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# New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership

Paul Mahoney\*

## I. The Problem and its Genesis

The present single, permanent European Court of Human Rights, with one judge for each of the now 43 Contracting States (Armenia being the most recent State as of April 26, 2002), was set up in Strasbourg, France<sup>1</sup> in November 1998 when, by virtue of Protocol No. 11 to the European Convention on Human Rights, it replaced the two former part-time enforcement bodies, the European Commission and European Court of Human Rights. The reform introduced by Protocol No. 11 was “principally aimed at restructuring the system so as to shorten the length of Strasbourg proceedings.”<sup>2</sup> Its purpose was to provide “a supervising machinery that can work efficiently and at acceptable costs even with forty member States and which can maintain the authority and quality of the case-law in the future.”<sup>3</sup>

A quick look at the statistics shows that, after three and a half years of existence of the new Court, the aim defined by the drafters of Protocol No. 11 is not being achieved. Upon its inception, the Court inherited some 6,800 pending registered applications from the Commission, and 90 or so cases from the old Court. Three years later, at the beginning of 2002, 19,815 registered applications were pending: the inheritance had almost trebled. In 1998, 5,981 applications were registered, followed by 8,400 in 1999, 10,482 in 2000 and 13,858 in 2001—that is, annual

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\* Registrar of the European Court of Human Rights. Any views expressed are personal. A version of this paper was presented at the International Law Conference entitled Human Rights: Dynamic Dimensions, held in London on April 27, 2002, and sponsored by the Center for International and Comparative Law of The Dickinson School of Law of The Pennsylvania State University in collaboration with the Institute of Advanced Legal Studies of the University of London.

1. The seat of the Court and its parent Organisation, the Council of Europe.
2. Explanatory Report to Protocol No. 11, ¶¶ 10-18 (1994).
3. *Id.*

increases of 40.44 %, 24.78 %, and 32.20 % over the last three years. The upward trend in incoming applications continues in 2002. It concerns both the long-established Convention countries and the so-called new democracies from the former Soviet bloc. While productivity is constantly improving in the face of this exponential increase,<sup>4</sup> the Court is unable to dispose of, each month, the same number of applications as are being received.<sup>5</sup> As a result of this imbalance between intake and output, the total number of pending cases is inexorably increasing and, correspondingly, the prospect of the Court “catching up” with its arrears of work is becoming fainter and fainter.

There is doubtless room, within the existing procedural framework laid down by the Convention, to expand the Court’s annual case-processing capacity beyond the results achieved in 2001 (just under 10,000 cases disposed of<sup>6</sup>). Such a result can be achieved by streamlining procedures even further, especially in unmeritorious and routine cases, and by increasing the Court’s resources, in particular the number of Registry lawyers preparing the cases for disposition by the judges.<sup>7</sup> The system for registering applications and the procedure for rejecting obviously inadmissible cases in Committees of three judges have been radically simplified as from January of this year.<sup>8</sup> A

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4. An average of 823 cases were disposed of per month in 2001 as compared with 622 in 2000 and 308 in 1999.

5. The monthly average for 2001 was 1,155 applications registered as against 823 applications decided; in 2000 it was 883 applications registered as against 622 applications decided.

6. That is, 8,959 applications declared inadmissible or struck off the list (8,314 by Committees, 675 by Chambers) and 888 judgments.

7. For an instructive comparison of how (similarly, in many ways) the European Court of Human Rights and the United States Courts of Appeals are endeavouring, through case-management techniques, to absorb growing case-loads, see Dinah Shelton, *Ensuring Justice with Deliberate Speed: Case-Management in the European Court of Human Rights and the United States Courts of Appeals*, 21 HUMAN RIGHTS L.J. 337 (2000). See also Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeal, submitted to the President of the Congress of the United States pursuant to Public Law Nos. 105-119 (December 18, 1998); this Commission had been set up by Congress in late 1997, “in the wake of controversy over whether the court of appeals for the Ninth Circuit—the largest federal court of appeals—ha[d] grown to a point that it [could] not function effectively and whether, in response, Congress should split the Ninth Circuit to create two or more smaller courts.” *Id.* See also the Report of April 2, 1990, by the Federal Courts Standing Committee of the United States, appointed by the Chief Justice at the direction of Congress in response to “mounting public and professional concern with the federal courts’ congestion, delay, expense and expansion.”

8. In particular, a separate paper decision for each application rejected by a Committee is no longer produced. Committees now deal with batches of applications a time. Minutes of the meeting, signed by the President of the Committee and the responsible Registrar, record what applications were rejected and what applications, if any, were referred to a Chamber of seven judges. Applicants receive a letter in their own language informing them that the application has been declared inadmissible or struck out

budgetary package involving injection of further resources over the next three years has been submitted to the Governments. As a result, the prospects of raising productivity nearer to the level of the incoming business are looking better. A Court of forty or so judges, with adequate resources, could process 14,000 cases annually (this being approximately the number of applications registered last year) without any need to reform Protocol No. 11; perhaps 20,000, or 30,000, or even 50,000. But there must, at some point, be a threshold beyond which the Court collectively and the individual judges cannot go. If the upward progression of cases being lodged in Strasbourg continues, one does not need to be a soothsayer to predict that, even if the statistical curve of annual increases becomes less steep, and whatever “managerial” changes are made within the existing structures regarding working methods, internal organization, and the procedural treatment of cases, the enforcement machinery set up by Protocol No. 11 will ultimately prove to be incapable of fulfilling the purpose fixed for it by its creators. Furthermore, “constant seeking for greater ‘productivity’ obviously entails the risk that [meritorious] applications will not receive sufficient . . . consideration to the detriment of the quality of judgments.”<sup>9</sup>

It would, therefore, be unwise to rule out that further reform—in the sense of structural changes that redesign the architecture of adjudication by the Court—will be called for, in addition to “managerial” changes, if the Court is not to be overwhelmed by its already enormous and growing case-load.<sup>10</sup>

## II. The Mission of the European Court of Human Rights

What must be done, in terms of structural reform, to ensure the continued effectiveness of the Court? This question was referred, by the Council of Europe, in February 2001, for study to an “Evaluation Group” composed of the Irish Ambassador to the Council (Justin Harman), the President of the Court (Luzius Wildhaber), and the Deputy Secretary General of the Council of Europe and former Secretary to the European Commission of Human Rights for 20 years (Hans-Christian Krüger). The answer to the this question depends on the answer to another, far more basic question: why have a European Court of Human Rights in

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and specifying, with reference to the relevant provision of the Convention, on what formal ground the application has been rejected, but without making explicit the particular reasons for the rejection.

9. Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights § 39, EG Court (2001)1 Council of Europe (Sept. 27, 2001).

10. The vocabulary of “managerial” and “structural” changes is borrowed from the 1990 Report of the Federal Courts Study Committee, *supra* note 7.

addition to the national mechanisms for securing human rights? In other words, the basic objective pursued by the Convention system should shape the contours of any possible reform.

Study of the drafting history of the Convention, and of the practice of the Strasbourg enforcement bodies, brings to light a tension between two visions of the purpose of the European Convention on Human Rights, with its right of individual petition. One perspective, that of "individual justice," views as the soul of the Convention the entitlement of each and every complainant to examination of his or her complaint and, if it is upheld, to individualized relief. The other, that of "constitutional justice," regards the Convention as a constitutional instrument of European public order in the field of human rights, and thus the mechanism of individual applications as the means by which defects in national protection of human rights are detected with a view to correcting them; thereby raising the general standard of protection of human rights, both in the country concerned and in the Convention community of States as a whole.

The emphasis has shifted at differing points during the Convention's history, but the demands imposed on the system by the vision of full "individual justice" have become increasingly difficult to meet as the caseload grows to enormous proportions.

Furthermore, the community of States served by the Convention has changed considerably in make-up since 1989 (following the fall of the Berlin Wall), in that it has expanded to include components of the former Soviet bloc nations, some with relatively recent and fragile democratic bases.<sup>11</sup> The Court, like its parent Organization, the Council of Europe, has acquired a new mission. Until 1989, the Convention could be described as an international control mechanism for fine-tuning sophisticated national democratic engines that were, on the whole, working well. Now, and in the foreseeable future, this is not a blanket assumption that can be made for many of the participating States that are starting out on the democratic path. The nature, not only the volume, of the cases submitted is liable to change.<sup>12</sup>

As far as the older participating States are concerned, the environment within which the Court operates has also changed. The

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11. For a perceptive assessment of the impact of the enlargement of the Council of Europe on the role of the Court, see Robert Harmsen, *The European Convention on Human Rights after Enlargement*, INT'L J. HUM. RTS., vol. 5, at 18 (2001).

12. It is also interesting to note how, statistically, the new democracies from the former Soviet bloc are increasingly entering into the Convention system. In 1999 the percentage of registered applications from the new democracies was 39 %; by 2001 the figure had risen to 56 %. The volume of applications from the original States is not diminishing, however - it is merely that the rates of increase are not as high as those of the new States.

Convention and its accumulated case-law have penetrated the fabric of domestic law and are being applied on a daily basis by national judges, whereas in earlier times the national legal systems did not on the whole take express account of the Convention standards. For such countries the Strasbourg Court is far less frequently called upon to review facts for the first time in terms of the Convention standards. The subsidiary character of the Convention is being reinforced progressively and consolidated by the national authorities themselves—not only the courts but also the legislature and the executive—thereby repatriating to the domestic legal system much of the human rights review function hitherto performed in Strasbourg. “Bringing rights home” as a description of the British Human Rights Act of 1998 is not a misnomer.

What should one now expect of the European Court of Human Rights in this changed environment? To quote the preface to the Report of the Evaluation Group<sup>13</sup>:

Since 1989-1990 the enlargement of the Council of Europe has created a new dimension for the operation of the Convention system. While the underlying purpose of the system remained the same, the Court now had a further role to play in the consolidation of democracy and the rule of law in the wider Europe. This is a process which continues today. In this sense its significance has arguably never been greater. The Court, through its case-law and in partnership with national Supreme and Constitutional Courts, serves to infuse national legal systems with the democratic values and the legal principles of the Convention and helps to ensure that Convention standards are implemented in everyday practice.

The major challenge for the Court today is not only to maintain and develop the Convention standards but also to ensure that the Europe of human rights remains a single entity with common values.

On that analysis, the Convention and its complaint-based enforcement machinery should not be viewed as aiming at providing individual relief for as many European citizens as possible, but, rather, as having the more general purposes of ensuring that each Convention country puts in place within its own internal legal order effective means for securing the guaranteed rights (the subsidiary facet); avoiding repetition of circumstances giving rise to a violation of the guaranteed rights (the preventive facet); and welding together a human rights community of nations with shared legal values across the whole mosaic of post-1989 Europe (the unifying facet). Those purposes are achieved by elucidating through individual cases the Convention principles to be

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13. See Evaluation Group Report, *supra* note 9, p. 8.

applied by national authorities.

### III. The Possible Solutions to the Problem

If one accepts that this is the reason why there should be a European Court of Human Rights in the twenty-first century, what then are the means that the Governments should be looking at in order to ensure the Court's continued effectiveness?

#### A. *Possible Solutions that are not Wholly Convincing*

The potential for the flow of alleged violations of the Convention to Strasbourg is enormous. There are over 800 million European citizens living in over forty different countries. The Convention and its guarantees percolate into every aspect of life in the participating countries—social, political, and even economic. There are a myriad of instances in people's lives where some measure or act or omission by the public authorities, including the legislature, is capable of having an adverse impact on the enjoyment of one of the rights or freedoms guaranteed to them under the Convention. A full-blown mini legal system centered on Strasbourg would be needed if the principle of affording proper judicial examination and individual relief at an international level in each case of alleged unjustified interference with a Convention right were to prevail.

Apart from the maximalist solution of a mini legal system, a number of other possible solutions can also be discounted at this early stage.

For example, doubling the number of judges to over eighty would undoubtedly expand the judicial case-processing capacity and address the problem of volume, but it would create an unwieldy body not capable of giving the focused "authority and quality of the case-law" that the drafters of Protocol No 11 intended. Genuine collegiality capable of producing a consistent, coherent case law would be impossible in a Court comprising 90 judges.

Similarly, the idea of regionalizing the Convention machinery,<sup>14</sup> by

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14. An idea originally advanced by Robert Badinter, former President of the French *Conseil Constitutionnel*, in THE EUROPEAN COURT OF HUMAN RIGHTS - ORGANISATION AND PROCEDURE - QUESTIONS CONCERNING THE IMPLEMENTATION OF PROTOCOL NO. 11 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 158 (1997) [proceedings of the Colloquy organised by the Human Rights Centre of the University of Potsdam in co-operation with the Council of Europe]; and *Du Protocole No. 11 au Protocole N° 12*, in MÉLANGES EN HOMMAGE À LOUIS-EDMOND PETTITI 103 (1998). Badinter's point of departure for regionalization is that within the large community of States that now subscribe to the Convention the level of human rights protection actually assured and capable of being assured by the domestic legal orders varies enormously: at one end of the scale some of the countries from the former Soviet bloc who still have a young and somewhat

splitting it into decentralized, regional tribunals and a supreme instance sitting in Strasbourg, has found few supporters.<sup>15</sup> The major argument made against regionalization is that it would create a “two-speed” system of human rights protection in Europe, that runs counter to the current mission of the Council of Europe—not just in the human rights domain but throughout the entirety of the Council’s activities—namely to bring the whole of Europe under one roof.<sup>16</sup>

Also finding little favor are “[the] suggestions that the Court should be empowered to give preliminary rulings on Convention issues at the request of national courts (in a procedure akin to that utilized by the Court of Justice of the European Communities) or that its competence to give advisory opinions (Articles 47-49 of the Convention) should be expanded.”<sup>17</sup> Unless the right of individual petition were to be limited or suppressed in parallel, any reform along such lines would be unlikely to resolve the caseload problem; on the contrary, it would merely serve to burden the Court with extra duties.

What is needed to maintain the effectiveness of the Court are means that are “practical and workable,” to use the words of one of the drafters of the Convention in 1949, as well as reconcilable with the imperatives of principle. As the Evaluation Group put it in its report:

There is . . . a need, in addition to the procedural streamlining and resource increases [required in the immediate under the present framework of the Convention], for yet further measures to reduce the workload, to expedite the handling of applications that do not warrant

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rudimentary democratic base and at the other end the older, established democracies with highly sophisticated mechanisms protecting civil liberties. The human rights realities are wildly different and the enforcement machinery should be adapted to this, Badinter is in effect saying.

15. Cf. the similar recommendation made by the United States Commission on Structural Alternatives for the Federal Courts of Appeals, *supra* note 7, at x of the foreword, and Summary: “[W]e recommend that Congress enact a statute organizing the Ninth Circuit Court of Appeals into three regionally based adjudicative divisions - the Northern, Middle, and Southern - each division with a majority of its judges resident in its region, and each having exclusive jurisdiction over appeals from the judicial districts within its region . . . Each division would function as a semi-autonomous decisional unit. To resolve conflicts that might develop between regional divisions, we recommend a Circuit Division for conflict correction . . . With from seven to eleven judges serving together on each regional division over an extended period of time, this plan would increase the consistency and coherence of the law, maximize the likelihood of genuine collegiality, establish an effective procedure for maintaining uniform decisional law within the circuit, and relate the appellate forum more closely to the region it serves. The circuit would remain intact as an administrative unit, functioning as it now does.”

16. See Evaluation Group Report, *supra* note 9, § 83: “[T]he Evaluation Group [was] not attracted by this solution: it carries a risk of diverging standards and case-law, whereas the essence of the Convention system is that uniform standards, collectively set and enforced, should obtain throughout the Contracting States.”

17. See *id.*, § 84.

detailed treatment and to leave the judges with sufficient time to devote to those that do.<sup>18</sup>

*B. Lighter, More Economical Initial Screening of Applications Received*

Such a conclusion argues in favor of a restructuring of the enforcement machinery, returning to a division of responsibility as regards admissibility and merits, whether within the framework of a single Court, or by means of separate institutions, as under the original 1950 model. In any event, an economical, timesaving system must be devised for filtering the huge mass of applications that are lodged. In time, forty or so judges will hardly have the time for this preliminary work as well as that of giving full, deliberative attention to meritorious applications. One can also doubt the wisdom of requiring such highly qualified judges to spend so much time on what is a relatively low-level judicial exercise that does not require great expertise.

Under this approach, the basic principle of the right of individual petition—keeping the doors of the Strasbourg Court open to all applicants—would be maintained, but there would be no guarantee of the same kind of treatment being accorded to all applicants once inside the doors.<sup>19</sup> A much lighter, more expeditious treatment for the thousands of unmeritorious applications received every year must be instituted if the foreseeable increase in the number of applications is to be absorbed in an economical manner, both judicially and financially.

This is not to say that the initial screening should not be carried out by a judge, in the sense of someone having judicial status, with all the usual guarantees of independence and impartiality. It is perfectly conceivable to have within one legal system two categories of persons exercising judicial power: lower-instance judges or “judicial officers”<sup>20</sup> who perform designated accessory functions such as identifying and preparing for disposition cases suitable for adjudication by higher-

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18. *See id.*, §§ 81 and 90.

19. *See id.*, § 92, for the similar conclusion of the Evaluation Group: “[T]he point has been reached at which a difficult choice has to be made: either the Court continues to attempt to deal in the same way with all the applications that arrive (in which event it will slowly sink), or it reserves detailed treatment for those cases which, in the light of its overall object and purpose (see the Preface to this report), warrant such attention. Not without some soul-searching but nevertheless unreservedly, the Group opts for the second alternative.”

20. Adapting the language of Article 5 § 3 of the Convention, which guarantees prompt judicial control of deprivation of liberty on suspicion of commission of a criminal offence: “Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought before a judge or other *officer authorised by law to exercise judicial power*. . .” [Emphasis added.]

instance judges—on the model, for example, of examining magistrates who send a case for trial before judges.

Such a redistribution of tasks within the Convention enforcement machinery would not necessarily entail a reversion to something like the original Commission/Court structure established under the 1950 version of the Convention. Under that structure there was a duplication of functions, in that the Commission acted more like a court of first instance in also addressing the merits in admissible cases. What the pre-1998 architecture of the enforcement machinery did show is that having one corps of adjudicators for initial screening,<sup>21</sup> and another corps for dealing with complaints identified as meritorious, is both compatible as a matter of principle with the ethos of the Convention and workable in practice. If the option of reducing the workload of the Court to manageable proportions by instituting a tribunal of first instance with jurisdiction to rule on the merits is to be discounted (as it is likely to be by the Governments, if only for financial reasons), an alternative is to limit the power of the first level of judicial officers to what the Evaluation Group called “streaming,”<sup>22</sup> that is, an initial screening that places different categories of applications on appropriate procedural tracks. The power of the filtering “judicial officers” could include the rejection by final decision obviously inadmissible applications; referring on up the line to the elected judges on the Court applications where admissibility is arguable; and certifying as admissible and, where appropriate, manifestly well founded other applications.

In favoring a scheme along these lines, the Evaluation Group proposed the creation of a separate division within the Court. As the Evaluation Group saw it, “the Court would consist of two divisions, the first composed of elected judges and the second—with responsibility for preliminary examination of applications—composed of appropriately appointed independent and impartial persons invested with judicial status (who would be designated as ‘assessors’ or some other suitable title).”<sup>23</sup>

Of course, other models are conceivable. In any event, whatever views one might have on the various conceivable models, what is clear is that some more procedurally economical form of judicial screening is necessary to prevent asphyxiation of the Court.

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21. Screening that, under the 1950 version of the Convention, it should be noted, included giving the decision on the admissibility of *all* applications.

22. In a different context, admittedly; see Evaluation Group Report, *supra* note 9, §§ 58-61.

23. See *id.*, §§ 98 and 100.21.

C. *A Method to Control the Flow of Cases Destined for Full Judicial Examination.*

Even if the ever-mounting mass of applications lodged each year were to go through some process of preliminary sifting, so as to relieve the Court (that is the elected judges) of this time-consuming but unrewarding burden, it would also be advisable to incorporate into the procedure a method to allow the Court itself to control the flow of cases that it receives.

As long as the principle of free access to Strasbourg is maintained, as it must be, the volume of judicial business will be irreducible. The number of incoming applications is increasing every year. A mechanism for a preliminary examination of applications, as the Evaluation Group called it, will provide a means for absorbing, more economically in procedural terms, such increases in volume at the admissibility stage. It will not, however, wholly protect the Court with respect to the accomplishment of its main task, namely that of adjudicating meritorious cases, with a view to the setting of standards for what is now a pan-European community of States. Again, as the Evaluation Group put it, "a vital consideration must be to ensure that judges are left with sufficient time to devote to what have been called 'constitutional judgments', i.e. fully reasoned and authoritative judgments in cases which raise substantial or new and complex issues of human rights law, are of particular significance for the State concerned or involve allegations of serious human rights violations and which warrant a full process of considered adjudication."<sup>24</sup>

In this context, the previously quoted statistics on obviously unmeritorious and inadmissible applications only provide part of the picture regarding the slow suffocation of the Strasbourg Court. There is, at the other end of the spectrum, another category of applications responsible for clogging the Court's docket: manifestly well-founded but repetitive cases that involve routine application of well established case-law, where it is quite clear from the outset that a violation has occurred. Prime examples of this category are cases in which the only or principal allegation is one of unreasonable length of proceedings in civil or criminal matters, contrary to Article 6 of the Convention. Between 1955 and 1999, 3,129 of the total of 5,307 applications declared admissible (58.95 %) raised a complaint of length of proceedings. In 2000, a total of 695 judgments were delivered by the Court. Impressive, one might think, until it is realized that 485 of them (69.78 %) were straightforward cases exclusively or principally concerning alleged

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24. *Id.*, § 98.

excessive length of proceedings, and 81 (11.65 %) were judgments essentially applying standard case-law. Fewer than 20 % of the cases actually raised a new or serious issue under the Convention.<sup>25</sup>

What is the justification for the highest “constitutional” Court in Europe spending so much of its time and resources on dealing with, for example, the thousands of cases from Italy, where the sole subject matter is unexceptional civil litigation that has lasted too long. Particularly in light of the fact that the Court has already delivered a leading declaratory judgment of principle<sup>26</sup> to the effect that the system of civil justice in Italy, as presently organized, is incapable of ensuring observance of the reasonable-time requirement in Article 6 of the Convention. Behind each one of these thousands of applications there is, of course, an individual who has suffered an unjustified denial of his or her Convention right to trial within a reasonable time. But is it the purpose of the Strasbourg Court to give considered adjudication and relief on each and every one of these cases? The consequence is that treatment of cases that raise genuine human rights issues is delayed.<sup>27</sup>

Whilst all applicants in these follow-up cases may well be the victims of a violation, the Italian example shows that what is being brought before the Court in each of these successive applications is in reality a problem of execution of the earlier judgment of principle, rather than an adjudicative issue warranting the attention of the Court. In terms of the objective pursued by the Convention’s enforcement system, the role of the Court has effectively been exhausted once a defect in the national legal order has been identified through an individual application. Thereafter, it should be for the respondent Government (by virtue of the principle of subsidiarity), and the other States on the Committee of Ministers of the Council of Europe (in their capacity as guarantors of the proper execution of judgments), to assume responsibility for all the various implications of the judgment of principle—notably, ensuring that the spotlighted defect is remedied (general measures) and recognizing and compensating all other victims (individual measures). Here, then, is

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25. On a cursory analysis, the figures for 2001 are comparable: 888 judgments delivered, 480 (54 %) standard length proceedings, approximately 275 (31 %) application of established case-law, with the remainder, approximately 15 %, new or serious issues.

26. *Botazzi v. Italy*, ECHR 1999-V 17.

27. See Harmsen, *supra* note 11. Mr. Harmsen makes, broadly, the same point when talking of the enlargement of the Council of Europe bringing with it “increased pressures on the Court to recast itself as more of a constitutional court”: “[T]he Court should concern itself more with questions of general jurisprudential doctrine, seeking on the basis of individual cases to establish clear interpretative principles of more general applicability. Already prior to enlargement, . . . many felt that the Strasbourg system was becoming bogged down by the need to process a large number of comparatively minor complaints which raised no new points of law.”

an indication of one aspect of a possible structural reform of the Convention remedy: to shift what is really a judgment-execution responsibility towards more appropriate shoulders.

The manifestly well-founded phenomenon in "minor" and repetitive cases is one of the main factors that has provoked a call for the introduction of a leave-to-appeal clause. The Evaluation Group made a proposal for the insertion into the Convention of a new provision "that would in essence empower the Court to decline to examine in detail applications which raise no substantial issue under the Convention."<sup>28</sup>

The question, of course, arises as to what is to happen to such applications if the Strasbourg Court declines to examine them. Via one perspective, the brutal answer is: nothing. The Strasbourg Court cannot be expected to deal with the details of every human rights ill that occurs in a Convention community of 800 million people. If the judgment of the Strasbourg Court is that the application does not raise a substantial issue under the Convention, then there is no justification in pursuing the matter on the international level. The Evaluation Group, however, took a more clement approach. It said: "Nevertheless, a blind eye cannot be turned to the question of what happens to the author of an application that is not accepted for detailed treatment. The Evaluation Group considers that this point should be studied concurrently with the drafting of the new provision, with a view to devising a mechanism whereby States would agree that such an application be remitted back to their authorities for reconsideration . . ."<sup>29</sup>

Alternatively, or additionally, where it has been established in a judgment of principle that there exists a structural or organizational shortcoming in the national legal order or an administrative practice, rather than simply a series of similar incidents, subsequent applications raising the same issue could well be treated as part of the process of execution of the judgment of principle. Such matters could be referred, without further examination by the Court, to the Committee of Ministers of the Council of Europe, the body responsible for supervising the execution of judgments. As a component of any reform, therefore, a special procedure of execution, to be activated by the Court by means of a direction in the operative provisions of the judgment of principle, could be devised to take account of this category of application.

Predictably, the proposal to invest the Court with a power of selection over what cases it will look into has provoked concern, even protest, from many quarters, notably the non-governmental organizations in the human rights field, on the basis that it involves cutting down the

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28. See Evaluation Group Report, *supra* note 9, §§ 93 and 100.20 (a).

29. See *id.*, § 96.

hard-won right of individual petition for reasons of pure expediency.<sup>30</sup> One can understand, and sympathize with, such a reaction, but it is difficult to see many other viable alternatives if one wants to keep a Europe-wide Court of Human Rights capable of providing a focused, consistent, and coherent case-law and of adjudicating meritorious cases with proper attention and within a reasonable time.

#### IV. Conclusion

Acting on the report of the Evaluation Group, the Council of Europe has referred the issue of possible reform of the Convention to a governmental steering committee on human rights. This committee is undertaking a widespread consultation of interested parties, including non-governmental organizations. Its final recommendations are expected in July 2003.

This paper's underlying conclusion is that there are two primary measures, the implementation of which is necessary to secure the continued effectiveness of the Strasbourg Court.

First, in the medium rather than the long term, an overhaul of the enforcement machinery under the European Convention on Human Rights, instituting (1) a lighter, more expeditious mechanism for preliminary judicial screening of applications, to be carried out by a corps of junior judges called judicial officers, assessors, adjudicators, magistrates or something of the like; and (2) the Court itself being enabled to control its "jurisprudential" workload by being vested with the power to accept for full judicial consideration only those cases which raise what the judges consider a substantial issue under the Convention.

Second, and in the meantime, a significant increase in the Court's resources and procedural innovations designed to reduce, to the minimum that is possible within the existing framework, the time spent by judges and the Registry on obviously inadmissible applications and on wholly routine and repetitive admissible applications (for example, through according priority to certain categories of applications to the detriment of others).

It is fair to say that many Convention commentators and insiders fear that the kind of reform advocated in this paper would entail a dilution, for almost exclusively financial reasons, of what they consider to be the judicial character of the right of individual petition. They feel very strongly that the right of every individual to have his or her

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30. For a balanced expression of such concern and an assessment of the Evaluation Group's Report, see John Wadham and Tazeen Said, *What Price the Right of Individual Petition: Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, E.C.H.R.L.R., Issue 2, at 169-174 (2002).

complaint scrutinized by the judge elected by the Parliamentary Assembly, if only to declare it inadmissible, is the strength and identifying characteristic of the Convention system, an *acquis* that should be maintained. Where the foregoing analysis, following more or less the same approach as that of the Evaluation Group, parts company with that view is not so much in the choice of the cures for an agreed ill, but, rather, at the beginning of the story: it sees a far more general and less individualistic rationale for the existence of the European Court on Human Rights and, thus, different tools for maintaining the Court's effectiveness.