NGO Comments on the Group of Wise Persons' Interim Report

July 2006

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We, the undersigned NGOs, submit the following comments on the proposals aiming to ensure the long-term effectiveness of the European Court of Human Rights presented by the Group of Wise Persons to the Council of Europe's Committee of Ministers in its Interim Report in May 2006[1]. We hope that these comments, which among other things explore some of the implications of the proposals put forward to date, will help inform future discussions, including by the Group of Wise Persons themselves.[2]

General Principles

1. We welcome the continuing commitment of the member states of the Council of Europe to ensure the long-term effectiveness of the European Court of Human Rights. This commitment was evidenced by the decision taken by the Heads of State and Government gathered at the 3rd Summit of the Council of Europe to establish a Group of Wise Persons to consider this issue. To this end, the Committee of Ministers Deputies appointed a group of 11 experts and asked them to consider the long-term effectiveness of the European Court of Human Rights, taking into account, among other things the initial effects of Protocol 14, and to make proposals which preserve the basic underlying philosophy of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2. We fully endorse the assessment of the Group of Wise Persons that the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Court of Human Rights (Court) "have become genuine pillars in the

[1] The Interim Report of the Group of Wise Persons , May 2006 (CM 2006)88. The report is available at: https://wcd.coe.int/ViewDoc.jsp?id=998185&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[2] *Paragraphs 1 – 14 of this document sets out general principles which have informed our comments to the Wise Persons' and Paragraphs 15 – 40 contain comments on specific proposals set out in the Wise Persons' Report.*

protection of human rights and fundamental freedoms" in the member states of the Council of Europe. We also agree that the Court's primary function is to "verify the conformity of the Convention of any interference by a State with individual rights and freedoms and find any violation imputable to the respondent state" and that its judgments "lay down common principles and standards relating to human rights and to determine the minimum level of protection which states must observe."[3]

3. We warmly welcome the acknowledgement that the right of individuals to submit an application directly to the European Court of Human Rights, is a distinctive and essential element that lies at the heart of the European regional system for the protection of human rights, and is part of the philosophy of the ECHR.[4] We consider that the essence of this right is the right of individuals to receive a binding determination from the European Court of Human Rights of whether the facts presented constitute a violation of rights secured in the ECHR. We welcome the intent of the Group of Wise Persons to ensure that the reforms it recommends do "not affect the substance of the right of individual application."[5]

4. We share the assessment of the Group of Wise Persons that the exponential increase in the number of individual applications, coupled with the backlog of cases pending before the Court, jeopardize the functioning of this unique mechanism and consequently the effective realization of the right of individual application. We believe that one way to strengthen this right is to ensure speedier resolution of applications submitted to the Court, which could be facilitated through the creation of a separate screening body within the Court as proposed by the Group of Wise Persons, as well as the expedited process for handling manifestly well-founded cases set out in Article 8 of Protocol 14 (which, when it comes into force, will amend Article 28 of the ECHR).

5. The Convention is clear that the primary responsibility for guaranteeing respect of the rights enshrined in the ECHR to the some 800 million persons living in Council of Europe Member States, as well as those in territories under their effective control, lies with the states themselves. This includes obligations to ensure the availability of effective and accessible remedies to those individuals who claim that their rights have been violated.

6. We remain convinced that greater respect for the Convention at the national level, including the existence of effective domestic remedies in the event of breaches of Convention rights, would significantly diminish the Court's overall case load by reducing the need for people to seek redress from the Court for violations of their rights.

[3] Paragraphs 12 and 18 of the Interim Report of the Group of Wise Persons, May 2006.

[4] See Warsaw Declaration at para 2 and Action Plan at para I(1) available at http://www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp; the Mandate and Composition of the Group of Wise Persons, is set out in Decision on item1.5 of the Committee of Ministers Deputies of 14 September 2005; see also paras 17 and 33 of the Interim Report of the Group of Wise Persons, May 2006.

[5] Para 27 of the Interim Report of the Group of Wise Persons, May 2006.

Accordingly, we regret the fact that, despite repeated commitments to do so, the majority of Council of Europe member states have yet to undertake the measures necessary to fully implement the Recommendations adopted in the course of the discussions leading to the adoption of Protocol 14, which aim at ensuring better implementation of the Convention at national level and effective and accessible domestic remedies.[6] We urge each Council of Europe member state to take all necessary measures to implement these recommendations rapidly. To that end, we recommend that all states analyse their laws and practice in the light of the Recommendations and that they create and implement an action plan to fill lacunae between state law and practice and the elements set out in each of the Recommendations.

7. It is widely agreed that the main challenges facing the Court are: screening quickly and effectively the some 90% or more of applications received which are inadmissible under the current criteria, and handling in an effective and efficient manner the more than 50% of admissible applications that raise issues about which the Court's case law is clear (known as "repetitive cases"). We are, however, concerned at the statement contained in the Group of Wise Persons' Interim Report that the Court should be "relieved" of manifestly inadmissible applications or repetitive cases which "distract" it from its essential role (paragraph 26). While the process of dealing with manifestly inadmissible cases is clearly burdensome, it is important that the Court continues to recognize that the process of filtering out such claims remains a judicial one and consequently falls clearly within the Court's responsibilities. We consider that measures must be taken so as to permit the Court to effectively, efficiently and thoroughly screen the applications it receives. In addition, with regard to repetitive cases, if Friendly Settlements are not reached, measures must be taken to ensure that the Court can issue judgments on such cases within a reasonable time, and that these judgments are implemented, in a manner that ensures not only redress to the individual concerned but also resolution of any systemic problems from which they arise.

8. Furthermore we consider that the Court has been hampered by a lack of sufficient human and financial resources. While we note that the budget of the Court has been increased, we are concerned that this sum was taken from the existing budget of the Council of Europe which reportedly had zero real growth in recent years. This has meant that the

[6] The relevant Recommendations of the Committee of Ministers are: Recommendations R(2000)2 **of** the Committee of Ministers to Member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights; REC(2002)13 of the Committee of Ministers to member states on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights; REC(2004)4 of the Committee of Ministers to member states on the European Convention on Human Rights in university education and professional training; REC(2004)5 of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights; REC(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies.

increase of the Court's budget has come at the expense of funding for other Council of Europe activities, including inter-governmental and targeted cooperation activities. We therefore call on the Council of Europe member states to increase the budget of the Council of Europe overall, including the budget allocated to the Court.

9. In the light of the above, we consider that the on-going process of ensuring the long-term effectiveness of the Court must meet six objectives. It must ensure:

   I. Better implementation of the ECHR at national level, which will reduce people's need to apply to the Court for redress;

   II. Preservation of the unique right of individual petition, the essence of which is the right of individuals to receive a binding determination from the European Court of Human Rights on whether the facts presented constitute a violation of rights secured in the European Convention;

   III. More efficient and effective screening of the applications received, to weed out the overwhelming majority of those that are inadmissible under current criteria set out in Article 35 of the ECHR;

   IV. The expeditious rendering of judgments, particularly on cases that raise repetitive issues about which the Court's case law is clear, and those that arise from systemic problems;

   V. Effective execution of judgments of the Court by Council of Europe member states and appropriate follow up where individual member states are slow to act or respond inadequately to Court judgments; and,

   VI. Adequate financial and human resources for the Court, which are not allocated at the expense of the budgets of other Council of Europe human rights monitoring mechanisms and bodies or inter-governmental activities.

10. We also consider it incumbent on the Council of Europe and each of the 46 member states to ensure that the public (and in particular Court users, civil society and national human rights institutions) continues to be informed about the on-going discussions on reform of the Court. Civil society should be consulted, and its views taken into account before any further reforms are made.

11. We have evaluated the proposals set out in the Group of Wise Persons Interim Report against the six objectives.

12. We warmly welcome the fact that the Group of Wise Persons agreed not to pursue proposals to give the Court a discretionary power to decide whether or not to take up cases, a proposal that received much consideration before it was rejected during the negotiations that led to the adoption of Protocol 14 to the ECHR. We endorse the Group of Wise Persons' conclusion that such a power would be "totally alien to the philosophy of the European human rights protection system" and the right of individual petition;

would tend to politicize the system, could lead to "risks of inconsistency, if not arbitrariness;" and "would be perceived as a lowering of human rights protection."[7]

13. We also welcome the Group of Wise Persons' rejection of the proposal, to establish regional courts of first instance. We concur with the views expressed that such courts would, among other things, raise "the risk of diverging standards and case law, whereas the essence of the Convention system is that uniform and coherent standards, collectively set and enforced should obtain throughout contracting states."[8]

Making the System more flexible as regards the conditions for reforming it:

14. We welcome in principle, but with some reservations, the proposal to empower the Council of Europe's Committee of Ministers to amend certain "Operating Procedures" of the Court, so as to obviate the need for the time consuming process of drafting, adoption and ratification of additional Protocols for such purposes. We consider that this could provide more flexibility.

15. However, we would underscore that, if this proposal were to be further considered, a precise definition of "Operational Procedures" would be required. For example, views may differ as to whether altering the number of judges required to make a decision on the admissibility of cases is a matter of "substance", which should require an amending Protocol, or merely an "operational procedure".

16. Furthermore, the granting of such a power to the Committee of Ministers should be accompanied by provisions requiring transparency and consultation with key stakeholders including the views of Court users, civil society and National Institutions for the Promotion and Protection of Human Rights, before amendments to operating procedures are agreed. We also endorse the *caveat* proposed by the Group of Wise Persons that any such changes should be solely at the Court's own initiative.[9]

Establishment of a new judicial filtering mechanism:

17. We welcome the proposal to establish a separate **judicial** filtering mechanism, which is integrated into the Court. This is a proposal that we and the Court had recommended be included in Protocol 14 to the ECHR.

[7] Para 33 of the Interim Report of the Group of Wise Persons, May 2006.

[8] Para 83 f the report of the Evaluation Group on the European Court of Human Rights, September 2001; para 32 of the Interim Report of the Group of Wise Persons, May 2006; Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights, of 28 March 2003.

[9] Paragraph 36.

18. We agree with the view expressed by the Group of Wise Persons that this body should be empowered to deal with applications which are inadmissible owing to failure to comply with time limits or the exhaustion of domestic remedies. We consider that such a mechanism would significantly reduce the administrative burden on the Court given that 90% of applications which are deemed inadmissible are struck out on the basis of these criteria. We also note the proposal of the Group of Wise Persons that this body might also be empowered deal with those cases where there is well-established case-law finding no violation of the Convention. We would however be concerned about such a body considering cases classified as "manifestly ill-founded", given the wide-ranging use of this category as a ground for inadmissibility; if such a proposal was being considered, we believe that clarity would need to be provided as to the types of "manifestly ill-founded" cases which would be covered.

19. We regret that, due to the fact that Protocol 14 has yet to enter into force, that the Group of Wise Persons is currently unable to evaluate the effectiveness of the three-judge panels empowered under Protocol 14 to rule on the admissibility and merits of case which raise repetitive issues about which there is well-established case law. We consider that, if Friendly Settlements are not reached in these cases, such three-judge panels could ensure that the Court can issue judgments on repetitive cases within a reasonable time. Furthermore, we consider it vital to ensuring respect for human rights in the country concerned and reducing the caseload of the Court, that decisions or judgments on such cases are implemented in a manner that provides not only redress to the individual concerned but also resolution of any systemic problems from which they arise.

Extension of the Duties of the Commissioner for Human Rights

20. We welcome the acknowledgment of the important role that the Council of Europe's Commissioner for Human Rights can play in encouraging states to fully and expeditiously implement the judgments of the Court.

21. We also welcome the Group of Wise Persons' recognition of the important role of appropriately mandated and resourced independent national institutions for the promotion and protection of human rights (i.e. Ombudspersons and NHRIs) in the promotion and protection of human rights. However, as noted by the Commissioner both his office and National Institutions must remain independent of member states as well as each other.[10]

22. We do not agree with the proposal that the Commissioner's "*…mandate could […] be extended to cover* ***co-ordination of the activities of the various Council of Europe bodies*** *competent in human rights matters."*[11] We agree, however, that the Commissioner should be informed about the findings and activities of all Council of Europe and other

[10] See para 7,Comments by Thomas Hammarberg, Commissioner for Human Rights on the interim report of the Group of Wise Persons to the Committee of Ministers, 12 June 2006, CommDH(2006)18.

[11] See para 10, Comments by Thomas Hammarberg (Footnote 9 supra)

monitoring mechanisms and that he should co-operate and coordinate with them. He should also encourage states to effectively implement the judgments of the Court and recommendations of the other monitoring bodies.

23. We welcome efforts to improve the dissemination of information by the Council of Europe regarding its activities and the recommendations of its various bodies and mechanisms to states, key stakeholders and the public at large in an easily accessible form. However, we consider that responsibility for this should lie with the Secretary General rather than the Commissioner.[12] We consider that the expansion of the information posted on the web by publicizing the Council of Europe's activities and recommendations relating to each state and priority themes (under a heading for each member state and theme, respectively) would significantly assist in the implementation of the recommendations of the Council of Europe's bodies and mechanisms, as well as coordination of action within the Council of Europe itself. It would also facilitate cooperation, coordination, and complementarity between the Council of Europe and relevant international organizations, assist national institutions for the protection of human rights and non-governmental organizations working in this field and enhance the visibility and understanding of the Council of Europe with the public at large.

24. As regards the dissemination of information concerning judgments of the Court within the Council of Europe's own bodies, we consider that the responsibility for this role more appropriately lies with the Court's Registry. We consider that each of the bodies and mechanisms themselves should ensure that they are informed about relevant judgments, rather than relying on the Commissioner to do so. We also consider that the Commissioner's mandate should not be expanded to working with the Registry to mediate Friendly Settlements between individual applicants and member states.

25. We also consider it inadvisable that the Commissioner play a role in recommending locations for decentralized offices. Nor should he be charged with assessing the functioning of such offices. Both tasks risk stretching the Commissioner's limited resources and deflecting time and resources from to his carrying out his vital core mandate. Furthermore, the assessing the functioning of Council of Europe offices would seem to fall more squarely within the mandate of other Council of Europe institutions, most particularly the Secretary General.

Judgments of Principle:

26. We would urge that the Court and its Registry regularize the practice of publishing press releases about the communication of applications and the announcement of judgments which raise issues of important principle, so that this information is readily available to

[12] See paragraphs 47 – 49 of the interim report of the Group of Wise Persons to the Committee of Ministers.

states, lawyers, NGOs and the public alike. Press releases at the communication stage would facilitate those states and third parties with an interest in intervening in the case.

27. We note the Group of Wise Persons' interest in the possibility of all States Parties being invited to intervene before the Court in cases where judgments are expected to establish a general principle.[13] We would have great concern regarding any such proposal. We consider that representatives of civil society have an equal interest in intervening in such cases, and that an invitation to states only would be unfair and could put the applicant, who is bringing the case, at an unfair disadvantage.

28. Furthermore we consider that the Committee of Ministers, in its role of supervising the implementation of judgments could play a key role in encouraging all member states to take into due consideration how a particular judgment of the Court could or should be implemented in each member state. This would be consistent with the role of the Committee of Ministers to ensure the common aims and standards of the Council of Europe as well as the dual role of the Court (both providing redress for violations of ECHR rights when a state has failed to do so, and laying down common minimum standards of human rights protection for Council of Europe member states) as well as the role of the Committee of Ministers.

Possible Strengthening of the Pilot Judgment Procedure

29. We welcome Rule 4 of Rules of the Committee of Ministers for the supervision of the execution of Judgments and the Terms of Friendly Settlements, adopted on 10 May 2006.[14] This rule requires the Committee of Ministers to give priority to supervision of the execution of judgments where the Court has identified what it considers to be a systemic problem in a manner which is not to the detriment of other priority cases, notably those where the violation established has caused grave consequences for the injured party. We consider that this will facilitate the rapid and effective implementation of such judgments. The rule should take into account the effects of the suspension of proceedings in similar cases pending before the Court.

30. Because the suspension of the cases of similarly situated applicants can prejudice those applicants, we consider that it will be necessary for the Committee of Ministers not only to ensure rapid execution of pilot judgments, but also to take all possible measures to guarantee that the manner of implementation genuinely affords an effective remedy for similarly situated persons. In considering the effectiveness of the remedy, the state concerned and the Committee of Ministers should examine not only whether the measures proposed afford just compensation, but also whether such measures actually effectively

[13] Paragraph 51, The Interim report of the Group of Wise Persons to the Committee of Ministers.

[14] CM/Del/Dec(2006)963/4.1b, CM(2006)39 Addendum, available at https://wcd.coe.int/ViewDoc.jsp?id=999007&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

address the underlying systemic problem. In length of proceedings cases, for example this would likely include not only providing financial compensation to those whose rights have been violated *but also* include reviewing domestic structures for the administration of justice or enhancing judicial capacity and resources.

31. Given the fact that Court has issued so few pilot judgments, the efficacy of this measure, and its impact on similarly situated applicants, have yet to be studied or fully tested. We therefore consider that contemplation of greater use of this procedure or amending the ECHR to include provisions about Pilot Judgments[15] is premature. In the meantime, the Committee of Ministers and the Court will need to be assiduous in monitoring the implementation and impact of Pilot judgments.

Improvement of Domestic Remedies

32. We consider that length of proceedings cases, which account for some 25% of the judgments issued by the Court in 2005, result from systemic deficiencies in the states concerned. Length of proceedings cases involve the fundamental right of access to justice. Cases about excessive length of pre-trial detention touch directly on the right to liberty and the right of detained persons to trial within a reasonable time or release pending trial. Ensuring the prompt and effective implementation of such judgments should be a major priority for the Committee of Ministers. We consider that the Ministers should require the states concerned to develop and implement Action Plans which address both the issue of compensation and the necessary structural changes, without undue delay. Since States are already obligated under the ECHR (in particular under Articles 5(3) and (4) and 6(1) and 13) to ensure effective, accessible domestic remedies in the event of such violations, we question whether an additional ECHR provision, as proposed by the Group of Wise Persons[16] is necessary, or would result in states taking the measures necessary to address underlying structural problems. We consider, however, that the Committee of Ministers should bring concerted pressure to bear on states which have been found to regularly violate these rights to take all necessary measures to implement these provisions of the Convention and Recommendation 2004(6).

Forms of cooperation between the European Court of Human Rights and National Courts

33. We welcome the Group of Wise Persons' recommendations that the Council of Europe continue its activities related to the training of national judges and that the Court enhance its contacts and links with national judges.

[15] Paragraphs 52 and 53 of the Interim Report of the Group of Wise Persons, May 2006.

[16] Paragraph 56 of the interim report of the Group of Wise Persons, May 2006.

34. We also consider that states must make a concerted effort to *implement* Recommendations (2002)13 (on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights) and (2004)4 (on the European Convention on Human Rights in university education and professional training). In this regard we note with concern that, to date, information provided by states is restricted largely to reporting on the *status quo*, rather than on new measures contemplated or taken to *implement* these recommendations. As noted above, we share the view that better implementation of the ECHR at national level, including ensuring accessible and effective remedies at home, will reduce the need for individuals to seek redress through the Court.

35. We endorse the proposal to empower the Court to give Advisory Opinions at the request of national courts.[17] We believe that this could assist national courts to ensure better implementation of the ECHR at national level. While this could add to the already over-burdened work-load of the Court in the short-term, if such Opinions were effectively adopted by the national courts, it could ultimately cut down the number of applications submitted to the Court on the issue concerned. If the Court were to be empowered to issue Advisory Opinions at the request of national courts, we would consider that it would be necessary to ensure that third parties are allowed to intevene in such cases, whether or not they have previously intervened at the domestic level. Moreover, we would be concerned if the new admissibility criteria set out in Protocol 14 to the ECHR were to be applied to any applications arising following a national court's receipt of such an Advisory Opinion. We would consider that such applications would merit a full review by the Court of the manner in which the national court had applied the Opinion in the case at issue.

36. We remain concerned about proposals to remit cases back to national courts for judgment on matters settled by well-established case law of the Court, or for decisions on compensation after a finding of ECHR violations.[18] Doing so would require each Member State to adopt the necessary laws and procedures which would grant national courts jurisdiction to consider such cases. The information provided to date by member states related to the implementation of Recommendation (2002) 2 indicates, however, that such procedures do not exist for the reopening or reexamination of all cases (civil and criminal) even following a judgment of the Court.[19] In addition, those with admissible applications have already been denied an effective remedy at the national level. In most cases they have already waited a number of years for redress.

37. Manifestly well-founded cases (many of which often point to systemic failures in the state concerned) are good candidates for friendly settlement, or could be handled in the expeditious 3 judge committee procedure established by Protocol 14, when it comes into force.

[17] Para 61 of the Interim Report of the Group of Wise Persons, May 2006.

[18] Paragraph 62 of the Interim Report of the Group of Wise Persons, May 2006.

[19] See CDDH (2006) 008 at pages 13-14.

38. We would welcome further consideration being given to the proposal to create a special panel within the Court to address the issue of compensation in complex cases as well as the development of guidelines by the Court on levels of compensation.

Decentralized offices performing information and advice functions

39. We have some concerns about aspects of the proposal for the Council of Europe to hire lawyers to work in its Information Offices in states which generate large numbers of Applications to the Court.[20] We urge the Council of Europe to make public the scope, methods and findings of any assessment that has been carried out of the pilot project in Warsaw, Poland.

40. We welcome the idea of such offices hiring lawyers who are experts on the Convention and the Court's case law to provide *information* about these issues to the public. While we welcome the fact that the Group of Wise Persons has clarified that such lawyers should not play any judicial function, we are concerned about the proposal to mandate such lawyers to assist potential applicants in preparing their application forms to the Court. There is a danger of such an approach resulting in Council of Europe employed lawyers influencing, or being seen to influence, individuals' decisions whether or not to lodge claims. We consider that such an advisory function should be played by independent lawyers and NGOs with relevant expertise. We therefore recommend that national authorities should be urged to provide adequate resources to lawyers and NGOs in order for them to assess and provide initial advice to would-be applicants to the Court. This should include the provision of free legal aid by the national authorities.

41. As noted above (in paragraph 25), we do not consider that it would be appropriate for the Council of Europe's Commissioner for Human Rights to take part in decisions about the location of such offices or the assessment of their functioning. Rather, the limited resources of his office should be used to fulfill his primary functions including fostering the effective observance and full enjoyment of human rights, identifying possible shortcomings in the law and practice concerning human rights in member states and assisting the states in implementing the human rights standards of the Council of Europe.

Translation and dissemination of the Court's case law

42. We regret the fact that all member states do not currently ensure that judgments of principle of the European Court of Human Rights are translated into the languages which are widely used in each member state and dissseminated to, among others, lawyers, prosecutors, judges, courts, other relevant public authorities, bar associations, law libraries and legal journals. We join the Group of Wise Persons in urging states to do so. To this end, we urge all Council of Europe member states to take all necessary measures

[20] Paragraphs 63-68 of the Interim Report of the Group of Wise Persons, May 2006.

to fill in any existing gaps in the implementation of Recommendation (2002) 13 and Resolution (2002) 58 of 18 December 2002, on the publication and dissemination in the member states of the text of the Convention and the case-law of the European Court of Human Rights.

Conclusion

43. We look forward to the Group of Wise Persons' final report which will likely include a number of additional proposals.[21] We urge the Group to examine how the systems in place aimed at ensuring effective enforcement of judgments by Council of Europe member states, as we consider that the failure of states to make effective systemic reforms following judgments of the Court has led to repetitive applications which burden the Court and undermine the protection of human rights.

Amnesty International

European Human Rights Advocacy Centre (EHRAC)

Human Rights Watch

INTERIGHTS

Justice

Liberty

Redress

The AIRE Centre

[21] Paragraph 74 of the interim report of the Group of Wise Persons mentions: "institutional issues, substantive and procedural rules governing the award of just satisfaction and alternative methods of resolving conflicts brought before the Court".