. Turkey, No. 24246/94, 08/07/1999
Özgür Gündem v. Turkey, No. 23144/93, 16/03/2000
Öztürk v. Turkey, No. 22479/93, 28/09/1999

Pancyprian Insurance Co. Ltd v. Cyprus, No. 1615/04, 04/05/2006
Papakokkinou v. Cyprus, No. 20429, 19/10/2006
Papamichalopoulos and Others v Greece, No.14556/89, 31/10/1995
Paroutis v. Cyprus, No. 20435/02, 19/01/2006
Pavlou v. Cyprus, No. 13010/03, 28/09/2006
Pelladoah v. The Netherlands, No. 16737/90, 22/09/1994
Piersack v. Belgium, No. 8692/79, 26/10/1984
Polat v. Turkey, No. 23500/94, 08/06/1999

Refah Partisi (The Welfare Party) and Others v. Turkey, (GC) Nos. 41340/98, 41342/98 and 41344/98, 13/02/2003
Riga & Kapnoulla v. Cyprus, No. 24623/03, 08/06/2006

Sadak, Zana, Dicle and Dogan v. Turkey, Nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 17.07.2001
Selçuk and Asker v. Turkey, Nos. 23184/94 & 23185/94, 24/04/1998
Selim v. Cyprus, No. 47293/99, 16/07/2002
Scordino v Italy, No. 36813/97, [GC] 29/03/2006
Scozzari and Giunta v. Italy, No. 39221/98 and 41963/98, 13/07/2000
Şener v. Turkey, No. 26680/95, 18/06/2000
Sergidou v. Cyprus, No. 28064/03, 23/05/2006
Socialist Party and others v. Turkey, No. 21237/93, 25/05/1998
Socialist Party of Turkey (STP) and others v. Turkey, No. 26482/95, 12/11/2003
Soering v. The United Kingdom, No. 14038/88, 07/07/1989
Solomonides & Co. Ltd v. Cyprus, No. 28049/03, 04/05/06
Steel and Morris v. The United Kingdom, No. 68416/01, 15/02/2005
Sürek v. Turkey, No. 24122/94, 08/07/1999
Sürek and Özdemir v. Turkey, No. 23927/94, 08/07/1999
Swedish Engine Drivers Union v. Sweden, No. 5614/72, 06/02/1976

Tekin v. Turkey, No. 22496/93, 09/06/1998
Tsaggaris v. Cyprus, No. 213222/02, 19/01/2006
Tüzel v. Turkey, No. 71459/01, 31/10/2006
Tyrer v. The United Kingdom, No. 5856/72, 25/04/1978

United Communist party of Turkey and others v. Turkey, No. 19392/92, 30/01/1998
Urbárska obec Trenčianske Biskupice v. Slovakia, No. 74258/01, 27/11/2007

Varnava and Others v. Turkey, Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90

Wemhoff v. Germany, No. 2122/64, 27/06/1968
Witkowska-Tobola v Poland, No. 11208/02, (dec.) 04/12/2007
Wolkenborg and others v Poland, No. 50003/99, (dec.) 04/12/2007

Xenides-Arestis v. Turkey, No. 46347/99, (dec.) 02/09/2004
Xenides-Arestis v. Turkey, No. 46347/99, (merits) 22/12/2005
Xenides-Arestis v Turkey, No. 46347/99, (just satisfaction) 07/12/2006

Yarar v. Turkey, No. 57258/00, 19/12/ 2006
Yazar, Karataş, Aksoy and the People's Labour Party (HEP) v. Turkey, No. 22723/93, 09/04/2002

Z. and others v. The United Kingdom, No. 29392/95, 10.05.2001

ECommHR cases

Cyprus v. Turkey, Nos. 6780/74 and 6950/75, (adm.) 26/05/1975
Cyprus v. Turkey, No. 8007/77, (adm.) 10/07/1978
France v. Turkey, *Norway v. Turkey*, *Denmark v. Turkey*, *Sweden v. Turkey*, *Netherlands v. Turkey,* Nos. 9940/82; 9941/82; 9942/82; 9943/82; 9944/82, (adm.) 06/12/83
The Kingdom of Greece v. The United Kingdom, No.176/56, 26/09/2958
The Kingdom of Greece v. The United Kingdom, No. 299/57, 08/07/1959
Chrysostomos, Papachrysostomou and Loizidou v. Turkey, Nos. 15299/89; 15300/89; 15318/89, 04/03/1991

Cyprus cases

Attorney-General v. Afamis, 1 R.S.C.C 121 at 125-126
Attorney-General v. Costas Constantinou, Civil Appeal No. 294/2005, 07/11/2005
Attorney-General v. Costas Meliou Menelaou, 14/04/2004
Attorney-General v. George Gabriel, Andreas Ioannides and George Afxentiou, Criminal Appeal No. 7691, 12/01/2005
Attorney-General v. Mustafa Ibrahim, 1964, C.L.R. 195
Attorney-General v. Odyssea Kanari, Criminal Appeal Number 7716, 04/03/2005
Christou v. Christou, 1964, CLR
Demetris Mehris v. Police, Criminal Appeal No. 67/2005 and 80/2005, 24/03/2005
Kannas v. Police, 1968, 2 C.L.R. 29
Korellis Application for Certiorari, No. 53/99
Kyriakides and Others v. The Republic, Nos. 298/96, 299/96, 300/96, 26.11.1997
Merthodja v. Police,1987, 2 C.L.R. 227
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Police v. Yiallourou, 1992, 2 C.L.R. 147
President of the Republic v. House of Representatives, 1994, 3 C.L.R. 1
Sigma Radio T.V. Ltd and others v. Cyprus Broadcasting Authority, Nos. 320/99,809/00 and others, 24/02/2004
Takis Yiallouros v. Eugeniou Nicolaou, Civil Action No. 9931, 08/05/2001
The Board for the Registration of Architects and Civil Engineers v. Christodoulos Kyriakides, 1966, 3 CLR 640
Tsirides v. The Police, 1973, 2 C.L.R. at p. 207

Turkish cases

Turkish Constitutional Court, Judgment, 1991.02.28, R. 1990/15, D. 1991/5, AYMKD, no. 27 Vol. I, 48 et seq. (61).
Turkish Constitutional Court, Judgment, 16 July 1991, R.G. no. 21125, 28 January 1992 (United Communist Party of Turkey).
Turkish Constitutional Court, Judgment, 1997.05.22, R. 1996/3, D. 1997/3, AYMKD, no. 36 Vol. II, 978 et seq. (1020).
Turkish Council of State, Judgment, 1989.07.12, R. 1988/6, D. 1989/4, R.G. no. 20428, 9 February 1990, DD Nr. 78-79, 50 et seq.
Turkish Council of State, Judgment, 1991.05.22, R. 86/1723, D. 91/933.
Turkish Military Administrative Court of Cassation, Judgment, 1998.12.15, R. 98/1041, D. 98/1059

judgment of 13.7.2004 of 9th Penal Chamber of the Court of Cassation E:2004/3780, K:2004/3879
judgment of 29.09.2004 of 5th Chamber of the Council of State E:2004/291, K:2004/3370
judgment of 08.02.2005 of 13th Chamber of the Council of State E:2005/588, K:2005/692
judgment of 24.5.2005 of Penal Plenary of the Court of Cassation E:2005/7-24, K:2005/56
judgment of 25.5.2005 of the Civil Plenary of the Court of Cassation E:2005/9-320, K:2005/355

Other cases

Ex. P. Pinochet (No.2), 1999, 1 ALL ER 577
Factory at *Chorzow (Claim for indemnity) (The Merits), P.C.I.J., Series A No. 17, (13/09/1928) 47*
Fisheries case, I.C.J. Reports 1951, 116 (132)
Nottebohm case, I.C.J. Reports 1955, 4 (20-1)
Wimbledon case (1923), P.C.I.J., Series A No.1, 19

APPENDIX 8: Bibliography

BOOKS

Brownlie, I., "Principles of Public International Law", 4th Edition, Oxford University Press, 1990

Buckley, C., "Turkey and the ECHR", Kurdish Human Rights Project, 2000

Cassese, A., "International Law", Oxford University Press, 2002

Clayton, R., and Tomlinson, H., "The Law of Human Rights", Oxford University Press, 2000

Clements, J.,L., & Mole, N., & Simmons, A., "European Human Rights Taking a case under the Convention", London, Sweet & Maxwell, 1999

De Smith, A., S., "The New Commonwealth and Its Constitutions", London, Stevens, 1964

Drzemczewski, A., "European Human Rights Convention in domestic law", Clarendon Press-Oxford, 1983

Fawcett, S., E., J., "The Application of the ECHR", Oxford: Clarendon Press, 1969

Greer, S., "The ECHR, Achievements, Problems and Prospects", Cambridge University Press, 2007

Hegarty, A., & Leonard, S., "Human Rights: An Agenda for the 21st Century", Cavendish Publishing Limited, London-Sydney, 1999

Huber, D., "A decade which made history. The CoE 1989-1999", CoE, 1999

Jacobs, O., & White, R., "The ECHR", Oxford University Press, Fourth Edition, 2006

Janis, M., Kay, R., & Bradley, A., "European Human Rights Law: Texts and Materials", Oxford University Press, 1995

Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", Human Rights Files, No. 19, 2002

Leach, Ph. "Taking a case to the European Court of Human Rights", Oxford University Press, Second Edition, 2005

Loizou, N., A., "The Constitution of the Republic of Cyprus" in Greek (Σύνταγμα Κυπριακής Δημοκρατίας), Nicosia, Cyprus, 2001

Loukaides, L., "The Institution of Attorney-General in Cyprus", Nicosia, 1974

Mowbray, A., "Cases and Materials on the ECtHR", Oxford University Press, Second Edition, 2007

Robertson, A.H., "Human Rights in Europe", Manchester University Press, 1977

Simpson, B., "Human Rights and the end of Empire", Oxford University Press, 2001

Steiner, H., & Alston, Ph., "International Human Rights in Context: Law, Politics, Moral", 2nd Edition, 2000

Tomaritis, C., "The Treaty Making Power especially under the Law of the Republic of Cyprus", Nicosia, 1973

Tornaritis, C., "Cyprus and its Constitutional and other Legal Problems", Nicosia, 1980

Tornaritis, C., "The Legal System of the Republic of Cyprus", Nicosia, 1984

Van Dijk, P., & Van Hoof, G.J.H., "Theory and Practice of the ECHR", Intersentia, Fourth Edition, 2006

CHAPTERS, ARTICLES

Andrews, J.,A., *Egmez v. Cyprus* (30873/96), (Unreported, December 21, 2000) (ECHR), Case Comment, *European Law Review*, 2001, 26 Supp, pp.155-156

Andrews, J., A., "Article 2: Right to Life", Case Comment, *European Law Review*, 2002, 27 Supp, pp.84-87

Balcerzak, M., "Guaranteeing the Long-Term Effectiveness of the ECHR: the Importance of Effective Remedies", in *The Improvement of Domestic Remedies With Particular Emphasis on Cases of Unreasonable Length of Proceedings*", Workshop Held at the Initiative of the Polish Chairmanship of the CoE's CoM, Strasbourg, 28th April 2005, pp.22-25

Barkhuysen, T., & Van Emmerik, Mic., L., "Legal protection against violations of the European Convention on Human Rights: Improving (Co-)operation of Strasbourg and domestic institutions", *Leiden Journal of International Law*, Vol. 12, 1999, pp.833-845

Barkhuysen, T., & Van Emmerik, M., "The Execution of Judgments of ECHR" in T., Christou & J.,Raymond (eds) *ECtHR- Remedies and Execution of Judgments*, The British Institute of international and Comparative Law, 2005, pp.1-23

Bates, E., "Execution of Judgments Delivered by the ECtHR", in Christou, Th. & Raymond, J.,P., "ECtHR, Remedies and Execution of Judgments", British Institute of International and Comparative Law, 2005, pp.49-106

Beernaert, Marie-Aude, "Protocol 14 and new Strasbourg procedures: towards greater efficiency? And at what price", European Human Rights Law Review, Vol.5, 2004, pp. 544-557

Bernhardt, R., "Reform of the Control Machinery Under the ECHR: Protocol No. 11", *The American Journal of International Law*, Vol. 89, 1995, pp.145-154

Bernhardt, R., "The Convention and Domestic Law", in eds Macdonald, R. St. J/Matcher, F./Petzold, H, "*The European System for the Protection of Human Rights*", 1993, pp.25-40

Bilder, R., "An Overview of International Human Rights Law" in Hannum, Hurst, "Guide to International Human Rights Practice", Philadelphia: University of Pensylvania Press, Second Edition, 1992, pp.3-18

Blackburn, R., "The Institutions and Processes of the Convention", in Blackburn, R., & Polakiewicz, J.,"Fundamental Rights in Europe: The ECHR and its Member States 1950-2000", 2000, pp.3-30

Bozkurt, R., Secretary General of Grand National Assembly of Turkey, "The Role of Turkish Parliament in Promoting Human Rights", Association of Secretaries General of Parliaments, Geneva Meeting, 1 - 3 October 2003, available at: www.asgp.info/Resources/Data/Documents/MEMBKIRBQXTBKXINGNIWXAWIMDEBVM.pdf

Bratza, N., & O'Boyle, M., "The Legacy of the Commission to the New Court Under the Eleventh Protocol", *European Human Rights Law Review*, Vol. 3, 1997, pp.211-228

Bratza, N., "The Future of the ECtHR- Storm Clouds and Silver Linings", Thomas More Lecture, October 2002

Brett, J., "Justice in time", 26/08/2004 available at: http://lawzone.thelawyer.com/human

Brownlie, I., Opinion on "The Status of 'Law 67/2005' Relating to Article 159 of the 'Constitution' of the 'TRNC'", 16/06/2006

Buckley, C., "The ECHR and the Right to Life in Turkey", Human Righst Law Review, Vol.1, No. 1, 2001, pp.35-65

Buergenthal, T., "*The Domestic Status of the ECHR*", Buffalo Law Review, 1963-1964, Vol.13, pp.354-392

Buergenthal, T., "The Effect of the ECHR on the Internal Law", *International and Comparative Law Quarterly Supplementary*, No. 11, 1965, pp.79-106

Caflisch, L., "The Reform of the ECtHR: Protocol No. 14 and Beyond", *Human Rights Law Review*, Vol. 6, 2006, pp.403-415

Çali, B., "Human Rights Discourse and Domestic Human Rights NGOs " in in Kabasakal Arat, Z, "Human Rights in Turkey", Pennsylvania Studies in Human Rights, University of Pennsylvania Press-Philadelfia, 2007, pp.217-232

Cameron, I., "Turkey and Article 25 of the ECHR", International and Comparative Law Quarterly, Vol.37, 1988, pp.887-925

Cameron, I., "Damages for violations of ECHR rights: the Swedish example" in Wahl, N., & Cramér, P., (eds) "Swedish studies in European law" Volume 1, 2006, Oxford-Portland- Or, Hart, 2006, pp.97-128

Clerides, Ph., "Article 25 of the ECHR and Human Rights", *Cyprus Law Review*, Vol.3, July-September 1983, pp.530-532

Costa, J., P., "The Provision of Compensation Under Article 41 of the ECHR", in eds Duncan Fairgrieve, Mads Andenas and John Bell "Tort liability of public authorities in comparative perspective", London, *British Institute of International and Comparative Law*, 2002, pp.3-16

Coufoudakis, V., "Cyprus and the ECHR: The Law and Politics of Cyprus v. Turkey, Applications 6780/74 and 6950/75", *Human Rights Quarterly*, Vol.4, 1982, pp.450-473

Dembour, M., D., "Finishing off cases: the Radical Solution to the Problem of the Expanding Caseload", *European Human Rights Law Review*, Vol.5, 2002, pp.604-623

De Vel, G., & Markert, Th., "Importance and Weaknesses of the CoE Conventions and of the Recommendations Addressed by the CoM to Member States", in Haller, Bruno (ed.) "Law in Greater Europe : Towards a Common Legal Area, Studies in Honour of Heinrich Klebes", The Hague-London-Boston, Kluwer Law International, 2000, pp.345-353

De Vey Mestdagh, K., "Reform of the ECHR in a Changing Europe", R. Lawson & M. de Blois (eds), "*The Dynamics of the Protection of Human Rights in Europe, Essays in Honour of Henry G. Shermers, Volume III*", Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1994, pp.337-360

Drzemczewski, A., "The Sui Generis Nature of the ECHR", *International and Comparative Law Quarterly*, 1980, Vol. 29, pp.54-63

Drzemczewski, A., "The CoE and the Issue of Incorporation", in Rehof, A., L., & Gulmann, C., (eds) "*Human Rights In Domestic Law and Development Assistance Policies of the Nordic Countries*", Publications from the Danish Center of Human Rights No. 2, The Danish Center of Human Rights, Copenhagen 1989, pp.127-132

Drzemczewski, A., & Meyer-Ludwig, J., "Principal Characteristics of the New Convention Control Mechanism, as Established by Protocol No. 11, Signed on 11 May 1994; A Single ECtHR is to be replace the existing Commission and Court in Strasbourg", *Human Rights Law Journal*, Vol. 15, 1994, pp.81-86

Drzemczewski, A., "The ECHR: A New Court of Human Rights as of November 1, 1998", *Washington and Lee Law Review*, Vol. 55, 1998, pp.697-719

Drzemczewski, A., "The Internal Organisation of the ECtHR: The Composition of Chambers and the Grand Chamber", *European Human Rights Law Review*, 2000, pp.233-248

Drzemczewski, A., "The European Human Rights Convention: Protocol No. 11- Entry into force and first year of application", *Human Rights Law Journal*, Vol.21, No 1-3, 2000, pp.1-17

Drzemczewski, A., "Monitoring Mechanisms of the CoE", in Linos-Alexander Sicilianos "*The Prevention of Human Rights Violations*", Martinus Nijhoff Publishers- Ant. N. Sakkoulas Publishers, 2001, pp.139-177

Eaton, M., & Schokkenbroek, J., "Reforming the Human Rights Protection System Established by the ECHR- A New Protocol No. 14 to the Convention and Other Measures to Guarantee the Long-term Effectiveness of the Convention System", *Human Rights Law Journal*, Vol.26, No. 1-4, pp.1-17

Efthymiou, A., "The Law of Necessity in Cyprus", *Cyprus Law Review*, Vol. 3, Issue 12, 1985, pp.1951-1956

Eissen, M.-A., "L' interaction des jurisprudences constitutionelles nationals et la jurisprudence de la Cour europeenne des Droits de l'homme", in Rousseau, D., & Sudre, F., (eds), Conseil constitutionnel et Cour europeene des droits de l'homme, Paris, 1990, pp.137-215

Evenson, E., "Reforms Ahead: Enlargement of the CoE and the Future of the Strasbourg System", *Human Rights Law Review*, Vol.1, 2001, pp.219-241

Evrigenis, D., "Reflections on the National Dimension of the ECHR", in Proceedings of the Colloquy About the ECHR in Relation to Other International Instruments for the Protection of Human Rights, Athens, September 1978, CoE, 1979, pp.69-80

Fragkakis, N., "A Look at the Future of the Individual Application Following half a Centrury of Application of the ECHR" Nomiko Vima, Vol. 53, Issue 2, February 2005, pp.1-11

Frowein, J., "The Binding Force of ECHR Judgments and its Limits", in Human rights, democracy and the rule of law = Menschenrechte, Demokratie und Rechtsstaat = Droits de l'homme, démocratie et état de droit : liber amicorum Luzius Wildhaber / eds. Stephan Breitenmoser ... [et al.]. - Zürich : Dike ; Baden-Baden : Nomos, 2007, pp.261-269

Garlicki, L., "Broniowski and After: On the Dual Nature of Pilot Judgments", in Liber amicorum Luzius Wildhaber : Human Rights, Strasbourg views = Droits de l'homme, regards de Strasbourg / eds. Lucius Caflisch ... [et al.]. - Kehl ; Strasbourg ; Arlington, Va : N.P. Engel, 2007, pp.177-193

Gattini, A., "Mass claims at the ECtHR", Human rights, democracy and the rule of law = Menschenrechte, Demokratie und Rechtsstaat = Droits de l'homme, démocratie et état de droit : liber amicorum Luzius Wildhaber / eds. Stephan Breitenmoser ... [et al.]. - Zürich : Dike ; Baden-Baden : Nomos, 2007, pp.271-294

Golsong, H., "On the Reform of the Supervisory System of the ECHR", *Human Rights Law Journal*, Vol.13, 1992, pp.265-269

Gozubuyuk, A., "The ECHR in the Legal Order of Turkey" in "The Domestic Application of International Human Rights Norms", Judicial Colloquy September 3-14 1990, Interights & The Ankara University Human Rights Centre, Ankara University Press, Ankara 1992, pp.19-31

Greer, St., "Protocol No. 14 and the future of the ECtHR", *Public Law*, SPR, 2005, pp.83-106

Gündüz, A., "Human rights and Turkey's future in Europe", Orbis- Philadelfia, Vol. 45, 2001, pp.15-30

Hakyemez, Y., "Constitutional Court and the Closure of Political Parties in Turkey", SETA, Policy Brief, May 2008, No. 13

Hampson, F., "The Concept of an 'Arguable Claim' Under Article 13 of the ECHR", *International and Comparative Law Quarterly*, Vol.39, 1990, pp.891-899

Hampson, F., "Study on Human Rights Protection during Situations of Armed Conflict, Internal Disturbances and Tensions", CDDH, 2001, 21, 31st October, 2001

Harmsen, R., "The ECHR after enlargement", *The International Journal of Human Rights*, Vol.5, No. 4, 2001, pp.19-43

Harmsen, R., "The ECtHR as a Constitutional Court: Definitional Debates and the Dynamics of Reform", Conference in Memory of Stephen Livingstone, Queen's University, Belfast, 7th & 8th October 2005

Hartwig, M., "Much Ado About Human Rights: The Federal Constitutional Court Confronts the ECtHR", *German Law Journal,* 2005, Vol. 6, No. 5, available at: http://www.germanlawjournal.com/article.php?id=600

Helfer, L., & Slaughter, A.-M., "Toward a Theory of Effective Supranational Litigation", 107 Yale Law Journal, 273, 1997, pp.273-391

Helfer, L., "Redesigning the ECHR: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", Vanderbilt University Law School, Public Law & Legal Theory, Working Paper Number 07-20

Hicks, N., "Legislative Reform in Turkey and European Human Rights Mechanisms", Human Rights Review, October-December 2001, pp.78-85

Imbert, P.,H., "Follow-up to the CoM' Recommendations on the Implementation of the ECHR at the Domestic Level and the Declaration on "Ensuring the Effectiveness of the Implementation of the ECHR at National and European levels" in "*Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the high-level seminar*", Oslo, 18 October 2004, available at: www.coe.int/T/E/Human_rights/prot14e.asp

Jordan, P., "Does Membership Have Its Privileges? Entrance Into The CoE And Compliance With Human Rights Norms", Human Rights Quarterly, Vol.25, 2003, pp.660-688

Kaboğlu, I., & Koutnatzis, S.-I., "The Reception Process in Greece and Turkey" in Keller, H., & Stone-Sweet, A., "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, p.451-530

Keller, H., & Stone Sweet, A., "Assesing the Impact of the ECHR on National Legal Systems", in Keller, H., & Stone Sweet (ed.) "A Europe of Rights- The Impact of the ECHR on National Legal Systems", Oxford University Press, 2008, pp.677-713

Klein, E., "Should the Binding Effect of the Judgments of the ECtHR be Extended?", in Mahoney et all (eds) Protecting Human Rights: The European Perspective, 2000, pp.705-713

Koçak. M., & Örücü, E., "Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the ECtHR, *European Public Law*, Vol. 9, No. 3, 2003, pp.399-423

Kruger, H., & Polakiewicz, J., "Proposals For a Coherent Human Rights Protection System in Europe", *Human Rights Law Journal*, Vol.22, No. 1-4, 2001, pp.1-13

Kurban, D., "Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union," *Columbia Human Rights Law Review,* Vol.35, 2003, pp.180-188

Lambert-Abdelgawad, E., "Le protocole 14 et l'execution des arrest de la Cour europeene des droits de l'homme" in Cohen-Jonathan, G., and Flauss, J.F., "La Reforme du systeme de controle contentieux de la Convention europeenne des droits de l'homme", Droit et Justice, Vol. 61, Bruxelles: Bruylant, 2005

Lauterpacht, E., "The Contemporary Practice of the United Kingdom in the Field of International Law- Survey and Comment", *International and Comparative Law Quarterly*, Vol.5, 1956, pp.405-406

Leach, Ph., "Beyond the Bug River- A New Dawn For Redress Before the ECtHR", *European Human Rights Law Review*, 2005, No. 2, pp.148-164

Leach Ph., "Strasbourg's oversight of Russia - an Increasingly Strained Relationship", Public Law, 2007 Win, pp.640-654

Leuprecht, P., "The Execution of Judgments and Decisions" in eds Macdonald, R. St. J/Matcher, F./Petzold, H, "*The European System for the Protection of Human Rights*", 1993, pp.791-800

Leuprecht, P., "Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?", *Transnational Law & Contemporary Problems*, Vol. 8, 1998, pp.313-336

Loizou, A., "Cyprus", in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, pp.217-241

Lord Lester of Herne Hill, "The ECHR in the New Architecture of Europe", proceedings of 8th international colloquy on the ECHR, held in Budapest in 1995, *A yearbook of the ECHR,* Vol.38, 1997, pp.226-227

Loucaides, L., "The Impact of the Recognition of Article 25 of the ECHR on the Cypriot Legal System", *Cyprus Law Review*, Issue 25, January-March 1989, pp.3874-3878

Loucaides, L., "The Role of the National Judge in the Trial and the Application of the ECHR" in Loucaides, L., "*Essays on the Developing Law of Human Rights*", Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1995, pp.170-178

Loucaides, L., "The Concept of 'Continuing' Violations of Human Rights" in Mahoney, P., et al.(eds) "*Protecting Human Rights: The European Perspective-Studies in Memory of Rolv Ryssdal*", 2000, pp.803-815

Loucaides, L., "The Judgment of the ECtHR in the case of Cyprus v. Turkey", Leiden Journal of International Law, Vol.15, 2002, pp.225–236

Mahoney, P., "Speculating on the future of the reformed ECtHR", *Human Rights Law Journal*, Vol.20, No. 1-3, 1999, pp.1-4

Masterman, R., "Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act", *International Comparative Law Quarterly*, Volume 54, Part 4, October 2005, pp.907-932

Mendel, T., "The Strasbourg Safeguard", available at: www.tol.cz/jun00/thestras.html

Meriggiola, E., "Italy", in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, pp.475-502

Meyer-Ladewig, J., "Reform of the Control Machinery", in Macdonald-Matscher-Petzold (eds) *The European System for the Protection of Human Right*, 1993, pp.909-926

Modinos, P., "Effects and repercussions of the ECHR", *International and Comparative Law Quarterly*, Vol.11, 1962, pp.1097-1108

Mowbray, A., "The Composition and Operation of the New ECtHR", *Public Law*, 1999, pp.219-231

Muller, M., "Nationalism and the Rule of Law in Turkey: The Elimination of Kurdish Representation during the 1990", reprinted in The Kurdish Nationalist Movement in the 1990's: Its Impact on Turkey and the Middle East 173, 178 (Robert Olson ed., 1996)

Nowicki, M., & Drzemczewski, A., "The Impact of the ECHR in Poland: a Stock-taking After Three Years", *European Human Rights Law Review*, 1996, Vol. 3, pp.261-286

Nowicki, M,, A., "The Role of Non-Governmental Organisations in Proceedings Before the ECtHR" in Machinska, H.,M., (ed) "The ECtHR, Agenda for the 21st Century", Warsaw, 2006, pp.73-79

Oberto, G., "The reasonable time requirement in the case-law of the ECtHR", Paper for the Workshop on "The Impact of EC Law at National Level and the Protection of Fundamental Rights", organised in the framework of the External Actions of the European Community-Cards Regional Project 2003. The workshop was held in Split (Croatia) on 14-16 September 2005

O'Boyle, M., "On reforming the operation of the ECtHR", European Human Rights Law Review, 2008, pp.1-11

Orucu, E., "The Turkish Experience With Judicial Comparativism in Human Rights Cases" in Orucu, E., "Judicial Comparativism in Human Rights Cases", British Institute of International & Comparative Law, 2003, pp.131-155

Ozbudun, E., "Constitutional Law" in Ansay, T., & Wallace, D., "Introduction to Turkish Law", Kluwer Law International, 2005, Fifth Edition, pp.19-45

Ozbudun, E., "Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy", *European Public Law*, Vol.12, Issue 2, 2006, pp. 213-223

Ozdek, Y., & Karacaoglu, E., "Turkey" in Blackburn, R., and Polakiewicz, J., "Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000", Oxford University Press, 2001, pp.879-914

Paraskeva, "Reforming the European Court of Human Rights: An ongoing challenge", Nordic Journal of International Law, Vol. 76, Issue 2, 2007, pp.185-216

Paraskeva, C., "Returning the Protection of Human Rights to Where They Belong, At Home", International Journal of Human Rights, Vol.12, June 2008, pp.415-448

Polakiewicz, J., & Jacob-Foltzer, V., "The ECHR in Domestic Law: the Impact of Strasbourg Case-law in States Where Direct Effect is Given to the Convention", *Human Rights Law Journal*, Vol. 12, No. 3, 1991, pp.65-85

Polakiewicz, J., "The Implementation of the ECHR and the Decisions of the Strasbourg Court in Western Europe", in Alkema, A., Bellekom, T., L., Drzemczewski, A., Schokkenbroek, G., J, (eds) "The Domestic Implementation of the ECHR in Eastern and Western Europe", All-European Human Rights Yearbook, Vol. 2, 1992, pp.147-172

Polakiewicz, J., "The Application of the ECHR in Domestic Law", Human Rights Law Journal, Vol.17, 1996, pp.405-411

Polakiewicz, J., "The Status of the Convention in National Law", in Blackburn, R., & Polakiewicz, J. "Fundamental Rights in Europe", Oxford University Press, 2001, pp. 31-54

Polakiewicz, J., "The Execution of Judgments of the ECtHR", in Blackburn, R., & Polakiewicz, J. "*Fundamental Rights in Europe*", Oxford University Press, 2001, pp. 55-76

Reidy, A., Hampson, F., & Boyle, K., "Gross Violations of Human Rights: Invoking the ECHR in the Case of Turkey", Netherlands Quarterly of Human Rights, Vol. 2, 1997, pp.161-173

Ress, G., "The effects of Judgments and Decisions in Domestic Law", in eds Macdonald, R. St. J/Matcher, F./Petzold, H, "*The European System for the Protection of Human Rights*", 1993, pp.801-854

Ress, G., "The Effect of Decisions and Judgments of the ECtHR in the Domestic Legal Order", *Texas International Law Journal*, Vol. 40:359, 2005, pp.359-382

Richmond, P. and Björnberg, K., "The Functioning of the Judicial System in the Republic of Turkey", Report of an Advisory Visit, 11 – 19 July 2004, European Commission, Brussels, available at: http://www.xs4all.nl/~ingel/ankara/advisory%20report%20II.pdf

Rolin, H., "Has the ECtHR a future?", Howard Law Journal, Vol. 11, 1965, pp.442-451

Roukounas, E., "The Role of NHRIs in Monitoring the Execution of Judgments of the ECtHR- What NHRIs Could Do", 4th Round Table of European National Institutions for the Promotion and Protection of Human Rights and the CoE Commissioner for Human Rights, Athens, 27-28 September 2006

Rowe, N., & Schlette, V., "The Protection of Human Rights in Europe after the Eleventh Protocol to the ECHR", *European Law Review*, Vol.23, 1998, pp.HR/3-HR16

Rozakis, Ch., "The ECHR as an international treaty", in Dupuy, R.-J. (ed.) : "*Mılanges en l'honneur de Nicolas Valticos : droit et justice*", Paris : Pedone, 1999, pp.497-506

Rozakis, Ch., "The ECHR and its application by the ECtHR", in "*The European Convention for the Protection of Human Rights: 50 Years of Implementation*" (in Greek), Sakkoulas Publishers, 2004, pp.23-30

Rumford, C., "Resisting Globalisation? Turkey-EU Relations and Human and Political Rights in the Context of Cosmopolitan Democratisation", International Sociology, Vol.18, No. 2, June 2003, pp.381-382

Ryssdal, R., "On the Road to a European Constitutional Court", Winston Churchill Lecture, Florence, 21st June 1991

Ryssdal, R., "The Coming of Age of the ECHR", *European Human Rights Law Review*, Vol.1, 1996, pp.18-29

Ryssdal, R., "*The Enforcement System Set Up Under the ECHR*", in Bulterman, M., K., & Kuijer, M., (eds), "*Compliance With Judgments of International Courts*", The Hague-Boston-London: Nijhoff, 1996, pp.49-69

Sardaro, P., "Individuals Complaints", in P. Lemmens & W. Vandenhole (eds), "*Protocol No. 14 and the Reform of the ECtHR*", Intersentia, 2005, pp.45-68

Shelton, D., "The Boundaries of Human Rights Jurisdiction in Europe", *Duke Journal of International and Comparative Law*, Vol.13, Issue No. 4, 2003, pp.96-153

Sherlock, A., "Prohibition of Homosexual Relations in Private and the Convention", Case comment, *European Law Review*, Vol. 19(1), 1994, pp.112-113

Schermers, H., "The Eleventh Protocol to the ECHR", *European Law Review*, Vol. 19, 1994, pp.367-384

Schermers, H., "Human Rights in the European Union After the Reform of 1st November 1998", *European Public Law*, Vol. 4, 1998, pp.335-343

Schermers, G., H., "Acceptance of International Supervision of Human Rights", *Leiden Journal of International Law*, Vol. 12, 1999, pp.821-831

Siess-Scherz, I., "The 2004 Reform and its Implementation", in "Applying and Supervising the ECHR- Future developments of the ECtHR in the light of the Wise Persons' Report", Colloquy organised by the San Marino chairmanship of the CoM of the CoE, San Marino, 22-23 March 2007, pp.16-25

Sicilianos, L., A., "The Reform of the European System of Protection of Human Rights: The 14th Protocol to the ECHR", Nomiko Vima, Vol. 53, pp.219-236

Smith, T., "Leveraging Norms: The ECHR and Turkey's Human Rights Reforms", in Kabasakal Arat, Z, "Human Rights in Turkey", Pennsylvania Studies in Human Rights, University of Pennsylvania Press-Philadelfia, 2007, pp.262-274

Spielmann, D., "The ECtHR- Recent developments", University of Cambridge, Lauterpacht Research Centre for International Law, 14th January 2005

Sudre, Fr., "La Communauté européenne et les droits fondamentaux après le Traité d'Amstrrdam: Vers un nouveau systéme européen de protection des droits de l'homme?", La Semaine Juridique, 7 January 1998, pp.9-16

Tarschys, D., "The CoE: strengthening European security by civilian means", *NATO Review*, Vol.45, No. 1, 1997, pp.4-9, Available at: www.nato.int/docu/review/articles/9701-1.htm

Tomuschat, C., "Just Satisfaction Under Article 50 of the ECHR", in P. Mahoney/F. Matscher/H. Petzold/L. Wildhaber (eds) *Protecting Human Rights: The European Perspective*, 2000, pp.1409-1430

Tornaritis, C., "The ECHR in the legal order of the Republic of Cyprus", Nicosia, 1975 (Reprint from the *Cyprus Law Tribune*, Year 9th, Part II

Tornaritis, C., "The Operation of the ECHR in the Republic of Cyprus", *Cyprus Law Review*, Vol. 3, July-September 1983, pp.455-464

Tuğcu, T., "The Place of the ECHR in Turkey", Solemn hearing of the ECtHR on the occasion of the opening of the judicial year Friday, 20 January 2006

Turkmen, F., "Turkey's Participation in Global and Regional Human Rights Regimes" in in Kabasakal Arat, Z, "Human Rights in Turkey", Pennsylvania Studies in Human Rights, University of Pennsylvania Press-Philadelfia, 2007, pp.249-261

Turkmen, F., "The European Union and Democratisation in Turkey: The Role of the Elites", *Human Rights Quarterly*, Vol.30, 2008, pp.146-163

Turnbull, L., "A victim of its Own Success: The Reform of the ECtHR", European Public Law, Vol. 1, No. 2, 1995, pp.215-225

Unal, S., "Turkish Legal System and the Protection of Human Rights", SAM Papers No 3/99, Ankara-April 1999, pp.1-44

Vandenhole, W., "Execution of Judgments" in Lemmens, P., & Vandenhole, W., (eds) "*Protocol No.14 and the Reform of the ECtHR*", Intersentia, 2005, pp.105-122

Van Kempen, P., H., "The Protection of Human Rights Under National Constitutions and The European Convention; An Incomplete System?", *Journal of Constitutional Law In Eastern and Central Europe*, Vol.3:225, 1996, pp.225-242

Vasak, K., "The ECHR beyond the frontiers of Europe", *International and Comparative Law Quarterly*, Vol.12, 1963, pp.1206-1231

Wadham, J., & Said, T., "What price the right of individual petition: Report of the Evaluation Group to the CoM on the ECtHR", European Human Rights Law Review, 2002, pp.169-174

Wardynski, T., "Education in Human Rights as an Important Element of Reform of the European Human Rights Protection System", in Machinska, H.,M., (ed) "The ECtHR, Agenda for the 21st Century", Warsaw, 2006, pp.69-71

Wildhaber, L., "A constitutional future for the ECtHR?", *Human Rights Law Journal*, Vol.23, No. 5-7, 2002, pp.161-165

Wildhaber, L., "The ECtHR in Action", *Ritsumeikan Law Review*, No. 21, 2004, pp.83-92

Wildhaber, L. "The Role of the ECtHR : an evaluation", *Mediterranean journal of human rights*, Vol. 8, No. 1, 2004, pp.9-29

Wildhaber, L., "Conference on The Position of Constitutional Courts Following Integration Into the European Union", Bled, 30th September 2004

Wildhaber, L., "Consequences for the ECtHR of Protocol No. 14 and the Resolution on judgments revealing an underlying systemic problem- Practical steps of implementation and challenges", Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the high-level seminar, Oslo, 18 October 2004, www.coe.int/T/E/Human_rights/prot14e.asp

Wildhaber, L., "Solemn Hearing of the ECtHR on the Occasion of the Opening of the Judicial Year, Friday, 21 January 2005", Speech by Mr Luzius Wildhaber

Wildhaber, L., Address by the President of the ECtHR, Luzius Wildhaber, Warsaw Summit, CoE, 16-17.05.2005, available at: http://www.coe.int/t/dcr/summit/20050516_speech_wildhaber_en.asp

Wolf, S.,"Trial Within a Reasonable Time: The Recent Reforms of the Italian Justice System in Response to the Conflict with Article 6 (1) of the ECHR", *European Public Law*, Vol. 9, Issue 2, 2003, pp.189-209

Yuksel, E., "Cannibal Democracies, Theocratic Secularism: The Turkish Version", *Cardozo Journal of International and Comparative Law*, Vol. 7, 1999, p. 423

Zwaak, L., "The Implementation of Decisions of the Supervisory Organs Under the ECHR" in Barkhuysen T., Van Emmerik, M., L., Van Kempen P., (eds) "The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order", Martinus Nijhoff Publishers, The Hague/Boston/London, 1999, pp.75-88

Zwaak, L. "The Effects of Final Decisions of the Supervisory Organs Under the ECHR", in Bayefski, A., The UN Human Rights Treaty System in the 21ts Century, Transnational Publishers Ardsley NY, 2001

Zwaak, L., 'Overview of the European Experience in Giving Effect to the Protections in European Human Rights Instruments', Working Session on the Implementation of International Human Rights Protections, available at: http://www.internationaljusticeproject.org/pdfs/Zwaak-speech.pdf

Zwaak, L., & Cachia, Th. "The ECtHR: A Success Story?", *Human Rights Brief,* Vol.11, Issue 3, 2004, pp.32-54

Zwaak, L., & Haeck, Y., "*Aziz v. Cyprus*", Case Comment, *Netherlands Quarterly of Human Rights*, Vol. 22(3), 2004, pp.449-500

ECtHR's Press releases and Statistics

Press release issued by the Registrar, ECtHR, 21.06.1999

Press Release issued by the Registrar, ECtHR, 28.07.1999

Press release issued by the Registrar, ECtHR, 08/06/2000

Press release issued by the Registrar, ECtHR, 05/12/2000

Press release issued by the Registrar, ECtHR, 21/01/2002

Press release issued by the Registrar, "Inter-state application brought by Georgia against the Russian Federation", 27.3.2007

Press Release issued by the Registrar, "First "pilot judgment" procedure brought to a successful conclusion- Bug River cases closed", 6 October 2008

ECtHR Statistics 2004, April 2005, available at www.echr.coe.int/.../0/ MicrosoftWordstatistical_charts_2004__internet_.pdf

ECtHR, Statistics, 1/1-31/10/2008, available at: http://www.echr.coe.int/NR/rdonlyres/A63F2A14-2C68-41F3-BFEF 49D3BF9D8C63/0/Statistics2008.pdf

Subject Matter of Judgments Delivered by the Court in 2003
http://www.echr.coe.int/NR/rdonlyres/F669187E-E17C-4CCC-97A2-34546CD7929B/0/MicrosoftWordSUBJECT_MATTER_2003_TABLE.pdf

Subject Matter of Judgments Delivered by the Court in 2004
http://www.echr.coe.int/NR/rdonlyres/6FF7A3DB-D885-41A4-9E4C-88DDF7F22C8C/0/MicrosoftWordSUBJECT_MATTER_2004.pdf

Subject Matter of Judgments Delivered by the Court in 2005
http://www.echr.coe.int/NR/rdonlyres/FAF5D123-47A3-42CA-A833-0C0504A65802/0/SUBJECT_MATTER_2005.pdf

Survey of Activities 2005, ECtHR, Information issued by the Registrar of the ECtHR, p. 33 available at: http://www.echr.coe.int/NR/rdonlyres/4753F3E8-3AD0-42C5-B294-0F2A68507FC0/0/SurveyofActivities2005.pdf

Survey of Activities 2007 available at: http://www.echr.coe.int/NR/rdonlyres/59F27500-FD1B-4FC5-8F3F-F289B4A03008/0/Annual_Report_2007.pdf

REPORTS

Aker, A., Çelik, A., Kurban, D., Ünalan, T., and Yükseker, H., The Problem of Internal Displacement in Turkey: Assessment and Policy Proposals, TESEV, 2005

Amnesty International calls for amendments to legislation on homosexuality, News Service 117/98, AI INDEX: EUR 17/02/98, 18/06/1998

Amnesty International's Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the ECtHR, 1st February 2004

Amnesty International, "Turkey: Injustice continues despite welcome reforms", press release (AI Index 44/014/2004)

Amnesty International, "Turkey, *Justice Delayed and Denied:* The persistence of protracted and unfair trials for those charged under anti-terrorism legislation", 2006

"Applying and Supervising the ECHR- The Improvement of Domestic Remedies With Particular Emphasis on Cases of Unreasonable Length of Proceedings", Workshop held at the initiative of the Polish Chairship of the CoE's CoM, Directorate General of Human Rights, CoE, 2006

AS/Jur (2005) 32, "Implementation of judgments of the ECtHR", Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group, 9 June 2005

AS/Jur (2007) 35 rev 2, "The effectiveness of the ECHR at national level", Committee on Legal Affairs and Human Rights, Parliamentary Assembly, CoE, Working document, Rapporteur: Mrs Marie-Louise Bemelmans-Videc, Netherlands, EPP/CD, 26 July 2007

AS/Jur (2008) 08, Committee on Legal Affairs and Human Rights, "Guaranteeing the authority and effectiveness of the ECHR", Working document prepared by Mr Frédérick Sudre, Professor, Faculty of Law, University of Montpellier

CDDH-GDR (2001)010 (Reflection Group on the Reinforcement of the Human Rights Protection Mechanism), Activity Report, Strasbourg, 15 June 2001

CDDH(2003)006 Addendum final, "Guaranteeing the long-term effectiveness of the control system of the ECHR, Addendum to the final report containing CDDH proposals" (long version), Strasbourg, 9 April 2003

CDDH-GDR(2003)017, "Impact Assessments of Some of the Reform Proposals Under Consideration", Document prepared by a study group of the Registry, Strasbourg, Monday, 17 March 2003

CDDH-GDR(2003)024, "Position Paper of the ECtHR on Proposals for Reform of the ECHR and Other Measures as Set Out in the Report of the CDDH of 4 April 2003", unanimously adopted by the Court at its 43rd plenary administrative session on 12 September 2003

CDDH-GDR(2003)027 (Drafting Group on the Reinforcement of the Human Rights Protection Mechanism), "Applications to the European Court of Human Rights by the Council of Europe Commissioner for Human Rights-Proposals of the Commissioner", Strasbourg, 1 October 2003

CDDH(2003)026, Addendum I Final "Guaranteeing the long-term effectiveness of the ECtHR – Implementation of the Declaration adopted by the CoM at its 112th Session (14-15 May 2003) -Interim Activity Report", Strasbourg, 26 November 2003

CDDH(2006)008 Addendum I, "Follow-up Sheets on the Implementation of the Five Recommendations", Strasbourg, 7 April 2006

CDDH(2006)008 Addendum II, "Tables on the Implementation of the Five Recommendations", Strasbourg, 7 April 2006

CDDH(2006)008 Addendum III Bil, Information submitted by member states with regard to the implementation of the five recommendations mentioned in the Declaration adopted by the CoM at its 114th session (12 May 2004), Strasbourg, 7 April 2006

CDL-AD(2006)036 Or. Engl., "Study on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings", Study No. 316/2004, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 22 December 2006

CDL(2006)026, "Study on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings- Replies to Questionnaire", Study No. 316/2004, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 15 February 2007

Committee on Legal Affairs and Human Rights, Mr Erik Jurgens, *Implementation of judgments of the ECtHR* (Doc.11020, September 18, 2006)

CoM "Written Question No. 428 to the Chair of the CoM by Mr Jurgens: Execution of the EctHR's judgments by Turkey, Reply of the Chair of the CoM", CM/AS (2003), Question 428 final, 5 September 2003

CM(2006)39 final, 116th Session of the CoM (Strasbourg, 18-19 May 2006), Ensuring the continued effectiveness of the ECHR- The implementation of the reform measures adopted by the CoM as its 114th Session, 12 May 2004

CM(2008)52, 118th Session of the CoM, Strasbourg, 7th May 2008, CDDH- Activity Report- Sustained Action to Ensure the Effectiveness of the Implementation of the ECHR at National and European Levels (follow-up on the Declaration adopted at the 116th Session of the CoM, Strasbourg, 18-19 May 2006)

CoE, Information Sheet, No. 21, Strasbourg, 1988, pp.4-13

CoE, Human Rights, H/INF (89)2, Information sheet No. 24, (November 1988-5 May 1989), Strasbourg 1989

Declaration of the Rome Ministerial Conference on Human Rights: "The European Convention on Human Rights at 50: what future for the protection of human rights in Europe?"

DH-PR(2006)004rev Bil , CDDH, Committee of Experts for the improvement of procedures for the protection of Human Rights (DH-PR), Replies to the new questionnaire with regard to the five recommendations mentioned in the May 2004 Declaration adopted by the CoM, Strasbourg, 17 January 2007

DH-PR(2006)007rev Bil, CDDH, 27 November 2006

Doc. 8808, Committee on Legal Affairs and Human Rights, "Execution of judgments of the ECtHR", Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group, 12 July 2000

Evaluation Group Report to the Committee of Ministers on the ECtHR, 29 September 2001, preface, available at: http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm

Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms

"Functioning of the Organs of the ECHR (Assessment, Improvement and Reinforcement of the International Control Machinery set up by the Convention)" GT-DH-PR B(2007)003, CDDH , Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), GT-DH-PR, Working Group B, Meeting Report, 7th meeting, 20-21 February 2006, Strasbourg, 7 March 2007

Human Rights Watch, "Unjust, Restrictive, and Inconsistent- The Impact of Turkey's Compensation Law with Respect to Internally Displaced People", December 2006, Number 1, available at http://hrw.org/backgrounder/eca/turkey1206/

Interview with President Luzius Wildhaber, "The reform is an absolute necessity", 21 April 2004, www.coe.int/t/e/com/files/interviews/20040421_interv_wildhaber.asp

"Long-term Future of the Convention System", Memorandum by the ECtHR, Third Summit of the CoE

Joint Committee on Human Rights, *Implementation of Strasbourg Judgments: First Progress Report* (HL Paper 133, HC 954, March 8, 2006)

Kurban, D., "Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, available at: http://www.eliamep.gr/eliamep/files/Turkey.pdf

Kurban, D., Erözden, O., & Gülalp, H., "Supranational rights litigation, implementation and the domestic impact of Strasbourg Court jurisprudence: A case study of Turkey", Report prepared for the JURISTRAS project funded by the European Commission, DG Research, Priority 7, Citizens and Governance in a Knowledge Based Society, available at: http://www.juristras.eliamep.gr/wpcontent/uploads/2008/10/casestudyreportturkeyfinal.pdf

"Length of proceedings in Italy", Written Question No. 384 by Mr Georges Clerfayt, issued on 3 May 2000

Opinion No. 209/2002, European Commission for Democracy Through Law (Venice Commission), Draft Opinion on the Implementation of the Judgments of the ECtHR, Strasbourg, 6 December 2002

Paper by Ms Claudia Westerdiek, ECtHR, "The Organisation of Work of Legal Secretaries in the Registry of the ECtHR", 07.10.2005, available at: http://www.usrs.si/3csg/index.php?sv_path=1801,1968

Parliamentary Assembly, Recommendation 1194, "On the reform of the control mechanism of the ECHR", 6 October 1992

Parliamentary Assembly, Recommendation 1764 (2006) – "Implementation of the judgments of the ECtHR"

Parliamentary Assembly, *Implementation of judgments of the ECtHR,* Resolution 1516 (2006), October 2, 2006

Presidency Conclussions, Brussels European Council, para. 18,22, 16-17 December 2004 available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf

Report submitted by the Swiss Delegation, European Ministerial Conference on Human Rights, European Ministerial Conference on Human Rights, Vienna, 19-20 March 1985

Report of the Joseph R. Crowley Program/Lawyers Committee for Human Rights: Joint 1998 Mission to Turkey, "Justice on Trial: State Security Courts, Police

Impunity, and the Intimidation of Human Rights Defenders in Turkey", Fordham International Law Journal, Vol. 22, 1999, pp.2129-2243

Report by Mr Alvaro Gil-Robles, The Commissioner for human rights, on his visit to Cyprus, 25 - 29 June 2003, to the attention of the CoM and of the Parliamentary Assembly, CommDH(2004)2, Strasbourg, 12/02/2004

Report of the Committee of Prevention of Torture (CPT) of 06/09/2006 on the visit to Turkey from 7 to 14 December 2005

Report of the Group of Wise Persons to the CoM, 15 November 2006, CM(2006)203, para.16, available at: https://wcd.coe.int/ViewDoc.jsp?id=1063779&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

Report on effectiveness of national remedies in respect of excessive length of proceedings" recently issued by the Venice Commission, document CDL-AD (2006) 036 rev of 03.04.2007

"Review of the Working Methods of the ECtHR", The Right Honourable The Lord Woolf, available at: http://www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORDWOOLFREVIEWONWORKINGMETHODS.pdf

"The Possibility of Merging the ECommHR and ECtHR" in "Reform of the Control System of the ECHR", H(92)14, Strasbourg, December 1992

The Problem of Turkey's Displaced Persons: An Action Plan for Their Return and Compensation (2006)

(Updated) NGOs Response to Proposals to Ensure the Future Effectiveness of the ECtHR", April 2004

Resolutions and Recommendations of the CoM

Resolution, 20 January 1979, DH(79)1, YB 22 (1979), 440

Resolution DH(97)336 on length of proceedings in Italy: supplementary measures of a general character *(Adopted by the CoM on 11 July 1997 at the 597th meeting of the Ministers' Deputies)*

Interim Resolution DH (99) 434, Human Rights Action of the Security Forces in Turkey: Measures of a General Character (*Adopted by the CoM on 9 June 1999 at the 672nd meeting of the Ministers' Deputies*)

Resolution DH(99)555 Concerning the Judgment of the ECtHR of 28 October 1998 in the Case of Çiraklar against Turkey (*Adopted by the CoM on 8 October 1999 at the 680th meeting of the Ministers' Deputies*)

Resolution 1226, 2000, "Execution of Judgments of the ECtHR"
Resolution I, "Institutional and functional arrangements for the protection of human rights at national and European level" [CM (2000)172]

Resolution ResDH(2001)152 concerning the judgment of the ECtHR of 22nd April 1993 in the case of Modinos against Cyprus (*adopted by the CoM on 17th December 2001 at the 775th meeting of the Ministers' Deputies*)

Interim Resolution ResDH(2002)98, Action of the security forces in Turkey, Progress achieved and outstanding problems, General measures to ensure compliance with the judgments of the ECtHR in the cases against Turkey listed in Appendix II (*Adopted by the CoM on 10 July 2002 at the 803rd meeting of the Ministers' Deputies*)

Resolution ResDH(2003)49 concerning the judgment of the ECtHR (Friendly Settlement) of 16 July 2002 in the case of Selim against Cyprus *(Adopted by the CoM on 24 April 2003 at the 834th meeting of the Ministers' Deputies)*

Interim Resolution ResDH(2004)38 Freedom of Expression cases concerning Turkey: General Measures (*Adopted by the CoM on 2 June 2004 at the 885th meeting of the Ministers' Deputies*)

Interim Resolution ResDH(2005)21 concerning the issue of conditions of detention in Greece, raised in the cases of Dougoz against Greece (judgment of 6 March 2001, final on 6 June 2001) and Peers against Greece (judgment of 19 April 2001) *(adopted by the CoM on 7 April 2005, at the 922nd meeting of the Ministers' Deputies)*

Interim Resolution ResDH(2005)43, Actions of the security forces in Turkey, Progress achieved and outstanding problems General measures to ensure compliance with the judgments of the ECtHR in the cases against Turkey concerning actions of members of the security forces (listed in Appendix III) (Follow-up to Interim Resolutions DH(99)434 and DH(2002)98) *(Adopted by the CoM on 7 June 2005 at the 928th meeting of the Ministers' Deputies)*

Interim Resolution ResDH(2005)113 concerning the judgment of the ECtHR of 19 June 2003 in the case of Hulki Güneş against Turkey *(Adopted by the CoM on 30 November 2005 at the 948th meeting of the Ministers' Deputies)*

Resolution ResDH(2006)13 concerning judgments of the ECtHR in cases relating to actions of police forces in Cyprus (Egmez against Cyprus, judgment of 21 December 2000; Denizci and others against Cyprus, judgment of 23 May 2001, final on 23 August 2001) *(Adopted by the CoM on 12 April 2006, at the 960th meeting of the Ministers' Deputies)*

Resolution CM/ResDH(2007)5 concerning the judgment of the ECtHR of 18th February 1999 in the case of Larkos against Cyprus (*Adopted by the CoM on 28th February 2007 at the 987th meeting of the Ministers' Deputies*)

Interim Resolution ResDH(2007)25 concerning the judgment of the ECtHR of 10 May 2001 in the case of Cyprus against Turkey *(Adopted by the CoM on 4 April 2007,at the 992nd meeting of the Ministers' Deputies)*

Interim Resolution CM/ResDH(2007)26 on the execution of the judgment of the ECtHR Hulki Güneş against Turkey (*Adopted by the CoM on 4 April at the 992nd meeting of the Ministers' Deputies)*

Resolution CM/ResDH(2007)77 concerning the execution of the judgment of the ECtHR Aziz against Cyprus (Application No. 69949/01, judgment of 22/06/2004, final on 22/09/2004) (*Adopted by the CoM on 20 June 2007 at the 997th meeting of the Ministers' Deputies)*

Resolution CM/ResDH(2007)100, Execution of the judgments of the ECtHR, United Communist party of Turkey (judgment of Grand Chamber of 30/01/1998) and 7 other cases against Turkey concerning the dissolution of political parties between 1991 and 1997 (*Adopted by the CoM on 20 June 2007 at the 997th meeting of the Ministers' Deputies)*

Interim Resolution CM/ResDH(2007)150 on the execution of the judgment of the ECtHR Hulki Güneş against Turkey *(Adopted by the CoM on 5 December 2007, at the 1013th meeting of the Ministers' Deputies)*

Recommendation CM/Rec(2008)2 of the CoM to member states on efficient domestic capacity for rapid execution of judgments of the ECtHR *(Adopted by the CoM on 6 February 2008 at the 1017th meeting of the Ministers' Deputies)*

Reports of the Commission of the European Communities

Commission of the European Communities, 1998 Regular Report on Turkey's Progress Towards Accession, available at:
http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/turkey_en.pdf

Commission of the European Communities, 2003 Regular Report on Turkey's Progress Towards Accession, available at:
http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/rr_tk_final_en.pdf

Commission of the European Communities, 2004 Regular Report on Turkey's Progress Towards Accession, Brussels, 06.10.2004, available at:
http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/rr_tr_2004_en.pdf

Commission of the European Communities, 2005 Regular Report on Turkey's Progress Towards Accession, Brussels, Brussels, 09/11/2005, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1426_final_progress_report_tr_en.pdf

Commission of the European Communities, 2006 Regular Report on Turkey's Progress Towards Accession, Brussels, 08.11.2006, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/tr_sec_1390_en.pdf

Commission of the European Communities, 2007 Regular Report on Turkey's Progress Towards Accession, Brussels, 6.11.2007, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/turkey_progress_reports_en.pdf

Commission of the European Communities, 2008 Regular Report on Turkey's Progress Towards Accession, Brussels, 5.11.2007, available at: http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/turkey_progress_report_en.pdf