FROM MADRID TO INTERLAKEN VIA BLED

PRESENTATIONS AT THE ROUND TABLE ENTITLED «BETWEEN MADRID AND INTERLAKEN — SHORT-TERM REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS»

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Provisional application of certain procedures in Protocol No. 14 — Single Judge and Three-Judge Committees: a note on the first steps

Today the number of applications waiting for a decision by the Court stands at 113 850.

The number of new applications the Court will receive this year is estimated at 58 000, an increase of roughly 15% compared to last year.

The yearly increase of applications is more than 10% every year over the last 10 years.

To continue like this will require further considerable investments in the Court and its Registry, which the States might not be prepared to pay for.

The alternative is a reflection on how the system functions and a fundamental reform program. That reform is possible, even rapid reform, is evidenced by what happened in Madrid.

On 12 May 2009 in Madrid two new legal instruments were adopted by the Committee of Ministers, both of which had the same purpose, namely to make it possible for the Court to apply the Single-Judge procedure and the new competence for Three-Judge committees as foreseen by Protocol No. 14.

The two new instruments were, on the one hand, a new Protocol to the Convention called Protocol No. 14 bis, and, on the other hand, an Agreement between the negotiating States of the European Convention on Human Rights on the provisional application of the above two procedures.

Protocol No. 14 bis requires three ratifications. It will enter into force on 1 October 2009. However, a State may also indicate under Protocol No. 14 bis that it accepts the two procedures provisionally before the entry into force. If so, such provisional application will start on the first day of the month following the declaration of provisional application. The Agreement will apply in respect of a State as from the first day of the month following the declaration of the State that it accepts the two procedures under the Agreement.

Switzerland was the first State to submit a declaration under the Agreement — already on 12 May 2009 — and technically speaking therefore the two new procedures could be applied by the Court as from 1 June 2009.

The Court adopted new Rules of Court on 29 June 2009. The new Rules, which are contained in an Addendum to the Rules of Court, entered into force on 1 July 2009.

By 1 July already, 7 States (Denmark, Germany, the Netherlands, Norway, Luxemburg, Switzerland and the United Kingdom) had made the necessary declarations either under Protocol No. 14 bis or under the Agreement.

The first Single-Judge decisions were adopted in the first week of July.

The Single-Judge procedure under Protocol No. 14 provides for a system whereby the decision is taken by a Single Judge with the assistance of a Non-Judicial Rapporteur, who is a member of the Registry. The Single Judge is appointed by the President of the Court. In practice the Single Judge operates within the framework of the existing Sections. The President therefore bases his decision on proposals coming from the Sections, notably the Section Presidents.

The Non-Judicial Rapporteurs, who are all members of the Court's Registry, are appointed by the President of the Court on the proposal of the Registrar.

The provisional application of Protocol No. 14 also gives the Court the possibility of assigning to Three-Judge Committees, applications which should be decided on the merits where the issue is covered by well-established case-law of the Court. In order to benefit as much as possible from this new power and in line with what has been said in the Explanatory Report[1], the Court has adopted a simplified procedure for these cases.

The initial preparation of the cases remains the same as before. The only addition being that the Judge Rapporteur in his/her analysis will indicate that the case appears to be suitable for examination by a Three-Judge committee. The case follows the usual procedure for communication by the Section President. The Committee will only be seized with the application once the parties have submitted written observations and Article 41 claims.

The new element lies n the fact that due to the well-established case-law on the issue in question the Court would not need any observations from the Government. Consequently, under this new simplified procedure the Government are not invited to submit observations but are only given an opportunity to submit such observations, if they so wish. At the same time the parties are encouraged to settle the case.

Fresh statistics

By today (22 September 2009), 16 States have accepted the new procedures. They have entered into force with regard to 12 States: Belgium, Denmark, Estonia, Germany, Iceland, Ireland, Liechtenstein, Luxemburg, the Netherlands, Norway, Switzerland and the United Kingdom.

[1] Explanatory Report to Protocol No. 14, §§ 68–72.

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Albania and Georgia will join that number on 1 October. Slovenia and Monaco will do so on 1 November.

Today a total of 592 Single-Judge decisions have been taken (Denmark — 7, Estonia — 38, Germany — 277, Luxembourg — 4, Netherlands — 57, Norway — 17, Switzerland — 61 and United Kingdom — 131).

These were some few words about how the Court has started to apply the provisional procedures under Protocol No. 14.

What about other reform?

Switzerland has now taken a very important initiative by convening the Interlaken conference on the future of the Court and the Convention system.

The expectations of this Conference are very high. The risk of failure is of course there. But we simply must succeed.

The Conference must address and respond to several fundamental issues.

The agenda should at least include the following major issues:

1. How can we improve the implementation of the Convention rights at national level?
2. Do we maintain the right of individual application as it is today or do we attach some further modalities to it?
3. How should the future filtering function be organized?
4. How should the problem of repetitive well-founded applications be addressed?
5. How should we improve the execution of the Court's judgments?
6. How do we maintain and reinforce the independence of the Court and its Members?

BRINGING RIGHTS HOME OR HOW TO DEAL WITH REPETITIVE APPLICATIONS IN THE FUTURE

I. INTRODUCTION

1. I am very pleased to address the issue of «repetitive applications» from the perspective of the European Court of Human Rights and its Registry at this important meeting.

2. I take the opportunity to thank the Slovenian authorities for the timely organisation of this Round table. I believe it is one of the central items worth discussing in the run-up to the conference on the future of the Court which will be taking place on 18–19 February 2010 in Interlaken, when Switzerland will be chairing the Committee of Ministers of the Council of Europe.

The views which I shall express this morning are my own and should not be taken as those of the Court. The decision to hold the Interlaken Conference is premised on the idea that we must reform the Convention system. It is my duty as Registrar to make proposals as to how this could be done. Whether they are good or bad will be for others to decide.

3. Speaking about the future of the Court, I should like, from the very beginning, to express my strong conviction that Protocol No. 11 represented an extremely important step forward in strengthening the judicial character of the European human rights protection system. Nevertheless, the machinery envisaged at that time to deal with the case-load definitely requires some adjustments today, in order to cope with the realities of a system that now comprises 47 Contracting States — unlike in the early nineties — and to avoid a breakdown of that system. The huge volume of applications raising issues the Court has already dealt with is one of the biggest challenges facing the Court today.

4. Put simply, the solutions to the Court's problem are either to reduce the volume of incoming applications or to simplify or speed up the process by which cases are dealt with, indeed both are necessary. There are some measures that can be introduced almost immediately, while other proposals will require legislative reform. Experience has shown that that may take many years. What I hope is that the result of our discussions this morning will be a strong message to the Governments, parliaments and public opinion, so that when the Government representatives meet at the political conference in Interlaken they will launch the necessary process of reform.

5. But before sharing with you the solutions that can be envisaged, let me first draw you a picture of the current situation with regard to repetitive cases, and the Court's current approach to them.

II. TYPES OF REPETITIVE CASES AND SOME EXAMPLES

6. It is no secret that the Court's docket is currently engorged with repetitive cases against many States. More than 50% of the total number of judgments delivered since the Convention system was first established over 50 years ago concern what are known as «repetitive» cases — about 25,000 applications currently pending before the Court fall into this category. An even greater cause of concern is that, in spite of the efforts deployed by the Court to deal with these cases on an individual basis by streamlining the proceedings and developing a wide range of tools — such as the pilot-judgment scheme, and unilateral declarations, which I will come back to later — there are no signs that the problem is diminishing.

7. Two main types of situation may be identified.

A. Systemic situations

8. Firstly, there are cases raising issues of a systemic nature, which stem from a defective legal provision or administrative practice and which can in fact be remedied fairly easily, by modifying the law or practice concerned, provided of course that the political will exists. An example of this is the long series of cases concerning the independence and impartiality of State Security Courts in Turkey. The Court first held in the case of *Incal* in 1998 that the presence of a military judge on the bench of State Security Courts deprived those courts of the independence and impartiality required by Article 6 of the Convention, because the military judges were subject to the military hierarchy. The solution was simple and the law was changed in 1999 to exclude military judges, and eventually the State Security Courts were abolished altogether. Nevertheless, the Court had to deal with several hundred cases of this type.

9. Another group of cases has arisen out of the restitution of property nationalised in Eastern Europe between the end of the Second World War and the fall of the Berlin Wall. Problems originating in denationalisation legislation affected virtually all of the former Eastern Bloc States, but as an illustration, mention may be made of some of the specific difficulties which have arisen in Romania. There are several different types of situation but one of the principal ones is the result of a

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lack of consistency in the approach of the domestic courts. On the one hand, the courts recognised that the original owners had never lost their ownership rights, since the nationalisation was considered to have been unlawful from the beginning. On the other hand, though, they also accepted that third parties who had in the meantime bought the properties from the State in good faith — usually the tenants — also had title. The result was that the courts actually recognised two competing titles in respect of such properties and refused to order the return of the property to the original owners. The Strasbourg Court has held in numerous cases that this constitutes a violation of the right of property guaranteed by Article 1 of Protocol No. 1 to the Convention.

10. Another problem which is also related to the post-Communist transition has arisen in connection with rent control, in particular in Poland, where the law restricted rent increases to such an extent that landlords were not even receiving enough income to allow them to fulfil their contractual obligation to maintain their property in good repair. In the Court's view, this inflexible system imposed a disproportionate burden on landlords, upsetting the fair balance which has to be secured under Article 1 of Protocol No. 1 when different interests are at stake.

11. Other situations which can be mentioned briefly, without going into detail, are: the length of pre-trial detention, especially in Poland and Bulgaria; discrimination between widows and widowers with regard to entitlement to certain allowances in the United Kingdom; the problem of property in northern Cyprus owned by Greek Cypriots; and the practice of «indirect expropriation» in Italy.

B. Endemic situations

12. The second type of situation the Court is confronted with is where the problem is the result of a structural breakdown, usually due to a lack of sufficient resources, or inefficient organisation. Remedial measures in this context are more dependent on budgetary means, one example being widespread poor prison conditions.

This problem is most acute in Russia, Ukraine, Poland and Bulgaria, often as a result of chronic overcrowding and outdated prisons in a poor state of repair. In such cases, the Court often refers to the standards laid down by the Committee for the Prevention of Torture, and it will thus take into account factors such as the notional area per person in a cell, the number of beds available — sometimes there are fewer beds than detainees, forcing them to take turns to sleep — as well as access to natural light, opportunities for exercise and so on.

13. Another example — and this is the second largest group of repetitive cases currently pending before the Court — is non-execution of final binding judgments of national courts. State authorities either delay in complying with judgments against them or simply refuse to do so altogether. This is often when the judgment has ordered payment of a pension or other claim, and the State does not have the funds to comply with it. This is not accepted as a valid excuse by the Strasbourg Court. In spite of the huge number of cases in which the Court has found a violation of Article 6 of the Convention on this ground, hundreds of new cases of the same kind continue to be lodged against Russia, Ukraine and Moldova, and various other countries where many final binding decisions are simply not enforced or executed.

I must also mention, last but not least, the category of «excessive length of proceedings before national courts», which in fact remains the largest group of repetitive cases currently pending before the Court. I will say no more about it, though, as this topic was widely discussed yesterday, on the first day of this round table.

14. How has the Court responded to these different repetitive issues?

III. THE COURT'S APPROACH TO REPETITIVE CASES

15. The Court's way of addressing this problem has been to examine each case on the merits and award compensation where appropriate.

16. Initially, of course, the Court tried to considerably streamline the procedure and simplify the text of the judgment as much as possible. New repetitive applications are grouped together by subject and sent to the responding States with a very short statement of the facts. Recent practice within the Court shows that it is possible to deal with this kind of application on a scale greater than ever before (to give you just two examples, 500 length-of-proceedings cases were communicated in one go to Italy earlier this year, and 200 non-execution cases were sent to Russia). The judgments in such cases tend to be rather succinct. The reasoning is often essentially limited to a finding that the case concerns a situation in which the Court has already found numerous violations in the past and that there is no reason to reach a different conclusion in the present case. Despite this, the preparation of each case may require considerable work, especially if the Court has to assess how much compensation should be awarded.

17. As a second measure, the Court has encouraged the conclusion of friendly settlements between the parties, emphasising the benefits, namely that since in a repetitive case the finding of a violation is virtually inevitable, a settlement will spare the Government the stigma of a high number of violations, while also avoiding unnecessary effort and expense in preparing observations. Moreover, the compensation awarded by the Court in the event of a violation is likely to be similar to that accepted in a settlement. From the applicant's point of view, the main advantage is that compensation will be paid much sooner[1].

18. As a third measure, in the event of an unjustified refusal by the applicant to settle the case, the Government have been encouraged to submit a unilateral declaration acknowledging the existence of a violation, along with an offer to pay compensation. Such declarations have allowed the Court to consider it no longer justified to continue the examination of the application, and to strike it out of its list.

19. Fourthly, in the last few years the Court has developed a practice of delivering «pilot» judgments. I will not say much about that, as this topic has been widely discussed and monitored over recent years[2]. I only wish to point out that the Court has become very aware that its approach to dealing with repetitive cases should focus more on identifying the underlying causes. It has increasingly shown a willingness

[1] The statistics reveal a real progression of the number of cases disposed of through a friendly settlement: in 2007 and 2008 more than 1,000 cases were disposed of following friendly settlements, which is almost half the total number of friendly settlements reached between 2002 and 2008.

[2] See the reports of the Stockholm Colloquy of 9–10 June 2008 and the recent colloquy in Warsaw on 14–15 May 2009.

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to give clear indications under Article 46 of the Convention and/or in the operative part of its judgments as to what steps should be taken by the State to remedy the dysfunction.

Besides, at the beginning of this year the Court adopted a new policy on the order in which it deals with cases, the immediate consequence of which is that any case which is symptomatic of a new systemic problem should now be given high priority. In this way the Court has sought to address the unacceptably long time it takes to deal with applications that concern serious Convention violations, or raise issues of general importance, or are symptomatic of a new systemic or endemic problem. In other words, the aim of this new policy is to shift delays in processing cases away from the more urgent and important cases and over to less serious cases, where a delay is of less consequence for the system as a whole.

20. From these premises, allow me to draw a few preliminary conclusions.

IV. THE NEED FOR A NEW APPROACH

21. The reality is that none of the solutions I have mentioned has really helped to stem the flow of repetitive cases or to solve the underlying problems at the domestic level, although in some friendly settlements Governments do commit themselves to taking appropriate measures of a more general nature, and some pilot judgments have succeeded in solving the problems underlying high numbers of repetitive applications to the Court — the *Broniowski,* and *Hutten-Czapska* and *Lukenda* cases are the best examples.

22. The Court's approach of examining each of these cases on the merits and awarding compensation where appropriate actually has the effect of attracting more and more cases. The more the Court attempts to render individual justice in these cases, the greater the problem of repetitive cases becomes: increased output at Strasbourg seems to act as a magnet for even more repetitive cases. With certain countries, the supply of new cases appears to be practically inexhaustible. Moreover, a large volume of communicated cases followed by judgments ordering compensation to applicants has in practice added to a government's difficulties in dealing with the underlying problem. Besides, repetitive judgments of just one or two pages are sometimes viewed as a parody of the judicial process. In these cases, the Court appears to function more as a low-level small-claims tribunal, which does not contribute to its authority as Europe's final arbiter in the domain of fundamental rights.

23. Pending reform of the Convention, such an approach is nevertheless consistent with the Court's duty to consider all meritorious cases brought before it. To refuse to deal with such cases would be to effectively extinguish the valid claims of many applicants who have been unable to vindicate their Convention rights within the domestic legal order.

24. Although the Court is working ever more productively, the reality is that it is not capable of dealing with such a large number of cases within a reasonable time-frame. The lengthening delays faced by many applicants threaten to render the right of application theoretical and illusory. It is true that with the entry into force of Protocol No. 14 *bis* and the agreement on the provisional application of certain procedures of Protocol No. 14, we have a new tool in the extended competence of the 3-judge committees, which will be able to adopt judgments in the most straightforward well-founded cases. I can assure you that the Court and its Registry will make the most of this new and simpler procedure to work even more efficiently.

In my view, as the number of such repetitive cases increases and budgetary resources dwindle, there is a serious question to answer about whether acting as a small-claims court is the proper role for an international Court to play and if, by doing so, the Court is not being diverted from its more important task of judicial interpretation and application of the Convention.

25. Indeed, so much of the Court's time has been devoted to straightforward cases in recent years, that there is a steady accumulation of substantial cases — those that really matter because they identify new areas of dysfunction in the national systems of human rights protection, or because they raise allegations of the most serious human rights breaches, or because they make it possible for general human rights jurisprudence to evolve and progress. This is, perhaps, the most worrying aspect of the case-load situation and it is made worse by the budgetary pressure exerted by the member Governments of the Council of Europe who, perhaps understandably, insist on visible increases in productivity, *i.e.* in the number of cases disposed of, with the inevitable result that the more complex cases — again, the more important ones — are not always dealt with in good time, contrary to one of the Convention's own requirements, that judicial proceedings be concluded within a reasonable time.

26. As I mentioned before, at the beginning of this year the Court adopted a new policy on the order in which cases are dealt with, the consequence of which was that cases are now dealt with on the basis of their importance. One obvious and expected result of this new policy will be considerable delays in the processing of repetitive cases. Because they now belong to a «non-priority» category of cases, they will no longer be processed until all the other applications, concerning serious Convention violations or raising issues of general importance, have been dealt with.

27. This brings me to a crucial point in the discussion on the reform of the Court, and to the main theme of my intervention this morning, namely, the future of repetitive applications. Rather than keeping such a large number of cases on the Court's list, with no guarantee that the Court will be able to deal with them in the future, at least within a reasonable time, would it not be better if those applications could be transferred away from the Court and back to where they belong, namely in the State concerned and in the Committee of Ministers?

28. But this is not the only reason. The very existence of all these repetitive applications is clear evidence that the States and the Committee of Ministers have not adequately fulfilled their obligations when it comes to executing previous judgments. Should future policy in respect of repetitive applications not, therefore, impress upon the States once and for all that they must effectively honour their obligations? And impress upon the Committee of Ministers that it must effectively supervise the execution of judgements.

29. From my perspective, the answer to that question can only be affirmative.

V. THE PROPOSED NEW POLICY

A. Proposal requiring the amendment of the Convention

30. I do see the future of repetitive cases as a real, effective system in which responsibility for the protection of human rights is shared between national authorities and the Court.

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In this new system, every actor — at the national level (the Contracting States) and the international level (the Court and the Committee of Ministers) — would have a specific role to play:

a) The task of the Court would be, first and foremost, to focus its energies on identifying the structural and systemic causes underlying the different categories of repetitive complaints. It would then choose one or several representative applications from that particular group and notify them to the respondent Government. And then process them, without undue delay, and give clear indications in the operative part of the judgment regarding the steps to be taken by the State to remedy that particular dysfunction. This could mean, for instance, requiring the State to create appropriate remedies at the national level, which would provide potential applicants with an opportunity to have their grievances examined within the national legal system, in conformity with the principle of subsidiarity. The Court should also indicate how to settle cases already pending before it of the same nature.

b) Once the «root causes» and the steps that should be taken by the State to remedy the dysfunction have been clearly identified, the burden should shift from the Court to the respondent State and the Committee of Ministers. All the other repetitive cases should be repatriated from the Court to the national level, where the applicants would have access to the domestic remedy the State was required to create. In addition, the Court would notify those cases to the Committee of Ministers, which would ensure that the State effectively redressed the Convention violation suffered by each individual applicant.

31. In order for this to happen, the Convention needs to be amended, to provide that, once it has identified a dysfunction at the domestic level and indicated to the respondent State what steps should be taken to remedy that particular dysfunction, the Court could reject any other application which raises the same issue. That could involve, of course, an obligation upon the State to reopen that case at the domestic level and consider it again in the light of the judgment which the Court identified as being its precedent. In my view, States should be obliged to introduce such a procedure and to keep the Committee of Ministers informed about its outcome in every individual case referred to them by the Court.

32. Certainly, such a proposal breaks with the rule that every well-founded case should be judicially decided at the international level. Yet, contrary to what might be expected, such a solution — inspired by the principle of subsidiarity — is totally in line with the basic philosophy underlying the Convention whereby the national and international courts share the responsibility for providing effective human rights protection. What is more, it does not water down the right of individual petition since, on the one hand, the «repatriation» of each case is accompanied by an obligation upon the State to reopen the proceedings and, on the other hand, the resolution of each individual case will be supervised by the Committee of Ministers. Admittedly, one could object that the Committee of Ministers has neither the remit nor the resources to function in this way. But if, as I argue, these cases should not be processed by the Court, then it is time to look at how the Committee of Ministers could be given the legal remit to take on this role and the means to do so.

33. This proposal will require legislative reform and, as experience has recently shown, that may take many years. Pending the changes to the Convention, we must also think of a means of introducing a new procedure to deal more effectively with repetitive cases.

B. Action to be taken pending the amendment of the Convention

34. This new procedure would, in fact, build on the ideas developed in the pilot-judgment procedure. It has the distinct advantage that it could almost be implemented without any amendment of the Convention. It has, as a starting point, a Strasbourg Court judgment which identifies a dysfunction at the domestic level and indicates to the respondent State what steps should be taken to remedy that particular dysfunction — I will call it a «leading case». All similar applications related to that «leading case» could be passed directly by the Court to the respondent Government and to the Committee of Ministers, who will be required to see to it that they are settled in accordance with the leading judgment concerned. Pending their response, the Court would adjourn its examination of the applications.

35. In other words, in contrast to the present practice of registering every repetitive application with a view to adjudication at some point in the future, there could be a lighter procedure that would see the Court simply notifying them to the respondent Governments and to the Committee of Ministers. And it would be for them to settle the cases. If the reply is that the State or the Committee of Ministers cannot do anything about them or simply in the event of unreasonable delay in implementing the corresponding leading case, it would be open to the Court to take some of these applications to judgment.

36. In this scenario, the weight of the numbers of repetitive applications notified by the Court to the Committee of Ministers will very clearly convey the scale of the problem and thus the urgency of remedial action by the State concerned.

37. The advantage of this proposal lies in the fact that it can be put into practice immediately. Nevertheless, a more effective, adequately-resourced Committee of Ministers would be important if it is to produce the desired positive results. Indeed, the political weight and expertise of the Committee of Ministers must rise to the vital task the Convention confers upon it, namely to ensure the enforcement of the Court's decisions. I take this opportunity to stress, once again, the need for a more effective — that is to say a more determined — supervision of the execution of judgments. This is, in my opinion, the key to eliminating repetitive cases. There must be a climate of true political accountability of States to their peers when it comes to remedying the causes of repetitive applications.

38. My conviction is that a more effective, adequately-resourced Committee of Ministers would strike a better balance in the Convention mechanism and would be the key to eliminating repetitive cases. There is no doubt that the Court would be in a much better position if its judgments were properly executed by States, under the vigilant supervision of the Committee of Ministers.

39. This is not to deny the importance of individual applications; they must remain at the centre of the Convention system, because it is through them that weaknesses in a State's system of protection are identified. But we must recognise that the role of the Court as an international court is to reinforce human rights protection at the national level, not

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to replace it. The principle of subsidiarity should prevail.

«*Bringing rights home*» could be chosen as a slogan for the important efforts required to make this principle clear and effective.

CONCLUSION

40. Let me finish by repeating the main theme of my address today. One of the guiding notions of the Convention is that of balance: balance between conflicting rights, balance between the individual interest and the general interest. If balance plays an important role in the substantive application of the Convention, it is also a crucial element in the operation of the supervisory mechanism. Here the balance is between national protection and international protection; both components must function effectively if the system is to work. In recent years that balance has been upset to the detriment of the international component: far too many cases come to Strasbourg which should, in accordance with the principle of subsidiarity, have been decided by the domestic authorities.

41. The Court cannot bear a disproportionate burden in enforcing the Convention; that burden has to be shared with the domestic authorities. I can only repeat that the underlying aim of the Convention is to create a situation in which the great majority of Convention complainants do not have to come to Strasbourg, because their complaint has been satisfactorily addressed at national level.

42. It seems to me that the basic philosophy of the future policy in respect of repetitive cases should aim to recover that balance, to restore the national component of the Convention protection to its proper — and, I would say, inevitable — place in the system.

43. The right of individual application implies individual justice for every applicant. But with repetitive cases, this burden becomes impossible to bear. It is clear that certain States repeatedly fail to meet their obligations under the Convention and do not take subsidiarity at all seriously. On this latter point, the Court's recurrent exhortations over the years have failed to make any appreciable impact in some States. Further repetition cannot be expected to make much difference.

The approach to repetitive cases needs to be modified. The focus should be on ensuring that the Contracting States and the Committee of Ministers effectively honour their obligations.

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