

The reform of the supervisory mechanism under the European Convention on Human Rights: Does it really matter?

L.F. Zwaak¹

As contribution to this "SIM Special" on the occasion of Peter Baehr's retirement as director of the Netherlands Institute of Human Rights (SIM) I have chosen to write about the changes which will take place since the entry into force of the 11th Protocol to the European Convention on Human Rights. These changes become effective on 1 November 1998. As to the reform of the supervisory mechanism of the Convention one may question if this really matters? With respect to Peter Baehr's retirement there is no question. It really matters. During his inspiring leadership the Netherlands Institute of Human Rights has become a leading research institute in the field of human rights. On the national and international level widely recognised for its research, its courses on the protection of human rights and its publications. I am convinced that we can do Peter Baehr no greater pleasure than putting all our efforts to keep this level.

Introduction

Since the entry into force of the European Convention the number of Contracting Parties has almost tripled. As a result of this the number of cases pending before the European Commission and the European Court of Human Rights has grown enormously, necessitating reform of the supervisory mechanisms. The purpose of these reforms is to enhance the efficiency of the means of protection, to shorten procedures and to maintain the present high quality of human rights protection. To this end, the Committee of Ministers of the Council of Europe adopted Protocol No. 11 to the Convention in May 1994. The Protocol has now entered into force and on 1 November 1998 the European Convention will be in force according the amendments of the said Protocol.²

The main feature of Protocol No. 11 is that a new single Court will replace the two existing supervisory organs, namely the European Commission on Human Rights and the European Court of Human Rights, and will perform the functions carried out by these organs. Thus an individual will have direct access to this new Court. The Committee of Ministers of the Council of Europe will retain its competence under the former Article 54 (supervision of the judgment of the Court), while its competence under former Article 32 in respect of individual applications will be abolished.³

¹ Lecturer International Protection of Human Rights, Utrecht University; Researcher Netherlands Institute of Human Rights (SIM), Utrecht.

² See in more detail Explanatory Report on Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 155), 1994, Council of Europe Publishing; Yvonne Klerk, "Protocol No. 11 to the European Convention for Human Rights: A Drastic Revision of the Supervisory Mechanism under the ECHR", NQHR, Vol 14, No. 1 (1996), pp. 35-46; A. Drzemczewski, "A Major Overhaul of the European Convention Control Mechanism: Protocol No. 11", *Collected Courses of the Academy of European Law; 1995 The Protection of Human Rights in Europe*, The Hague 1997, pp. 125-244.

³ Hereafter reference will be made to the provisions, as amended by Protocol No. 11. If reference is made to the existing provision this will be indicated with the addition "(old)".

The jurisdiction of the new Court will become mandatory and will extend to all matters concerning the interpretation and application of the Convention including inter-state cases as well as individual applications. In addition, the Court will, as at present, be able to give advisory opinions when so requested by the Committee of Ministers. Article 56 on the territorial application of the Convention repeats the text of Article 63 (old). This implicates that the contracting Parties have to make separate declarations in respect of territories for whose international relations they are responsible. In this respect the jurisdiction of the Court is not mandatory.

Individual applications will be examined by a Committee that may exercise its powers unanimously declare an application inadmissible or strike it from its list of cases if such a decision can be taken without further examination. If a Committee does not find an application inadmissible, the case will be transferred to a Chamber, which will decide both on the admissibility as well as on the merits of the case. Admissibility of inter-State applications will be determined by a Chamber, rather than by a Committee. In exceptional cases, the Court may decide that a decision on admissibility should not be taken as a separate question, for example where a State accepts that a particular application is admissible.

On entry-into-force of the Protocol, the office of the former Court and Commission, as well as the Registrar and the Deputy Registrar, will end. Nevertheless, during the transition period, the Commission will continue its work for an additional year in order to deal with applications pending before them at the time the Protocol becomes effective. In instances when the Commission does not declare an application inadmissible, the Court will deal further with the application.

Applications already declared admissible prior to the protocol's entry-into-force, however, will be finalised according to the old system. Any application not disposed of during the transitional period will be examined by the Court albeit only as to the merits. In regard to those cases for which the Commission has adopted a report during the twelve months following the entry into force of Protocol No. 11, the procedure for referring cases to the Court in Article 48 (old) (and Protocol No. 9, where applicable) shall apply. Similarly, cases not referred to the new Court shall be dealt by the Committee of Ministers in accordance with Article 32 (old) of the Convention. The current European Court of Human Rights will cease to function at the date of entry-into-force of Protocol No. 11. All cases pending before the former Court are to be transmitted to the Grand Chamber of the new Court.

The New Single Court

The Court will function on a permanent basis and will consist of a number of judges equal to that of the State Parties to the Convention.⁴ According to Article 23(1) judges will be elected for a period of six years, and may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years. The judges whose term of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election. In Article 23(6) it has been

⁴ Article 20.

laid down that the term of office of the judges shall expire when they reach the age of 70. And as said before the Court shall function on a permanent basis.⁵ The judges will have a full-time office and will have their home basis in Strasbourg. Those members of the Commission which have been elected as judges to the new Court will have to finish their work as Commissioner, while at the same time they will function as judge in the new Court. The former requirement that no two judges may have the same nationality no longer applies under Protocol No. 11.⁶

When deciding cases the Court will sit in Committees, Chambers and in a Grand Chamber. The Committees will consist of three judges, Chambers of seven judges and the Grand Chamber of seventeen judges. In plenary the Court will only deal with administrative matters, like the election of the Presidents of the Chambers, the adoption of the Rules of Procedure, *etc.*⁷

The Court will set up the Chambers which are constituted for a fixed period of time and the Chambers shall establish Committees, for a fixed period of time as well. The Grand Chamber shall include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice (who shall sit in the capacity of judge). To make sure that the Grand Chamber looks into the matter afresh when it examines a case referred to it under Article 43 (Referral to the Grand Chamber), judges from the Chamber which made the initial judgment are excluded, with the exception of the President of the Chamber and the judge who sat in respect of the State concerned.

The Handling of Cases by the Court

The Court will receive applications from:

- a. a State Party in the case of interstate applications (Article 33) or
- b. any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of the Convention by one of the State Parties (Article 34).

Both procedures are now mandatory and the same is true with respect to the jurisdiction of the Court. The registry of the Court will receive the applications and will establish the necessary contacts with the applicants, if necessary it will request for further information. Subsequently, the complaint will be registered by a Chamber of the Court and assigned to a judge rapporteur. The criteria, laid down in Article 35, governing the admissibility of applications remain unchanged. The same is, partly, true with respect to the procedure after the case has been declared admissible. At that stage the case may end in the form of a friendly settlement or in a judgment on the merits by the Court. At this stage the Committee of Ministers does not play any role anymore.

The purpose of Protocol No. 11 is to streamline procedures rather than to change substantive matters. Thus the Court will exercise the filter function, as presently performed by the Commission. Subject to powers specifically attributed to the Committees and the Grand

⁵ Article 19.

⁶ For further information see H.C. Krüger, "Selecting judges for the new European Court of Human Rights", HRLJ, Vol. 17 (1996), pp. 401-404.

⁷ Article 26.

Chamber, Chambers will have inherent competence to examine the admissibility and the merits of all individual and interstate applications. The Committees only play a role at the admissibility stage of the proceedings dealing with cases brought by individuals. In accordance with Article 28 a Committee may, by unanimous vote, declare an application inadmissible or strike a case off its list of cases where such a decision can be taken without further examination. The decision shall be final. According to Article 29(2) a Chamber will decide on the admissibility and the merits of inter-state complaints.

When the judge rapporteur considers that an application raises a question of principle and is not inadmissible or when the Committee is not unanimous in rejecting the complaint a Chamber will decide on the admissibility (Article 29(1)). The merits of an application will be examined by a Chamber and, exceptionally, by the Grand Chamber (Article 29(1)). The judge rapporteur will prepare the case file and establish the contact with the parties. The parties will continue to present their submissions by means of a written procedure. The oral procedure will consist of a hearing at which the applicant, or a State Party in an interstate case, and the respondent State will have the right to speak. The Chamber will also place itself at the disposal of the parties with a view to reach a friendly settlement. If no settlement can be reached, the Chamber will deliver its judgment. In cases with serious implications affecting the interpretation of the Convention or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, a Chamber will be able to relinquish jurisdiction *proprio motu* in favour of the Grand Chamber at any time, as long as it has not yet rendered judgment, unless one of the parties to the case objects.⁸ Once a judgment has been rendered by a Chamber, it will become final when the parties declare that they will not request referral to the Grand Chamber, or three months after the date of judgment if no referral to the Grand Chamber has been made within that time. Only the parties (*i.e.* not the Chamber) may request that the case be referred to the Grand Chamber for re-hearing. Should one of the parties refer a case to the Grand Chamber, a panel of five from that body will determine whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or if the case raises an issue of general importance. If so, the panel will accept the request for a referral.⁹ The purpose of applying this standard is to ensure the quality and consistency of the Court's case-law by allowing for a re-examination of the most important cases if the above mentioned conditions are met. All judgments will be final and binding when there is no further possibility of a referral to the Grand Chamber because the three months time-limit has elapsed, or if the parties to a case have indicated that they do not want a re-hearing, or when the panel of five judges of the Grand Chamber have considered that the Grand Chamber should not look into the matter. The Committee of Ministers will supervise the execution of the judgment. Just as under the current system, a case may be terminated by a friendly settlement between the parties at any stage of the proceedings.

The Protocol also provides for the participation of third parties in proceedings before the Court. This third party intervention can be exercised by a contracting Party one of whose nationals is the applicant. The President of the Court may also invite any contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written

⁸ Article 30.

⁹ Article 43.

comments or take part in the hearings.¹⁰ Under the existing system third party intervention was possible in the proceedings before the Court under Rule 37(1) of the Rules of the Court.

The Articles 47-49 on the Court's competence to give advisory opinions are merely a reproduction of the text of the Second Protocol to the existing Convention with one exception that the decisions of the Committee of Ministers to request an advisory opinion requires a majority vote of the representatives entitled to sit on the Committee, instead of a two-thirds majority. It is not likely that the Court will receive such requests in the view of the text of Article 47(2):

“Such opinions shall not deal with any question relating to the content and scope of the rights and freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention”.

The advisory jurisdiction of a court is of great importance for the uniform interpretation and the development of the law. Regrettably, also in the amended Convention the advisory jurisdiction of the Court will be no more than a “dead letter”.

The Transitional Provisions

The Articles 4 and 5 of Protocol No. 11 provides for the transition of the existing system to the new system. According to Article 4 the election of new judges and any further steps to establish a new Court may take place immediately after the last ratification. At present (March 1998), not all the contracting Parties have already nominated their candidates. The picture of the newly elected Court, so far, shows that many old members will not return to Strasbourg. In some cases this is due to the new age limit of 70, but in other cases is not clear why contracting Parties have decided not to nominate, as their first choice, a sitting judge or the member of the Commission.

Article 5 deals with the transitional provisions for applications that have been lodged and which are still pending. The structure is rather incomprehensive and quite complicated. The terms of office of the judges, members of the Commission, Registrar and Deputy Registrar will expire at the date of entry into force of Protocol No. 11. The Commission will continue to exist for a period of one year thereafter to settle applications which have been declared admissible at the date of entry into force of this Protocol. These applications will be finalised by the Commission under the old system. Applications which have not been declared admissible at the time of the Protocol's entry into force, will automatically be dealt with by the new Court. The same is true for applications which have not been completed during the transitional period of one year.

With respect to applications in which the Commission, after the entry into force of Protocol No. 11, has adopted a report in accordance with Article 31 (old), the report shall be transmitted to the parties, who shall not be at liberty to publish it. In such cases Article 48 (old) and where applicable Protocol No. 9 will apply. Thus in these instances the Commission or a State Party or - where Protocol No. 9 is applicable - the individual may refer a case to the Court. However, a panel of five judges of the Grand Chamber shall determine whether one of the Chambers or the

¹⁰ Article 36.

Grand Chamber shall decide the case. Cases not referred to the Court shall be dealt with by the Committee of Ministers acting in accordance with Article 32 (old).

The former Court will cease to function at the date of entry into force of Protocol No. 11. Cases pending before the Court at the date of entry-into-force of Protocol No. 11 will be transmitted to the Grand Chamber of the new Court. Lastly, cases pending before the Committee of Ministers which have not been decided at the date of entry into force shall be completed by the Committee of Ministers acting in accordance with Article 32 (old), until such time as they are completed.

As stated in Article 5(3) of Protocol No. 11 also during a year after entry-into-force the Commission shall continue its work with respect to applications which have been declared admissible.

Back to the Future?

Since 1982, several proposals have been forwarded concerning the possibility of “merging” Commission and Court into a single body. Apart from the idea of “merging” there was in 1990 a Dutch-Swedish initiative where the idea was launched that the opinions of the Commission under Article 31 (old) – in so far as individual applications were concerned – would have been transformed into legally binding decisions. Thus, there should be a two-tier judicial system, where the Commission would operate as a court of first instance from which individual applicants and States would be granted a right of appeal to the Court. Also in this proposal there was no role for the Committee of Ministers under Article 32 (old) in respect of individual applications.¹¹ No consensus, however, could be reached as to such a proposal. Having tried unsuccessfully to reach an agreement on the proposals of a reform, the different proposals were referred to the Committee of Ministers in order to obtain a clear mandate for the further work on the reform. At the Vienna Summit of October 1993, the Council of Europe’s Heads of State and Government adopted the “Vienna Declaration” of 9 October 1993, which finally resulted in the reform enshrined in Protocol No. 11.

One of the great advantages of the reform of the control mechanism under the Convention is undoubtedly the direct access of the individual to the Court. This idea is not new, already in December 1947 a number of prominent European politicians and other groups formed the ‘International Committee of the Movements for European Unity’, which organised in May 1948 the ‘Congress of Europe’ in The Hague. In a number of resolutions of this Congress there was a call for the establishment of a political and economic union. There should be a Charter of Human Rights and a Court of Justice with adequate sanctions for the implementation of this Charter should be created. During its first session in August 1949 the Consultative Assembly (later the Parliamentary Assembly) discussed this matter and charged its Committee on Legal and Administrative Questions with a consideration of the collective guarantee of human rights. This Committee studied a revised proposal for the establishment of ‘an organisation within the Council of Europe to ensure a collective guarantee of human rights’, and before the end of the same session it presented its conclusions in the famous Teitgen Report of 8 September 1949, which was adopted by the Assembly in the same session. The Committee proposed that a list of ten rights from the Universal Declaration should be the object of a collective guarantee and that a European Commission of

¹¹ For further details see Council of Europe document “Reform of the control system of the European Convention on Human Rights”, HRLJ, Vol. 14, 1993, pp. 31-48.

Human Rights and a European Court of Justice should be established. The former was to hear complaints of alleged violations and to attempt a friendly settlement, the latter to take decisions, if necessary, as to whether a violation has occurred. After further consultation of the Assembly, in the summer of that year the Convention was signed in Rome on 4 November 1950. The rights guaranteed are substantially the same as those proposed by the Assembly in the previous year and the organs of control were a Commission and a Court of Human Rights. But the supervision machinery was less strong than the original proposal: the rights of individuals to lodge complaints with the Commission and the jurisdiction of the Court were made optional, and the Committee of Ministers was brought in as the final arbiter in cases which were not referred to the Court of Human Rights. It took thus almost half a century to realise the ideals of the 'Congress of Europe'.

The Commission itself has already on several occasions expressed its support for a merger. As early as 1983, in a memorandum on the then draft Protocol No. 8 (concerning the streamlining of the procedure before the Commission), the Commission commented that "in its opinion, a reform of the structure of the Convention machinery should lead, in the long term, to a merger of the two organs. Establishing one European Court to which applicants would have direct access". Subsequently, the Commission confirmed its support on the occasion of the Human Rights Ministerial Conference and its Opinion on the draft Protocol No. 9 (concerning a right for individual applicants to refer admitted cases to the Court).¹²

Does it Really Matter?

It has been argued that under the old system a lot of the work done by the Court was more or less a duplications of the work already done by the Commission. To a certain extent this is true. However, was it not the Court itself which held concerning questions of admissibility which were already decided by the Commission that:

"Once a case is duly referred to it, (...) the Court is endowed with full jurisdiction and may thus take cognisance of all questions of fact and law which may arise in the course of the consideration of the case. It is therefore impossible to see how questions concerning the interpretation and application of Article 26 raised before the Court during the hearing of the case should fall outside its jurisdiction".¹³

In several other cases the Court followed this line of reasoning and also the Commission has accepted the Court's case-law in this respect. However, it has been argued that the Court has given a too wide interpretation of its scope of jurisdiction.¹⁴ It is submitted here that the Court would seem to have disregarded the fact that Article 45 (concerning the Court's jurisdiction) cannot be viewed in isolation from the other provisions concerning the supervisory procedure provided for in the European Convention.¹⁵ Articles 24 to 27 are especially relevant in this context. In particular from Article 27 it seems to follow that the Commission has exclusive

¹² *Idem.*

¹³ Judgment of 18 June 1971, *De Wilde, Ooms and Versyp* ("Vagrancy" cases), A. 12, pp. 29-30.

¹⁴ P. van Dijk, G.J.H. van Hoof *et al.*, *Theory and Practice of the European Convention*, Third revised edition, 1998, pp. 211-213.

¹⁵ Art. 31(1) of the Vienna Treaty on the Law of Treaties provides as a general rule of interpretation: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. According to para. 2, 'context' must be understood to include also the text of the treaty itself.

competence with respect to questions of admissibility.¹⁶ This results from the fact that the drafters of the European Convention did not aim at a hierarchically organised division of competence between the two organs, but juxtaposed the Commission and the Court, each of them with its own duties within the supervisory procedure, without one organ being subordinate to the other.¹⁷ The Court, too, in its judgment held that decisions of the Commission 'to reject applications which it considers to be inadmissible are without appeal as are, moreover, also those by which applications are accepted'.¹⁸ Thus, in this respect the duplication of work is accountable to the Court's interpretation of its competence. With respect to the examination on the merits of an application, there can hardly be said that there is an overlap between the activities of the Commission and those of the Court, because according to constant case-law the Court has observed that the establishment and verification of the facts are primarily a matter for the Commission. While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area.¹⁹

Several reasons have been given why a reform of the supervisory mechanism was necessary. Some of these reasons are not very convincing and it may also be questioned why the drafting Committee of Protocol No. 11 was given a rather narrow mandate. Wasn't it the right moment to take into consideration other shortcomings of the Convention system? The right of States to derogate from the obligations of the Convention or to make reservations have not changed. While the supervision with respect to derogations and reservations can hardly be called effective, since there is no adequate remedy to respond immediately once a derogation or reservation has been made. The supervisory mechanism only comes into play once a complaint in this respect has been lodged.

In my opinion, the overlap of activities is not a very convincing reason to opt for a single Court. Furthermore, it has to be regretted that the proponents of the merger did not give any argumentation to abandon the advantage of the existing system that important cases would be analysed twice. They also neglected the fact that a quasi judicial body, as the Commission is better equipped to play a decisive role in conciliation by reaching a friendly settlement between the parties. There are other reasons to regret the abolishment of the Commission. The drafting of a new Protocol amending the control mechanism of the Convention was a unique opportunity to revise the role of the Commission. The drafters of the Protocol could have looked at the competence and tasks of the Inter-American Commission on Human Rights. This Commission, can initiate for example. on its own motion fact finding missions, when there are serious indications of gross and systematic violations of human rights in a certain country. It does not have to wait until a complaint in that respect has been lodged. It cannot longer be hold that

¹⁶See also the joint separate opinion of judges Ross and Sigurjonsson in the case of *De Wilde, Ooms and Versyp* ('Vagrancy' Cases), judgment of 18 June 1971, A.12, p. 50; and the separate opinions of judge Bilge (*ibidem*, p. 54) and of judge Wold (*ibidem*, pp. 55-58).

¹⁷Thus also the Commission itself by the words of its then President in the case of *De Wilde, Ooms and Versyp* ('Vagrancy' Cases), B.10 (1971), p. 209.

¹⁸Judgment of 18 June 1971, *De Wilde, Ooms and Versyp* ('Vagrancy' Cases), A.12, p. 30.

¹⁹ See e.g. judgment of 25 September 1997, *Aydin*, (not yet published), § 70.

Europe does not need such an active kind of supervision.²⁰ Seemingly, there was no political will of the Contracting Parties to amend the supervisory mechanism of the Convention in this direction. Still, it can be said that the enlargement of the Council of Europe with “new democracies”, the recent ratification of the Convention by the Russian Federation and the existing human rights situation in Turkey are only some indicators that a more active role of a supervisory body would be desirable. A revision of the supervisory mechanism in this direction is, however, further away than ever. Firstly, because the Commission has ceased to exist and that was the body which fitted the best for this kind of activities. Secondly, these kind of reforms can only be reached by amending the Convention. For such an undertaking the acceptance by all the Contracting Parties is needed, and hence give rise to no doubt lengthy intergovernmental negotiations.

During the drafting of Protocol No. 11 the need for a political element in the control system has been put forward. Especially with respect to inter-State complaints it was argued that such an element had certain advantages. However, the advocates of a political element attributed a role in this respect to the Committee of Ministers and did not put forward any argument in favour of the Commission. The role of the Committee of Ministers under the supervisory mechanism of the Convention has been criticised on several occasions by a number of prominent scholars.²¹ It might be seen as one of the advantages of the present reform that it removes one of the anomalies in the design of the control mechanism, which had its reasons at the time of its creation but which is no longer justified in the present situation. At least insofar as individual applications are concerned there is under the present situation no role for the Committee of Ministers in the decision-making process under the Convention.

In my opinion, the criticism towards the role assigned to the Committee of Ministers in the past should, however, not be based on its political character. More important was the fact that it is a body which does not meet even the most rudimentary criteria of a fair hearing: the individual was totally excluded from the Committee’s consideration of a case and the consideration did not take place before an independent and impartial tribunal. These prerequisites of a fair trial should be met, before a body, within the control mechanism of the Convention would be attributed with functions of a political nature. The Inter-American Commission on Human Rights plays a role which to a certain extent is comparable to that of the Committee of Ministers of the Council of Europe. It has three categories of powers. One with respect to all member States of the Organization of American States; another *vis-à-vis* the State Parties to the American Convention on Human Rights and a third with regard to the OAS member States not Parties to the American Convention. Thus, apart from its quasi judicial character it also acts as political body, while the Inter-American Commission on Human Rights fully meets the requirements of independence. In

²⁰ See M. Kamminga, “Is the ECHR equipped to cope with gross and systematic violations?”, NQHR, Vol. 12 (1994), pp. 153-164.

²¹ See e.g. H. Golsong, “Die eigenartige Rolle des Ministerkomitees des Europa-rates als eine der beiden Endentscheidungsinstanzen im Rahmen der MRK”, EuGRZ (1975), pp. 448-449; P. Leuprecht, “*The Protection of Human Rights by Political Bodies - The Example of the Committee of Ministers of the Council of Europe*”, *Progress in the Sprit of Human Rights* in: M. Nowak, Steuer, Tretter (eds) Engel Verlag (1988), p. 95 (103-104); A. Drzemczewski, “A ‘non-decision’ of the Committee of Ministers under Article 32(1) of the European Convention on Human Rights: The East African Asian Cases”, *Modern Law Review* (1978), pp. 337-342.

this respect, the drafters of Protocol No. 11 completely neglected the role which the Inter-American Commission on Human Rights has played and plays in enforcing respect for human rights and fundamental freedoms in the American continent.

It was common ground that the existing machinery of the Convention is overburdened with work. Several factors have attributed to the overwhelming workload of the supervisory organs in Strasbourg. The length of proceedings under the Convention, the fact that the Court and Commission are part-time bodies, the enlargement of the Council of Europe, the wide acceptance of the right of individual petition, the acceptance of the jurisdiction of the Court, and above all the fact that the complaints lodged are more complex than at the start of the control mechanism. All these made it necessary to review the work capacity of the Strasbourg organs. Although there was a slight decrease of the backlog of cases at the level of the Commission because of a large increase of meetings of this body, since the entry into force of Protocol No. 8 and other procedural innovations, and although the meetings of the Court have increased significantly, it was clear that far-reaching steps were needed, in order to realise a significant reduction of the length of proceedings and the backlog of cases. However, it is doubtful if the present reform will be a solution to this problem. First of all, since no transitional time period has been foreseen for the existing Court, the new Court will receive at the date of entry into force of Protocol No. 11 as a “dowry” all the cases which could not be completed by the old Court. Secondly, it cannot be foreseen which dimensions the workload of the Court will take, since also the Russian Federation has opened for everyone within its jurisdiction the possibility of an individual complaint. Of course one might argue that the new Court will sit permanently and this would overcome the workload difficulties currently faced by the members of the Court and Commission. However, one should not underestimate that the new Court has in each and every case to determine questions of admissibility and fact, to consider possibilities for a friendly settlement and to take a decision on the merits. All these functions are currently performed by the Commission, Court and Committee of Ministers. Finally, it should be noted that for several reasons the new Court will consist of many inexperienced new members, who all have to find their way in a rather complex system and who have to acquire a thorough knowledge of the existing case-law of the Court and Commission in order to keep and to improve further the level of protection of human rights and fundamental freedoms in Europe.

It does matter!

The idea launched at the ‘Congress of Europe’ in 1948 of creating a Court of Justice dealing with applications on alleged violations of human rights lodged by individual with a direct access to that body has been achieved. Maybe the advocates, of such a system at that time did not realise that such a body on its own cannot realise the common heritage of political traditions, ideals, freedom and the rule of law. To take steps for the collective enforcement of the rights and freedoms enshrined in the European Convention a more drastic reform of the control mechanism is needed, than that foreseen in Protocol No. 11. It took almost 50 years, before the first substantial reform of the present system took place. It really matters if we have to wait another 50 years for a system, which effectively will be able to deal with questions like gross and systematic violations Furthermore, such a system should function as an “early warning” system and where necessary it should have the ability to offer its good offices in conflict prevention. It is too ambiguous to expect these results all at once. On the other hand, 1998, the year of the celebration of fifty years of the Universal Declaration, should have been a real starting point for

an effective mechanism of enforcement and control. In 1948, the initiative in Europe, to achieve a mechanism under which individuals could lodge a complaint at the international level, was a great step. It was an example, which was followed, some decades later, by the United Nations. The European Convention on Human Rights has been a model for other individual petition systems. If the present reform of the European Convention will be again a model for other systems it will be a great achievement with regard to those systems. It is, however, too little to keep in scope the standard of human rights protection already achieved in Europe.