Legitimacy of European Court of Human Rights Judgments: Procedural aspects

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Chapter 27
LEGITIMACY OF EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS: PROCEDURAL ASPECTS

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1. INTRODUCTION

The legitimacy of judgments – by which we also mean the acceptance thereof by the parties involved – depends to a great extent on the structure and operation of the procedure that has resulted in these judgments. Important procedural defects may impair this legitimacy. On the other hand, a procedure that includes many safeguards and that is completed within a reasonable period may contribute essentially to the acceptance (and hence legitimacy) of judgments, even in the eyes of unsuccessful parties.[1] It is safe to assume that the same applies to the judgments of the European Court of Human Rights (ECtHR, or 'the Court').

This is why this chapter will focus on the quality of the procedure before the Court. In this context, the term 'procedure' is used in a broad sense, it concerns the strict procedural position of the relevant parties as well as the grounds and consistency of the judgments. This contribution does not aim to present a detailed analysis of the foregoing, but rather a relatively concise and thought-provoking statement for the purpose of encouraging the debate about the quality of the present procedure. In our opinion, this is badly needed because the problems affecting the Court's procedure may well give rise to a legitimacy crisis.

We will successively deal with the present Court procedure and the future prospects (§ 2), the problems (§ 3) and – finally – the possibilities of preventing a legitimacy crisis (§ 4). Because of the nature of this contribution, we have refrained from including extensive references to sources.

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[1] N. Luhmann, *Legitimation durch Verfahren* [Legitimacy by Procedure] (Darmstadt [etc.], Luchterhand 1978).

N. Huls, M. Adams and J. Bomhoff (eds.), The Legitimacy of Highest Courts' Rulings

2. THE PRESENT COURT PROCEDURE AND FUTURE PROSPECTS

2.1 Main features[2]

By far the most important Court procedure concerns the right of individual recourse. Under Article 34 of the ECHR, the Court may receive complaints against a State Party from any person, non-governmental organization or group of individuals after all available effective national remedies have been exhausted. Until 1 November 1998 (the date of entry into force of the Eleventh Protocol), this supervision was exercised by the European Commission on Human Rights (the EComHR or 'the Commission') and the Court jointly.[3] The Commission acted as a preparatory body for the Court; it rendered an opinion on the admissibility of the application and if it found it to be admissible, it rendered a provisional opinion on the question whether any right had been violated. The Commission was abolished by the Eleventh Protocol, as it was hoped that this and other procedural adjustments would allow the ever-increasing caseload to be handled more effectively. The new Court has since performed the tasks of the old Commission. It functions on a permanent basis (Article 19 of the ECHR). The jurisdiction of the Court is accepted *de jure* by all States Parties and extends, pursuant to Article 32 of the ECHR, to all matters concerning the interpretation and application of the Convention. Just like before the entry into force of the Eleventh Protocol, the Committee of Ministers exercises supervision over the execution of the Court's *final* judgments and over compliance with the ECHR in general (Article 46 of the ECHR).

The Court consists of one judge for each of the States Parties (Article 20 of the ECHR). Judges are elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates nominated by the relevant state (Article 22 of the ECHR). As a general rule, the judges are elected for a period of six years and may be re-elected (Article 23(1) of the ECHR). Plenary meetings of the Court, which are few, concern administrative matters, such as electing the President or the Presidents of the Chambers and adopting the Rules of the Court (Article 26 of the ECHR). To consider cases brought before it, the Courts sits in Committees of three judges, in Chambers of seven judges and a Grand Chamber of 17 judges (Article 27 of the ECHR). There are five Chambers, each of which is responsible for applications from a specific group of Contracting States. The registry of the Court plays an important role. The Registrar assists the Court in preparing judgments, is responsible for the organization of the registry, manages the files and handles the communication between applicants and the Court (see Article 25 of the ECHR).

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[2] See also the contribution to this book by L. Garlicki, 'Judicial Deliberations: The Strasbourg Perspective'. The subject was treated in detail by P. Leach, *Taking a Case to the European Court of Human Rights* (Oxford, Oxford University Press 2005).

[3] Cases that were not referred to the Court after having been handled by the Commission were disposed of by the Committee of Ministers by means of a binding decision on the question whether or not the ECHR had been violated. The Committee lost this task after the entry into force of the Eleventh Protocol.

2.2 Procedure

The procedure for hearing complaints has been laid down in Article 28 et seq. of the ECHR and the Rules of the Court.[4] The applicant and the respondent State have the same procedural possibilities in the context of this procedure. Usually, a complaint is first handled by a Committee, which may, by a unanimous vote, decide to declare an application inadmissible (which also involves an examination on the merits of the application in terms of apparent groundlessness (manifestly ill-foundedness), a criterion on the basis of which many applications are declared inadmissible), which brings the proceedings to a close. If this decision is not taken, the individual application is brought before a Chamber which includes a judge sitting in respect of the State Party concerned. If the Chamber is of the opinion that the application is admissible and if no friendly (amicable) settlement is reached between the parties, the Court renders a judgment on the merits. Incidentally, in order to promote the efficient dispensation of justice, the Court is deciding, more and more frequently, on the admissibility and merits at the same time. The Chamber may also relinquish jurisdiction in favour of the Grand Chamber when it faces a 'serious question' affecting the interpretation of the Convention or if the Chamber sees fit to deviate from a judgment previously delivered. Third parties (States Parties and other interested parties who are not applicants) may be permitted to take part in hearings and submit their views on the matters raised in the application to the Court (Article 36 of the ECHR). There is also a type of internal appeal procedure with respect to judgments of the Chambers. At the request of the parties, the Grand Chamber may rehear a case decided by a Chamber if a panel of judges of the Grand Chamber is of the opinion that the case raises a serious question of interpretation or a serious issue of general importance. For this reason, a judgment of a Chamber does not become final until after a period of three months has expired. Judges may add 'dissenting opinions' or 'concurring opinions' to a judgment, in which they state that they disagree with the majority opinion, and usually why, or express their own special reasons for agreeing with the majority. The Court's final judgment (either a Chamber or the Grand Chamber) is binding. However, the Court determines only whether the ECHR has been violated, it is not competent to annul national government acts (orders, legislation, etc.) that have caused this violation or to declare them non-binding. Judgments of the Court are of a declaratory nature and impose an obligation on the states to effect *restitutio in integrum* (restoration to the original position) and to prevent future violations. This may involve measures with respect to the specific case but also amending legislation or existing practices. Unlike in the past, the Court now indicates in certain cases what steps a state found to be at fault may best take to redress the consequences of the relevant violation of the Convention, for example, the restitution of land,[5] the release of a prisoner[6] or the reopening of

[4] See Leach, n. 2, and the Court's website, which includes a great deal of practical information for applicants or potential applicants: <www.echr.coe.int>.

[5] See, for example, ECtHR 30 May 2000, *Belvedère Alberghiera S.r.l.* v. *Italy*.

[6] ECtHR 8 April 2004, *Assanidze* v. *Georgia*.

national criminal proceedings.[7] According to the settled case law of the Court, the State Party against which judgment is given is free, by virtue of Article 46 of the ECHR, to choose the means by which it will abide by the Court's judgment, even though the Court occasionally points out that this power is quite restricted.[8] In these cases, there is in fact only one way in which the consequences of the violation can be repaired. In situations where a large number of cases are pending before the Court in connection with a challenged State practice, the Court increasingly renders 'pilot judgments.' In this kind of judgment, the Court decides on one exemplary case and issues guidelines about how to resolve it. In this way the relevant state is invited to resolve the cases comparable to the pilot case at a national level in accordance with the pilot judgment. This eases the burden on the Court. It further reduces its workload by resolving cases pending before it that are comparable to the pilot case simply by making a reference to the pilot judgment.[9]

Further, the Court may award just compensation to the injured party under Article 41 of the ECHR. The Committee of Ministers exercises supervision over the execution of the judgments.[10] As far as that issue is concerned, the Court takes the view that it does not have to play a role as yet. To prevent irreparable damage or loss pending the procedure, the Court may award interim relief, which may under specific circumstances be binding, according to the relevant case law.[11]

2.3 The future of the Court

Since the newly-restructured Court started its work on 1 November 1998, the number of applications filed has steadily grown, partly as a result of the increase in the number of States Parties. Despite the changes pursuant to the Eleventh Protocol, this has resulted in an even greater backlog in pending cases and even longer periods for processing the applications – cases often take more than two to three years to be processed. This is a major problem, particularly because the Court always corrects national courts if they exceed the reasonable period of Article 6 of the ECHR in a procedure. To give an idea of the situation; in 2003, a total of 17,950 cases were disposed of – which represents an amazing achievement – but in that same year, nearly 38,000 new applications were registered. In 2006, nearly 30,000

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[7] ECtHR 2 June 2005, *Claes and others* v. *Belgium*.

[8] *Assanidze* v. *Georgia*, n. 6: according to the Court, the violation of Art. 5 of the ECHR leaves the State no other option but to release the applicant; ECtHR 16 June 2005, *Sisojeva and others* v. *Latvia* (the violation of Art. 8 of the ECHR leaves the State no other option but to issue a permanent residence permit).

[9] See, for example, ECtHR 22 June 2004, *Broniowski* v. *Poland*.

[10] Cf. E. Bates, 'Supervising the execution of judgments delivered by the ECtHR: the challenges facing the Committee of Ministers', in T. Christou & J.P. Raymond, eds, *European Court of Human Rights. Remedies and execution of judgments* (London, British Institute of International and Comparative Law 2005) p. 49; T. Barkhuysen, M.L. van Emmerik and P.H. van Kempen, eds, *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (The Hague, Martinus Nijhoff Publishers 1999).

[11] ECtHR 4 February 2005, *Mamatkulov and others* v. *Turkey*.

cases were disposed of – once again a huge increase – but nearly 40,000 new cases were registered. This brought the total number of cases still pending in 2006 to 90,000.[12] This means that despite the faster rate at which cases were processed, the Court's backlog actually rose considerably. In addition, the question arises whether the rate at which cases are being processed at present may (ultimately) be at the expense of carefulness (see also § 3). The problem may be even greater, because it is safe to assume that the annual number of *new* applications will rise even further as the citizens of the new States Parties are becoming increasingly aware of the Court's existence.

The Court and the States Parties recognize the seriousness of the situation, as a result of which they are seriously trying to find ways to come to grips with these problems. Apart from a – justified – appeal for an increased budget for the purpose of expanding the Court's support staff, a significant change in the supervisory mechanism is not ruled out either. One of the solutions considered is an amendment to the Convention that would enable the Court to select the applications it wishes to hear itself (a 'pick-and-choose', or leave system), *inter alia*, on the basis of the question whether the case presents a serious violation of human rights and/or an important question of law. This would impair the Court's legal protection function, however, and it would also send a wrong signal to the States Parties, which explains why there is a fair amount of opposition to this solution. Advocates of this kind of 'leave system' point out that, ultimately, this is the only way to prevent the Court's downfall.[13] They also emphasize their preference for the development of the Court into a constitutional court, with a focus on legal development and less of a focus on offering legal protection in individual cases.

These concerns resulted in the signing of the Fourteenth Protocol in May 2004. This Protocol has three purposes: (a) preventing violations and, to this end, improving human rights protection at the national level; (b) streamlining the procedure in Strasbourg both in terms of 'filtering' new applications and in terms of the further processing of the applications that pass this filter ,and (c) improving and accelerating the execution of ECtHR judgments. This Fourteenth Protocol represents an attempt to preserve the Court's individual legal protection function as much as possible, but it does empower the Court to declare cases in which the applicant does not suffer a 'substantial' disadvantage inadmissible.[14] There is widespread doubt, however – including within the Court – whether the entry into force of the Fourteenth Protocol will actually free the Court from the stranglehold of too heavy a caseload. Meanwhile many persist in their call for a 'leave system' – i.e., a 'pick-and-choose' system – which would allow the Court to reject cases in which the

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[12] See the Survey of Activities of the ECtHR for these years at: <www.echr.coe.int>.

[13] On this discussion, see T. Zwart, *The Admissibility of Human Rights Petitions* (dissertation, University of Leiden) (Dordrecht, Martinus Nijhoff Publishers 1994).

[14] More information on the 14th Protocol can be found in M.A. Beernaert, 'Protocol 14 and New Strasbourg Procedures: Towards greater efficiency? And at what Price?', *European Human Rights Law Review* (2004), p. 544; S. Greer, 'Protocol 14 and the future of the European Court of Human Rights', *Public Law* (2005) p. 83.

applicant does suffer a substantial disadvantage but which are not important to the development of law.[15] In fact, the entry into force of this Fourteenth Protocol has been longer in coming than was expected and is desirable, mainly due to Russian opposition.

3. PROBLEMS: LEGITIMACY UNDER PRESSURE

3.1 Introduction

Let us now focus our attention on a few conspicuous problems affecting the Court's procedure. As already stated in the introduction of this contribution, we will make a distinction in this context between the Court's procedure in general on the one hand (§ 3.2), and the grounds and consistency of the judgments on the other hand (§ 3.3). This section ends with the conclusion that the legitimacy of Strasbourg judgments is really at stake because of the problems established (§ 3.4).

First, we should emphasize, however, that the problems to be discussed are not caused by the procedure laid down in the text of the ECHR (as argued in § 2 above, this procedure looks quite good on paper), but rather by the Rules of the Court, which are quite scanty – and even restrictive – when viewed from the perspective of litigants and by the Court's practice. This is due to the huge quantity of applications to be processed by the Court, combined with the utterly insufficient budget for that purpose, which we will address in section 4 of this contribution.

3.2 Quality of the Court's procedure

Serious doubts can be expressed as regards whether the principle of due care or fair trial is fully respected in the Strasbourg procedure. We will mention some examples based on our own research into recent ECtHR case law and practices of the Court:

- The Court holds hardly any hearings where applicants and/or their lawyers can argue their case.
- Decisions on admissibility, especially, are not very well-reasoned (if reasoned at all), while there is no right to appeal.
- The conclusions of pilot judgments are sometimes applied in cases that are not identical in legally relevant respects.[16]

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[15] See G. Cohen-Jonathan and J.F. Flauss, eds, *La réforme du système de contrôle contentieux de la Convention européenne des droits de l'homme* (Brussels, Bruylant 2005) (with various contributions).

[16] See, for example, the pilot judgment in ECtHR 22 September 2005, *Goudswaard-Van der Lans* v. *The Netherlands* (admissibility decision) and the cloning case: ECtHR 22 September 2005, *Van den Born-Van de Wal and others* v. *The Netherlands* (admissibility decision), in which the pilot judgment in the case of *Goudswaard-Van der Lans* v. *The Netherlands* is followed unconditionally with respect to Articles 6, 8 and 14 ECRM, even though there were essential differences in this respect, as some of the applicants in these later cases had filed a complaint against the violation of these Articles with the Court in a timely fashion. For the record, the first author of this contribution was involved in these later cases as a lawyer.

– The Strasbourg procedure itself is very lengthy.

The possible entry into force of the Fourteenth Protocol will not improve the position of the individual applicant, or that of the respondent state.[17] On the contrary, the Protocol contains several elements that will probably be even more detrimental to the position of individual applicants, for example:

– More admissibility decisions will be taken by a single judge, without the possibility of appeal, which is a problem because the judge concerned has no special knowledge of the law of the state concerned (the national judge is prohibited from sitting as a single judge in cases concerning his own state) and also because this is a bigger threat to the uniformity of the Court's case law.
– A stricter admissibility criterion for individual applications ('substantial disadvantage') will be introduced, the meaning of which is rather vague at present.
– More judgments will be passed on the basis of a prior pilot judgment, while the applicant – in contrast to the state – cannot object to this course of affairs.

Further proposals of a Committee of Wise Persons, which were sent to the Committee of Ministers of the Council of Europe at the end of 2006,[18] improve neither the position of the individual applicant nor that of the respondent state. In addition to embracing the Fourteenth Protocol, the Committee, for example, proposes referring decisions on the amount of compensation to be awarded under Article 41 of the Convention to the national state concerned. As a result, victims of violations of the Convention, who have already had to undergo lengthy national and Strasbourg proceedings, still have to await the final and – hopefully – satisfactory ending of this procedure at national level.

3.3 Sound reasoning and consistency of the judgments and decisions of the ECtHR

It is also doubtful whether the Strasbourg decisions and judgments are sufficiently well-reasoned and consistent.[19] We have already mentioned the admissibility decisions, but also judgments on the merits are not always in conformity with the justification principle. Furthermore, the existence of the five Chambers of the Court (each consisting of nine judges), combined with the huge increase in applications, has increased the risk of contradictory judgments, although the Court has tried to cope with this problem by introducing the 'Case-law Conflict Prevention Group.'[20]

[17] Cf. P. Leach, 'Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery', *Human Rights Law Journal* (2006) p. 11-25.

[18] CM (2006)203 15 November 2006.

[19] On this subject, see also the contribution to this book by J.H. Gerards, 'Judicial Deliberations in the European Court of Human Rights'.

[20] On this problem, with further references, see also T. Barkhuysen, *Het EVRM als een integraal onderdeel van het Nederlandse materiële bestuursrecht* [The ECHR as an integral part of Dutch Administrative Law], Preliminary Report VAR 2004, VAR series 132 (The Hague, Boom Legal Publishers 2004).

An example of the problems concerning the consistency of the Court's case law may be found in the 2003 case of *Morel*. In this case, a Chamber of the Court found that Article 6 under 'its criminal head' did not apply in respect of a 10 per cent tax surcharge, because of the lack of severity of the penalty.[21] This judgment did not correspond to established Strasbourg case law and led to uncertainty; after more than three years, it was finally resolved by the Grand Chamber judgment in the case of *Jussila* v. *Finland*.[22] As far as this issue is concerned, one may retort that national legal systems also encounter the problem that it may well be a long time before the highest court establishes legal uniformity. This is to ignore the fact, however, that the ECtHR formally is to be regarded as a single court and it is actually perceived as such by the parties involved.

Finally, it must be noted in general that the Court decides each case on the merits of the individual complaint brought before it. Generally, it does not answer legal questions in the abstract. In combination with the lack of sound reasoning and consistency, this may cause some serious problems for the national authorities that wish to fulfil their obligations flowing from the Convention. This required the Dutch legislature, for example, to take great pains to ascertain the exact content of the right of an accused to remain silent, as derived from Article 6 of the Convention by the ECtHR in several cases.

3.4 The legitimacy of ECtHR judgments is at stake

We would like to stress that these critical notes about the procedure of the ECtHR do not diminish our appreciation for all the work and effort being put in by all persons working at the Court. From the perspective of the individual applicant and the respondent governments, however, one can express serious doubts about the quality of the Strasbourg procedure in general and the sound reasoning and consistency of the decisions of the Court in particular. As far as this procedure is concerned, one can seriously doubt whether the Court itself abides by the guarantees of the Convention, especially Article 6 (fair trial, reasonable time, right to a well-reasoned judicial decision), as developed in its own case-law. In our opinion, there is an urgent need to examine the current and – possibly – future Strasbourg procedure itself, with a view to ensuring conformity with rights under the Convention. The legitimacy of 'Strasbourg' is really at stake. This touches upon the very heart of the legitimacy – and the acceptability and effectiveness – of judicial deliberations, one of the core elements of Professor Lasser's interesting study.[23]

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[21] ECtHR 3 June 2003, *Morel* v. *France*.

[22] ECtHR 23 November 2006, *Jussila* v. *Finland*.

[23] Mitchel de S.-O.-L'E. Lasser, *Judicial Deliberations, A comparative analysis of judicial transparency and legitimacy* (Oxford, Oxford University Press 2004).

4. FINALLY: HOW TO PREVENT A LEGITIMACY CRISIS?

First, it should be emphasized that an international corrective mechanism that is broadly accessible to individual citizens, such as the Court, is and remains of paramount importance. This need is all the more urgent at a time when fundamental rights are coming under increasing pressure in the whole of Europe as a result of new 'security thinking' and when, to an increasing extent, persons in authority openly turn against what they perceive as the exaggerated protection of human rights, because this would thwart efficient administration and measures beneficial to 'normal' citizens. This international supervision is also very necessary *vis-à-vis* very strict measures in the field of alien law. In this respect the Court can act as a corrector of procedures in the member states in which not all the Convention requirements are sufficiently obeyed. In the case *Salah Sheekh* v. *The Netherlands*, for example, the ECtHR held unanimously that the applicant's expulsion to Somalia would be in violation of Article 3 of the Convention (prohibition of inhuman or degrading treatment).[24] The Court emphasized that it should use an *ex nunc* approach in the assessment of an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, as the situation in a country of destination may change in the course of time. This even means that the Court should take into account information that has come to light after the final decision taken by the domestic authorities. Furthermore, the Court will assess Article 3 issues in the light of all the material placed before it, or, if necessary, material obtained *proprio motu*. In these cases the Court should not limit itself to taking into account documents made available by the domestic authorities of the State Party concerned. The Court should also use materials originating from other reliable and objective resources, such as other states, whether States Parties or not, agencies of the United Nations and reputable non-governmental organizations. As a consequence, it is advisable for the Dutch judiciary to depart from the present *ex tunc* approach and follow an *ex nunc* approach where Article 3 issues are concerned. In this perspective it is also recommendable for the Dutch judiciary to adopt in Article 3 cases a more critical (*full*) approach as far as the determination of the facts is concerned.[25] This would entail a review of all the relevant and reliable information available, and not a limitation to the so-called country reports produced by the Dutch Ministry of Foreign Affairs.[26] By taking such a full, *ex nunc* approach, future condemnations

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[24] ECtHR 11 January 2007, *Salah Sheekh* v. *The Netherlands*. This judgment led to some uproar in the Netherlands, because the Court agreed with the applicant that *in casu* the Administrative Jurisdiction Division of the Council of State, the highest jurisdiction in asylum cases, could not be regarded as a remedy to be exhausted in the sense of Article 35 ECHR. This remedy did not need to be exhausted because it was not likely that it could be effective in this special case. According to settled ECtHR case law, ineffective remedies do not need to be exhausted.

[25] Compare T. Barkhuysen, *Eenheid en coherentie van rechtsbescherming in de veellagige Europese rechtsorde* [Unity and Coherence of Legal Protection in the Multilevel European Legal Order], inaugural lecture, University of Leiden (Deventer, Kluwer 2006).

[26] See also B.P. Vermeulen in his annotation of this judgment in: 76 *Administratiefrechtelijke Beslissingen* (2007) p. 433.

of Strasbourg can be prevented. This case provides a good example of the ECtHR giving guidelines to improve the quality – in a human rights perspective – of national procedures, also before highest Courts.[27]

Despite the above-mentioned problems affecting the ECtHR procedure, we therefore oppose the view expressed by many that the Court should abandon the principle of individual legal protection and should explicitly opt for a more constitutional, law-developing role, partly by introducing a pick-and-choose, or leave, system after the example of the US Supreme Court. This view is usually justified by pointing out that the Court does not succeed, or insufficiently succeeds, in performing its legal protection role as matters stand, and that the Court cannot be expected to do so *at all* if it receives even more complaints than at present. These advocates are willing to accept, however, that cases brought before the Court that clearly present violations of fundamental rights may remain unheard.

We believe that the greatest asset of the Court's supervisory mechanism is offering legal protection to individuals by breaking the State Party's sovereignty. This principle is enshrined in Articles 19 and 34 of the ECHR and constituted a departure from the traditional view that States can only be the subject of international law and individuals can only be the object of international obligations. Granting individuals the right to appear before an international body such as the Court means that they are able to hold a state directly accountable for its failure to perform obligations arising under the Convention. The current supervisory mechanism under the ECHR clearly puts the main focus on the individual and is designed to prevent the failure to recognize his or her personal rights and interests in view of national or public interests in situations where the national court also fails to take these into account properly or at all. The advocates' proposals for a leave system, however, result in a less central position of the individual and, at least, in the latter's *locus standi* becoming restricted. From the individual's perspective, however, it is unacceptable that a violation of his or her human rights cannot be redressed because it concerns a violation that occurs frequently or is insufficiently serious. This is why we believe that advocates of restrictions on the *locus standi* of individual applicants before the Court too easily accept defects in the current system when it comes to offering individual legal protection, whilst basing an argument in favour of restricting the individual right of recourse on these defects goes too far in any case. Also, they give in too easily to the power of the number of '800 million potential applicants.' Unlike these advocates of restrictions on the right of individual recourse, we believe that the current situation calls for measures to strengthen the Court's legal protection function even further. We think that there are sufficient possibilities for that.

First and foremost, it is high time that the Court's financial resources were tailored to the great and extremely important task the Court is facing. Even though it may not be entirely fair to refer to 800 million potential applicants (it would, per-

[27] The Dutch government has announced it will follow the Court's approach in *Salah Sheekh*, see *Kamerstukken II* 2006/07, nos. 29 344 and 30 800 VI, no. 64.

haps, be more realistic to consider the number of cases heard by the various national courts in the highest instance, as, in principle, other cases cannot be brought before the Court), it is clear that the current organization and budget are utterly insufficient. Why is the Strasbourg organization of the ECtHR so much smaller in size than the Dutch judiciary, which, as a general rule, administers justice to only 16 million potential applicants? The fact that the Dutch courts face a greater diversity of cases offers only a partial explanation for that. And why do the EU Member States pay a great deal more for preserving the legal protection of the European Court of Justice and the Court of First Instance, which take on far fewer cases?[28] This is unacceptable and the States Parties should take up their responsibility immediately. If not, might it raise the suspicion that they have an interest in restricting the possibilities of the ECtHR, which is sometimes perceived as a pain in the neck?

We also believe that it is possible to achieve an efficient system of individual legal protection at the Strasbourg level within realistic financial parameters and without having to restrict the individual right of recourse. For example, in our opinion, the prescribed maximum number of judges (equal to the number of States Parties, which is 47 at present) is not sacred, The number of judges can be increased considerably by developing proper coordination systems.[29] This is also true of the number of support staff and the space physically available. For example, a financial injection may be used to tackle the long waiting periods in the Court itself (it does not have a positive effect if the Court itself fails to observe the reasonable time requirement of Article 6 of the ECHR) and to increase the time court staff are able to spend on a case.

This expansion of resources would also offer sufficient possibilities to remove many of the defects in the Court's legal protection function and the obstacles in the Court's procedures. We not only recognize the existence of these, but we have regularly drawn attention to these defects by proposing solutions to existing problems.[30]

Naturally, proper cooperation with the various national authorities is a prerequisite to preserving the ECHR system of individual legal protection. National authorities must observe the Convention and – insofar as they fail to do so – legal protection should be offered at national level. This is the principle underlying the Convention system as well, which is also enshrined in Articles 1, 13 and 35. The Court should give the national authorities and agencies the opportunity to do so by rendering well-reasoned and direction-providing judgments and, where applicable,

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[28] The Court does not have a separate budget, but its budget is part of the general budget of the Council of Europe. The Court's budget for 2006 amounted to • 44,189,000. The total expenditure of the European Court of Justice in 2006 amounted to • 188,647,506.93. See, respectivelty, www.echr.coe.int and <http://eur-lex.europa.eu/budget/data/P2008_VOL5/NL/nmc-titleAAAEU/index.html>.

[29] This may include appointing staff members who keep abreast of the case law in respect of one Convention article or one aspect thereof, and who verify for every draft decision and judgment whether the established case law of the Court is respected and if this is not the case, whether a decision or judgment that departs from such an established line is at least well-reasoned.

[30] See, for example, T. Barkhuysen and M.L. van Emmerik, 'Legal protection against violations of the European Convention on Human Rights: Improving (Co-)operation of Strasbourg and Domestic Institutions', *Leiden Journal of International Law* (1999) p. 833..

by creating the possibility of preliminary questions. Preventing violations is highly important. For that purpose, it would be commendable (*inter alia*) if the States Parties kept abreast of legal developments in respect of the ECHR and ECtHR case law on a permanent basis, for example, by creating a specific professional interdepartmental organization and providing it with sufficient means.

Accordingly, the emphasis should be on national legal protection and the Court and national authorities should mutually assist each other. In this manner, the Court could finally become a properly equipped 'catcher' in the field of individual legal protection.[31] In our opinion, the preventive effect of the Court will be greatest if it offers wide access to individual applicants. Naturally, it should be taken into account that not all states, in particular, new Member States, will immediately provide for effective national legal protection and, for this reason, the Court should have sufficient capacity to deal adequately with cases from these countries. In this context, the Court should assess explicitly whether or not the system of national legal protection is satisfactory and, if necessary, condemn states for violating Article 13 of the ECHR.[32] Combined with effective and financial support for the legal system of the countries concerned, this will considerably increase the chances of improving national legal protection in any case.[33]

If national legal protection operates properly, the Court will receive fewer cases and, moreover, the cases that are brought before the Court will have been assessed by a national court already. This preliminary work by the national court enables the Court to review the case faster and better. In that case, the Court can deal with the arguments presented by the national court and the parties' assertions before the national court, as a result of which the legitimacy of Strasbourg decisions may increase.

This means that we are of the opinion that there is every reason and that there are sufficient possibilities to preserve individuals' wide access to the ECtHR, to remove the procedural obstacles and to refrain from introducing the pick-and-choose system. In the latter system, assessing whether or not cases should be heard necessitates a more political assessment and, moreover, it involves the risk of a discussion on this issue with, *inter alia*, the State Party. This discussion would also be detrimental to the Court's authority. In our opinion, the introduction of a pick-and-choose system would require the Court to venture into even more – political – turbulent waters. And who is there to save the Court?

This means that everything possible should be done to preserve the individual legal protection function. However, this is sensible only if the quality of the Strasbourg procedure is sufficiently guaranteed. This is not the case at present, which causes the legitimacy of judgments to decline and parties to the proceedings

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[31] For details of these proposals, see Barkhuysen & Van Emmerik, n. 30.

[32] For a positive example of this, see ECtHR 26 October 2000, *Kudla* v. *Poland.*

[33] Barkhuysen & Van Emmerik, n. 30.

to be disappointed in the system. It is therefore necessary to invest considerably in improving the quality of the Court's procedure.[34]

Should the latter turn out to be impossible (which is unlikely), we believe that there remains only one possibility – by way of an *ultimum remedium* – of preventing a serious legitimacy crisis, namely, abandoning the idea of protecting individual human rights and investing the resources released as a result thereof in considerably improving the quality of the procedure in respect of the remaining cases, which are to be disposed of. This is because a situation where the Court itself selects a limited number of cases through a leave or pick-and-choose system and disposes of them according to a careful procedure is preferable to the current situation, where the Court is so eager to deal with all incoming cases within a reasonable period that it is forced to place less strict requirements on the quality of the procedure, with all the negative consequences resulting from that.

[34] Cf. S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge, Cambridge University Press 2006), which is also very critical about the current procedure of the Court in Strasbourg.